Paper for the
IASCP Europe Regional Meeting
”Building the European Commons:
From Open Fields to Open Source”
Brescia, Italy; March 23-25, 2006

"Collective Rights in a Modernizing North – on institutionalizing Sámi and Local rights to land and water in Northern Norway".

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Summary:

Devolution and the institutionalizing of indigenous and local rights in the northern areas of the world have been a lengthy process. Alaska, Canada, Russia and the Nordic countries have experienced long and painful constitutional processes that are far from resolved yet. Among these, one of the most interesting ones is the 25 year long Norwegian political and legal process to establish local property rights to “land and water” in the northern province of Finnmark. This paper gives an update and a framework for analysing this process at the verge of the implementation of a new property rights regime in the north.

In this Northern Province, institutional developments have been distinctly different from the rest of Norway. This has been a meeting place between “the three tribes” (the Sámi, the

Háløygs and the Kven) at the same time as the state has had a significant and powerful presence in the area since the 16th century. The evolving institutions are also characterized by a customary collective use of the harvestable resources on land and water in the entire area and the nomadic pasturing and managing rights of the reindeer herders which have evolved from ancient use and are independent of the rights of the owners of the ground. The national institutional solution also has to be in accordance with international law, in this case in particular the UN-Convention on Civil and Political Rights (Article 27) and the ILO-convention no. 169 on indigenous peoples in independent states.

In this complex web of diverse historical rights, multilevel usage and international considerations, a process of institutionalization has taken place that will be of considerable interest to other northern areas, but which still is open towards future developments.

Property rights are in many respects the best connection we have between the biophysical world and the social world. The way the economic forces affect the functioning of the ecosystems, and the way the forces of nature hit back at social and economic systems, can in most cases be better explained if the evolution and diversity of property rights are included in the analysis. Thus the efficiency of the property rights is to some extent reflected in the fate of the resources in question and in their sustainable or unsustainable use.

Policies of rural development must therefore take into consideration the nature of property rights institutions, both when these are inherited from ancient times and when such institutions are designed afresh as part of a conscious development effort.

The aim of this paper is therefore to show how rural development in a European periphery can be analysed with the tools of institutional analysis. In doing this, it acknowledges the fact that the real world in infinitely more complex than the standard textbook in institutional analysis. In the crafting of new institutions, there is never a “clean slate”, existing rights will always have a heavy influence, as will ancient rights with different local origins and anchoring in national and international political and legal doctrines. Thus a realistic analysis will often take place in the narrow space of tension between the origin of ancient rights and the functions of existing rights.

The European discussion of the nature of “indigenous title” is very old, but can conveniently be traced to the beginning of the age of the great colonisations and the teachings by Francesco de Vittoria around 1532, “De Indis et de Iure Belli Relectiones”. These teachings established the natives of an area as the right owners of their areas, irrespective of religion and social structure. Accordingly, wars of conquest were to be forbidden and both sovereignty and the rights to the land should remain in the hands of natives, as long as Europeans were not denied trade and missionary activity, and as long as sovereignty or land rights could be transferred in accordance with the rules in force at that time. However, history often took a different course and because of distance and limited monitoring and sanctioning capacity available to the European states, colonizers often created their own reality. For instance the conquistadores of South America could openly defy the “rules” of Madrid without risking life or wealth.

Especially the British legal tradition has been consistent through the centuries in incorporating this doctrine of indigenous people’s right to land and water. It has thus become an important source in the legal order of important countries with substantial indigenous groups, like Australia, New Zealand,Canada and to some extent the USA. From here, the doctrine has found its way into the core of international law and is now heavily influencing the development of institutions for rural development in other parts of the world, especially in the northern parts of Scandinavia and in Northern Russia. These processes are markedly different from one country to the next, and comparative analysis of these differences can contribute to a sharpening of the tools of institutional analysis. The legal protection of the areas and livelihood of the aborigines of Australia is markedly different from the treaties between the Maori chiefs and New Zealand (Waitangi-treaty 1840) or the early Treaty between the Nordic States regarding Sami nomadic rights (Lappecodicillen 1751). And the dynamic devolution processes in the Canadian North, with its negotiation and co-management instruments, is markedly different from the US “Federal Indian Law” developed from the “North-West Ordinance” (1787) and to a large extent outside of mainstream International Law. However, such comparative analysis are not the purpose of this paper, suffice here to notice what is common in both International Law and in most countries’ incorporation of this: Indigenous groups does not loose their rights to land and water by being subjected to a state’s sovereignty and they maintain a right to some form of political representation in relation to the powers of the state.

The colonisation of the arctic and subarctic regions of the planet has a number of common traits. In both Alaska, Canada, Scandinavia and Russia, we find that the colonization was never quite complete, the indigenous groups in the harshest and most marginal regions maintained much of their style of life and their use of natural resources. This was often by default rather than a conscious state intention. Both the Scandinavian Countries and Russia are characterised by an “inner colonization”. This meant that the dominating agricultural and commercial cultures in the southern metropolitan areas of these countries spread northwards and pushed the hunting, gathering and nomadic cultures of the indigenous groups into more marginal areas, or assimilated them into the mainstream Norwegian, Swedish, Finnish and Russian cultures. In Russia this process took place with the aid of the Russian orthodox church which established mission stations in the north, only to be followed by the tsar’s civil and military administration, later by the soviet style state companies, forced settlement schemes and Gulag work camps. The indigenous groups (“the small peoples”) were left in “traditional pockets”, too a large extent neglected and to some extent untouched by modernization. In northern Scandinavia and Finland, the nation states themselves were active from the outset in securing sovereignty over the northern areas and in promoting rural development here in the form of agriculture based on individual proprietorship.

For Northern Norway, this is clearly documented in government records form 1749 onwards, based on the Lutheran morale of owning, working and saving. From 1328 to 1852 the geopolitical situation here was ambiguous and the national borders between Norway, Sweden, Finland and Russia somewhat unclear or not strictly enforced. The nomadic Sámi reindeer herders could move quite freely with their herds between the territories claimed by the separate nation states. Sometimes they were taxed in triple, i.e. by tax collectors from 3 different countries, sometimes they could avoid tax altogether by mobility and good intelligence. However, the sedentary Sámi were gradually assimilated into the Norwegian, Swedish and Finnish culture from the 1750s onward, by means of national compulsory schooling systems, by expanding religious services, by agricultural market and support systems and by a cadastre linking property rights and property tax. For the nomadic Sámi on the other hand, the “institutionalization of heavy modernity” (Bauman 2001,Beck 2004) did not start until 1852, when the borders between Norway, Sweden and Finland were finally closed to reindeer migrations. This was also the start of a period of heavy “Norwegianization” of the Sami group, with total assimilation as the stated objective.

In brief, the Finnish “inner colonization” was a spontaneous migration northwards by poor Finnish peasants. After a series of crop failures in central Finland, these overran most of the Sámi traditional areas and created a northern Finnish sedentary culture which combined farming, fishing, hunting and reindeer husbandry. In Sweden a similar expansion of peasants northwards was checked by state intervention and a special cultivation-border (*odlingsgränsen*) was created between peasant land and Sámi reindeer land. South of this border, Swedes and Sámi alike could farm, fish and do forestry, north of the border Sámi, and only they, could practice reindeer husbandry, fish, hunt and collect produce from the mountains. In Norway, the state was the prime colonizer in the north and the Danish/Norwegian kings early acquired the property rights under the *dominium directum* legal doctrine of the sovereign rulers in Europe. Already in 1693 we find that the state in its legislature and its governance consistently uses the term “King’s Ground” or “ State ground” about the land in the north, not the South Norwegian concept of the King’s Commons or State Commons (Sandvik 1993). This “inner colonization” is even today the reason why the Norwegian “Law of Mountain Commons” (*Fjellloven*) only applies to Southern Norway. Up to 2005, as much as 95 % of the total area of the Northern Province of Finnmark, the main area for nomadic reindeer husbandry in the whole of Scandinavia, has thus been owned by the state as a sovereign owner. The early ambitions of the state was to achieve development by selling plots of land to settlers, both Sámi, Norwegians and Finnish (“kven”) who wanted to take up agriculture and “enhance the value of the province”. This settlement policy accelerated from the 1750’s and in 1863 a Law for the Sale of Ground in Finnmark was enacted and a special agency: the State Ground Sale Office was set up to speed up individualization and rural development. Thus the ideas that sovereign State Property Rights are real in this area goes several hundred years back in history and one would think that this would be sufficient for these to be legally entrenched and thus not susceptible to change.

But in order to fully understand the background for the present institutionalization of Sámi rights and transfer of State Property Rights to the local level now in the 21st century, it is also important to be aware of some fundamental differences that through the centuries have emerged between the Finnish, Swedish and Norwegian system of indigenous rights. One is the codification of the right to practice reindeer husbandry, where only the Sámi in Northern Norway and the Sámi in Northern Sweden have this as an exclusive right for this indigenous group. While in Finland, on the other hand, every farmer settled in the north can have some supplementary reindeers. This means that the right to pasture and

movement of reindeer in Norway and Sweden has a legal base in ancient indigenous rights, independent of the contemporary reindeer husbandry legislation. In brief this means that the reindeer legislation in Norway and Sweden can be changed at the operational level without the fundamental indigenous rights to grazing and movement on the constitutional level being affected. Whereas in Finland, where there is no further legal base than the operational law, reindeer herding is today confined mostly to the farm property itself; there are no independent nomadic rights. Another important difference is the nature of the right holders. In Sweden the reindeer grazing rights are anchored in the traditional Sámi collective, the siida (Sw: *samebyn*). Every member of a *sameby* share in this collective right, but in practice only Sámi reindeer owners are now members of a *sameby*, thus rendering a large number of Swedish Sámi *de facto* without this right.

In Norwegian reindeer herding legislation these rights now belongs to a more modern entity mirroring a firm, the "operational unit" (No : *driftsenhet*), which by the state is authorised to operate within a certain "reindeer district", which again is part of a larger "Sámi reindeer area". The indigenous collective reindeer rights in Norway thus resides in the socially constructed "Sámi reindeer areas" with its "Area council", representing broader societal interests. In Sweden these collective rights are anchored in an institution linked directly to ancient Sámi lineage based collectives. The reindeer district in Norway (the level beneath the "area") has a governing board, composed of representatives of the operational units in the district, thus representing mainly the private interests of the reindeer owners and operating more like a corporation than a political body. Despite these modern "firm-like" institutions at the operational level, there is now widespread agreement that the "reindeer-commons" rights of Finnmark are still valid – even after 300 years of absolute state ownership. Thus it may in some ways be classified as a "long-enduring commons" and the contemporary institutionalization of Sámi and Local rights can in some ways be viewed as a surfacing of the underlying "real" property rights of this commons.

The above mentioned "industrial age" institutions for the "reindeer industry" in Norway have to some extent produced an individualisation of the *de facto* reindeer grazing rights in Norway. This has led to some confusion regarding succession of reindeer owning within the traditional Sámi family structure and frustration in face of the downsizing of the total number of reindeer in the northern province of Finnmark to combat widespread overgrazing. This often takes place as a government buy-out of operational units from the industry which again implies that an

increasing number of Sámi are de facto excluded from partaking in reindeer husbandry. But at the same time the Norwegian High Court has made it clear that the legal base for Sámi reindeer husbandry is still ancient indigenous use rather than the contemporary law, and that the right to reindeer grazing is a collective right which every Sámi has a part in. This lack of correspondence between the institutional map of indigenous rights as shared collective rights and the factual situation on the ground with overgrazing and "herder cannibalism" has reduced the legitimacy of the state governance of the reindeer industry and thereby also of the ability of the state to secure a sustainable use of the state owned ground in the north. However, this does not alone explain the present process of institutionalising Sámi and local rights in the north.

In the age of "light and fluid modernity" (Bauman 2001) the European nation states are no longer preoccupied with national homogeneity. After the end of the "cold war", we also find that the borders in the north are more open and that frequent crossing does not represent a risk to national security. Thus, the geopolitical environment in the north has through the last decade opened up for important institutional changes. Still, the process of institutionalising Sámi rights in the north has been part of a deep, lengthy and often painful constitutional process that at times have shaken the nation. It is convenient to identify the start of this process to 1978, when there was a great political battle over the construction of a hydroelectric dam across the Alta River – one of the legendary Salmon Rivers of Europe, with an accompanying inundation of large areas of Sámi traditional grazing land. The dam was forced through by the political establishment, but at the price of the formation of a Royal Sami Rights Commission, which was "to map <u>all</u> unclear aspects of the property rights and user-rights regarding ground use (land and water) in the northern province of Finnmark, and to propose local governance arrangements that would accommodate the needs of all the groups inhabiting this area". It took this Commission 17 years to complete its work, and another 8 years for the Norwegian Government and Parliament (*Storting*) to make the final decisions. The outcome of the process is that the property rights to all "state ground" in this northern province is now to be transferred to a new local body, the Finnmark-property (*Finnmarkseiendommen*), the construction of which naturally carries all the traits of a political compromise.

This 25 year process is a unique example of a constitutional process with major implications for a modern nation. It might also have some repercussions for other nations struggling with the same kind of questions, notably Sweden, Finland, Canada, New Zealand and

Australia – and further down the road also Russia. The major considerations in this constitutional process have been of two different kinds. One has been to make amend the injustice done towards the Sámi people from the Norwegian State through the centuries, both the forced assimilation policies ("Norwegianization") and the state initiated encroachment of Norwegian farmers on Sámi lands. The other consideration was the need of a small country like Norway to adhere strictly to international Law and to Conventions and treaties – also those on cultural rights and indigenous peoples. On the first account, research often fails to give good answers on whether historical injustice can be repaired by various institutional measures and compensations to later generations. On the other account, International Conventions (Especially ILO Conventions 107 and 169) started to impact on Norwegian legislation already in the 1970s. The Sámi Rights Commission gave its first report in 1984, proposing far-reaching reforms in the field of civil and political rights. This formed the basis for a specific Sámi Law in 1987 which established separate political rights as Sami and special Sami Parliament in Karasjok. A new clause was then enacted in the Norwegian Constitution (110a) (1988), wherein the State takes upon it to "create favourable conditions for the Sami People to secure and develop its Language, its Culture and its Society." This is interpreted to mean that the State of Norway is founded on the territory of two peoples: the Norwegians and the Sámi and from this day the Sámi is viewed as a "State-constituting people" a position which is fundamentally different from other minorities in Norway.

According to the Sami Parliament, the entry of the Sami in the Norwegian constitution also "means that the historical rights of the Sámi, their ancient use of lands and the Sámi perceptions of rights – and everything else in a culture that forms the basis for contemporary law, for legal protection and resource management, shall constitute the basis for future legal development and governance – in the same way as the historical rights of the Norwegians, their ancient use of lands and the Norwegian perceptions of rights has been through the last centuries". (Sametinget's Plenary 3/99, Case # 32/99. Thus, through these lengthy constitutional processes, international conventions have been "transformed" into Norwegian Law – in much the same way as modern EU-law is also becoming national law in the EU member states. Following this, the Sámi Parliament also interpret the transformation of e.g. the ILO-convention 169 into Norwegian Law to imply that any changes in the property rights system of the ground in the Northern Province of Finnmark now would need the consent of the Sámi

Parliament. Or else it would be a breach of these Conventions that Norway has joined (Sametinget op. cit.).

Both the Sámi Rights Commission (NOU 1997:4), a specialist group of experts on international law (NOU 1997:5), and a specialist group on Sami customs and perceptions of rights (NOU 2001:34), agree that the institutional arrangements governing property rights and resource use in Finnmark were no longer satisfactory in view of the later changes in both the Norwegian constitution and in the political rights of Sámi. These arrangements were in modern times based on a law from 1965 on the State's "un-matriculated" ground in Finnmark. This was not an absolute property right as was the pretensions of the 17th century kings. The role of the state as owner of these "public lands" was formed through several hundred years and has never been clearly defined in relation to the rights of the many users of the area. We have already mentioned that the nomadic reindeer herding rights were a separate ancient right independent of who is the owner of the ground, and that the state was not a very successful range manager in this respect. Also other groups exercise their customary rights in relation to this area, for hunting, fishing, berry picking etc, partly independent of the ground owner. So not only demanded constitutional processes a change, also the ambiguity of the rights on the ground made the "old" institutions for owning and governing the ground in Finnmark ripe for a dramatic change.

In looking for solutions, the state chose to start afresh and create a completely new owner of all public land and water in this Northern Province. This can to some extent be explained by the diverse attitudes regarding an "ideal" or preferred solution from the 3 important groups of "players" on this northern field:

1. The first group is the Sámi Parliament, the predominantly Sámi municipalities in "Inner Finnmark" and the Sámi organisations. They want the indigenous Sámi rights to be strengthened through this innovation, and an acknowledgement of the Sámi's right to "own and occupy their territory".
2. The second group is the Provincial Council of Finnmark, the "Outer Finnmark" predominantly Norwegian coastal municipalities and provincial public bodies and organizations. They were generally against a strengthening of Sámi rights as such, but were positive to increased local governance of the huge land and water resources of Finnmark Province.

3. The third group were mainly the central ministries and their sector agencies. They were mainly concerned that whatever the chosen solution, the state should not loose all control over the ground in Finnmark, infrastructure development of national importance must not be hindered and National Parks must not be stopped.

The compromise outcome of the political struggle was a new owner-body that tries to balance all these different considerations. In doing this it is somewhat helped by a doctrine developed by the first chairman of the Sámi Rights Commission, the former chief justice of the Norwegian Supreme Court; Carsten Smith. This "*lex Smith"*, states that when indigenous Sámi rights are made applicable in an area, those rights shall apply to all inhabitants of that area, irrespective of ethnic identity. In many ways it is this doctrine, also put forward by the Sámi Rights Commission, that has made the present compromise possible.

In short, the new law passed by Parliament (Finnmarksloven - Innst. O. nr. 80 2004-2005), implies the creation of a new and independent owner-body to which the Norwegian state will transfer all land and water that today is owned by the state and is managed by the State Forest Company (Statskog). It will thus be an independent legal entity separate form the state itself.
This body, *Finnmarkseiendommen* (The Finnmark Property), will have a governing board with equal number of members (3) from the Sámi Parliament and from the Provincial Council of Finnmark (3). The State will in addition appoint one board member without voting rights.
The Sámi Parliament will according to this law have the power to decide guiding principles for how the effects for Sámi culture, reindeer husbandry, land-use, industry and society resulting from changes in the use of land and water on the property shall be judged.
The new law also clarifies the relation to the legal base for acquiring independent rights in Finnmark. Thus this law does not change private and collective rights that are based on active contemporary use, traditional use or ancient user rights. Such rights can be tied to diverse subjects like individuals, families, "clans", communities, villages anchored in old siidas, municipalities, reindeer districts, community-commons and state-commons. It also clarifies that the centuries of state ownership have not jeopardised the development of local property rights through long and enduring use, and it has provisions for a special *Finnmarkskommisjon*, which will undertake factual mapping and propose acceptance of existing user-rights and owner-rights of various kinds to the board of the *Finnmarkseiendommen*. This commission will also be supplemented with a special court (*Utmarksdomstol*) which will decide in

cases of disagreement. These supplementary bodies still remain to be worked out in detail.

Maybe the most interesting part of the new owner-body will be its future practice regarding the use of certain local resources. The fundamental principle in the law is here that collective rights can exist alongside with individual rights and that both individual rights and collective rights should be allowed to develop in a dynamic fashion. Thus a municipality can give individuals or groups of individuals in a local community whose livelihood is depending on the use of certain local resources, the right to utilize these for a period of 10 years at a time. The new body, *Finnmarkseiendommen*, can craft general guideline for the municipalities in working out this kind of local practices. This will be challenging because these rights regimes will have to be developed within a general three-tier system of rights to mountains and forest in Norway. For *Finnmarkseiendommen* the Norwegian Parliament has assumed that the underlying rights structure will be more local than in the rest of the country – something like the following:

- Public rights: Everyone will have the right, against paying a fee, to hunt and catch small game and to do sports fishing in water and rivers with rod or hand-line. Everyone will in this case not only be all Norwegian citizens, but on certain conditions, also all EU-citizens.
- Regional Commons rights: All inhabitants in the Province of Finnmark will have the right to big game hunting, cloudberry gathering and the gathering of wood for traditional woodcraft.
- Local Commons rights: All inhabitants of a municipality will have the right to fish for lake fish with nets, to catch anadromeous fish in the sea with fixed gear, and to collect birds' egg and down. They will also have the right to cut deciduous forest for firewood needs in one's own house as well as taking fencing materials for agriculture and reindeer husbandry and the to collect turf for fire and other needs.

But the new owner-body will have a considerable freedom to vary the access to these various resources and thus decide the distribution of rights among the inhabitants of the province according to the overall availability of resources and the local demand for such user rights. The devolution of these kinds of decisions within the realm of political ecology is in many ways a novelty in Norway, where hunters and leisure fishers have been used to the state as the guarantor of constant and uniform rights for most parts of the country. The prospects of increased

institutional diversity is therefore one of the grounds for persistent strong opposition to the whole law from the organised hunting and leisure-fishing interests.

In addition this body will also have the flexibility to limit or expand the harvest of renewable resources according to the resource situation in a particular year or even in a particular season. Such considerations are meant to be in line with good ecosystem management principles and adhering to different EU-frame directives for good governance (i.a. the Water Directive). This will tend to bring more of the resource rights to the local level, as hunting parties from abroad or from Southern Norway will have greater difficulties in incorporating Finnmark in their long term plans with this kind of seasonal uncertainty regarding starting dates and "bag limits". But there are also provisions in the law that the new owner-body can outsource the management of particular resources in particular areas to local organisations and corporations for a period of 10 years, again increasing the potential for commercialisation based on outsiders and their long term planning needs. Such commercial utilization of certain resources of a local commons is known to lead to conflicts and will depend heavily on the construction of the local organisation that obtains such a concession.

To this we must add the fact that the price for hunting and fishing licences will be set by the new owner-body, within certain limits set by the law. As a major part of its income is generated from such licences, its pricing policy will be an important part of its decision making agenda. Usually outsiders are willing to pay higher prices for hunting and fishing and this will again tend to stimulate the new-owner body to open the resources for either public or regional users. Thus the mixture and diversity of property rights regimes throughout the Province is expected to become considerably greater than under the present uniform state system.

As designed in the law, the future development of this system for multi-tier governance of local resources is quite open to change dynamics, and likely to be influenced both by individual enterprise, by conscious collective action and by party politics. For scholars interested in in-depth studies of collective choices of all kinds, it will thus be an exceptional rich field for in-depth studies in many years to come. To a large extent, this future is impossible to predict, just as nobody in the tumultuous year of 1978 could have predicted the virtual abolition of state ownership of this Northern Province by 2005.

But some longer questions of longer evolutionary processes should also be addressed in the years to come. Most of these are connected to the increased potential for local collective choice that this reform enables the people of Finnmark to undertake, thus potentially enabling them to solve some long standing resource governing problems themselves. We have above briefly mentioned the problems in the reindeer industry of Norway, in short characterized by individualization of operations, exclusion of an increasing number of Sámi from this core-activity of Sámi culture, and widespread ecosystem decline resulting from state-subsidised fencing, over-mechanisation and poor herding practises. These problems are much a result of a dominating trend in the evolution of property rights in the western world during the last 250 years – which is characterized by a transformation of community allocations into private property and market allocations, and always with the active state as the prime guarantor of individual property rights as against more primordial collectives. As an important background for the transfer of state property rights in Finnmark to a new local owner-body was exactly the demise of the reindeer industry, it is expected that the collective aspects of the indigenous Sámi rights will become more prominent in the future. However, also here the situation is quite open: On the one hand the new legal tools now at hand for both the Sámi parliament, the Provincial Council and for the new owner-body, can enable a re-collectivization of the whole Finnmark pasturing area, a removal of all fences and the establishment of a "collectively rational" pasture management system. On the other hand, the "private" property rights to winter grazing areas and to scarce migration "corridors" of the different "operational units" are on the verge of being entrenched and the pressure exercised by the most powerful reindeer owning families to protect these can lead in the opposite direction – to a massive self-privatization of the whole grazing area. Again, it is virtually impossible to predict what the situation will be after another 25 years.

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