

Can Land Consolidation Principles Improve the Land Use Situation in Reindeer Husbandry?

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1 Introduction

1.1 Topics, aims and methods

The concept of land consolidation, or ‘severance’, describes processes of improving land use or property structure. These processes are based on recognition of the fact that properties or usufructs are difficult to use and that legally defined measures will make it possible to improve the situation. Improving a property situation through land consolidation normally entails changing the layout of properties or usufructs between the possessors, or dividing joint properties between the owners. *Prescribing rules related to use*, based on the ratio of each participant’s property to the whole or share in a joint property, is also one type of land consolidation.

The legal basis and the methods for defining rights are rather different for reindeer husbandry than for farming and forestry, for example. The aim of this paper is to determine whether some of the principles from land consolidation measures might be considered as a juridical “instrument” to improve the land use situation, solve conflicts and define rights for reindeer owners and others that use the pastures in the reindeer husbandry areas. As the article is based on a recently started project rather than a completed one, the aim is to see if, and to what extent, the principles might be considered such a juridical instrument. For the same reason, there will not be any exact conclusions but rather certain concluding remarks, the question addressed being whether the principles from land consolidation measures are applicable as they stand, or modification of the legal framework is necessary to make the principles suitable for use in reindeer husbandry areas.

In what follows, I will go through the principles of land consolidation with an emphasis on prescribing rules related to use, which is the most interesting measure for purposes of this work. I will look at this measure in general, and then go through the present status of the principles as they relate to reindeer husbandry. I will also provide a brief historical survey of the land consolidation process, the related legal developments and developments in reindeer husbandry, which make it interesting to see if land consolidation measures might be useful in improving the situation in the reindeer husbandry areas. Further on, I will go through some of the procedural requirements related to land consolidation. In the last section, I will concentrate on the principle of prescribing rules related to use in reindeer husbandry areas, asking the question what, if anything, has to be done for the principle to be considered as a conflict-solving juridical instrument for such areas.

Methodologically, the article is based on relevant juridical literature, relevant

legal acts, parliamentary bills and other legislative history, as well as decisions from the Courts of Appeal and the Norwegian Supreme Court of Justice. The discussion at the end of the article draws on three decisions from the land consolidation courts in Northern Norway.

1.2 The land consolidation process and developments in reindeer husbandry

The first land consolidations arose from the need to dissolve joint ownerships in real estate or to settle rights of use as pressure on land intensified through use. The affected areas were typically ‘common land’ that was used for grazing, forestry or fishing. Over several hundred years, such measures have taken place among landowners, tenants and peasants nearly all over Europe in order to improve the use of farmland, pastures and forests.

The past and, to some extent, present situation among landowners can in some ways be compared with the current reindeer husbandry situation in the Saami areas in Norway, where general societal development has raised production aims, resulting in increased pasture use. At the same time, development of the Industrial Society has led to the loss of a substantial proportion of reindeer pasture; e.g. in the county of Finnmark, pastures have been reduced by approximately 35 per cent during the last 50 years.

During the last decade, the acknowledgement that reindeer owners have usufructuary rights to pastures of a private nature has appeared among lawyers and others. The more intensive use of limited pastures makes it necessary to identify and determine the extent of these rights. The acknowledgement makes it particularly interesting to see if juridical principles from land consolidation measures can be applied in determining such rights and in improving the land use situation in reindeer husbandry. Prescribing rules related to the use of land might be such a measure. In the following, I will go into the concept underlying this measure.

1.3 Definition of prescribing rules related to use

The concept of prescribing rules related to use might be semantically understood simply as “to prescribe rules for a certain kind of use”, without saying anything about the basis for the arrangement. From this starting point, one might for example conclude that the rules for using pastures are prescribed on the basis of biological criteria to prevent overgrazing and that the aim is to administer the pastures for the common good of the users as a ‘community’.

This does not contradict the law where the participants do not have specific private rights to use the land but are merely members of an intangible group with a collective right to grazing or other needs. Furthermore, one might also observe a

politically defined system of prescribing rules related to pasture use arising from collective “fairness concerns” about the highest number of grazing animals allowed for a particular business, for example.

In this paper, I shall employ “prescribing rules related to use” in a juridical context or, more precisely, in the context of land consolidation. In such a context, “prescribing rules related to use” is one among several types of measures that aim to improve a property or land use situation and that have the common name *land consolidation*. *Dissolving a system of joint ownership* and *reallocating property through the exchange of land* are the measures traditionally connected with land consolidation. But *prescribing rules related to use*, *terminating rights of use (by compensation)* and *organizing joint enterprises* are also measures described in the Land Consolidation Act¹ as land consolidation.

Prescribing rules related to use is applicable where two or more entities have usufructs or private properties and there is “joint use by estates”.² The process might also be applied where there is no joint use by estates “when the land consolidation court finds that the attendant circumstances make such use particularly difficult”.³ The legal basis for the process might be usufructs, private ownership, or a share in a joint property. The remedy might take into account the relations between several joint owners, between a joint owner and a holder of a usufruct, or only between holders of usufructs.⁴

As with the other land consolidation measures, it is a condition for prescribing rules related to use that the remedy be built on the existing legal situation. What this comprises, including its purview, can be found in sections 27 and 28 of the Land Consolidation Act, which state: “Joint property shall be reallocated according to the share ratio” and other properties “in such way that each estate obtains total land value equal to that which it gives up”.

The legal status must therefore be clear or, according to section 16 of the Land Consolidation Act, the land consolidation court must clarify it. If a dispute arises, it must be handled according to section 17 of the Land Consolidation Act. The ratios between property values or rights in connection with each of the joint users or owners must not be changed when prescribing rules. This implies that the property or usufruct which a participant has must be assessed (valuated). After the case is decided, the value of this share should not be less than before.

Moreover, yields, investments and operating expenses are to be divided in accordance with a determined ratio. The costs are normally apportioned according to the benefit accruing to each participant,⁵ which is again often a function of the participant’s ratio in the arrangement. The same principle of apportionment by determined ratio applies to the amount of influence a participant has on the board of the joint property or the object of the arrangement.

One might therefore say that the appellation “prescribing rules related to use” does not precisely describe what the land consolidation court does. “Prescribing *legal* rules related to use” would seem to be more correct.

As one might see from section 34, last subsection of the Land Consolidation Act,

a case involving prescribing rules related to use might also entail simply determining the share ratio after the use of the estate is decided. According to section 88a of the Land Consolidation Act, a land consolidation court can clarify and determine conditions related to the property and rights of users in joint ownerships and in other areas that are subject to joint use by estates. To establish the share ratio, each joint owner's share of usufruct or the estate must be assessed.

Individual privileges and property in which the genuine value changes over time must also be taken into account. Questions may therefore crop up regarding the valuation of shares, for example, in grazing against shares in hunting or fishing. It is always advisable to clarify the various types of future use. Where an assessment is carried out, it is best that the person performing it is also the one who recommends solutions to the questions.⁶

1.4 Historical development

There were no separate sections about prescribing rules related to use in the two oldest Land Consolidation Acts of Norway.⁷ However, according to the Land Consolidation Act of 1857, rules could be prescribed between owners and holders of usufructs if this was done in connection with the dissolution of joint property or reallocation of mixed property plots. Prescribing rules related to use as we know it today appeared for the first time in the Land Consolidation Act of 1882.⁸ Societal development has made it necessary to change these rules several times, but their purpose throughout has been to provide a means for efficiently adapting the utilisation of properties and usufructs to changing circumstances.

Besides creating more useful relations between possessors, the articles regarding prescribing rules related to use had the purpose of providing rules for use and joint use in joint ownership of real estate. In the 19th century, these were primarily related to harvesting, grazing and common fishing.

At that time, joint ownership of real estate was considered to be a hindrance to developing more modern agriculture. According to the 1882 Act, prescribing rules related to use between owners and holders of usufructs could be done only when the court rejected the dissolution of joint ownership of real estate for economic or other reasons. Prescribing rules related to use could then be a mean to improve the land use situation where it was not possible, according to law, to terminate joint ownership of real estate. Together with the section on prescribing rules related to use, all the Land Consolidation Acts since 1857 have had sections about investments in and maintenance of common roads, fences and the like in joint owner relations.

The Land Consolidation Act of 1950 changed the assumption that prescribing rules related to use was a subsidiary process when the dissolution of joint ownership of real estate could not be carried out. Considered a less comprehensive measure, prescribing rules related to use could now be examined as an option in all cases where it was not deemed less useful than dissolving joint ownership.⁹ The provision

especially targeted mountain areas where grazing domestic animals was the most important form of land use, but it was not limited to such areas.

Prescribing rules related to use could be applied to both joint ownership and disorderly property situations, but it was considered to be most useful for the former situation.¹⁰ That prescribing rules related to use should be given priority over dissolution of joint ownership could also be seen as a change in Norwegian agricultural policy. During the last half of the 19th century and the beginning of the 20th, 'common land' and joint ownership in real estate was considered to be a bygone, incomplete form of ownership associated with a "lower cultural level" and a hindrance to the development of agriculture. Accordingly, the authorities considered land consolidation to be a suitable measure to both benefit agriculture and raise the cultural level. By the end of the first half of the 20th century, this view changed. It was no longer obvious that individual ownership was always better than well-organized joint use or joint ownership.

More stringent restrictions were placed on dissolving joint ownership of real estate above the timberline. According to section 3, item 4 of the Land Consolidation Act of 1950, there could not be any dissolution of joint ownership for such properties unless a land consolidation court unanimously decided that such a measure was more useful than prescribing rules related to use. The aim of this provision was:

to hinder the implementation of land consolidation in mountain areas where prescribing rules related to use might be as useful. One opinion states that it would be justified to sever such areas as can be cultivated, but not more than that. To sever uncultivable joint-owned land above the timberline into individual private plots may hinder use, e.g. for common grazing.¹¹ (author's translation)

The provision was carried further into the Land Consolidation Act of 1979 as a new section 26. One may notice that the argument used for the restrictions related to dissolving joint ownership in mountain areas seems to be based solely on the grounds of protecting common grazing of domestic animals belonging to the joint owners. Reindeer husbandry was not mentioned.

In common land areas,¹² where there is no distinct private or joint ownership, the attitude towards land consolidation measures has been even more restrictive. In general, a land consolidation court has no jurisdiction over such areas. An exception was provided for persons who have the rights to grazing domestic animals. As early as 1882, they could demand that the court prescribe rules related to grazing in the part of the common land where they had grazing rights. The provision was carried forward in the Land Consolidation Act of 1950 but with a more limited scope. The jurisdiction of the land consolidation court became subsidiary, since the court could only handle cases on appeal after the board overseeing the common land had prescribed the rules of grazing. The rule was carried still further to the present Land Consolidation Act of 1979 in its section 33.

The present Land Consolidation Act again changed the rule from the act of 1950 stating that prescribing rules related to use should have priority over the dissolution of joint ownership in real estate. In the present Act, dissolving joint ownership and prescribing rules related to use are made equal. The measures may be chosen according to which will yield the most useful result; or they can be combined if this will provide a more proper solution to the case.

Prescribing rules related to use in reindeer husbandry areas was adopted through the inclusion of a new article in the Land Consolidation Act in 1996.¹³

2 Some procedural requirements

2.1 Useful property (improved property structure)

The basic material condition in any kind of land consolidation is the assumption that the properties are only slightly or not at all useful and that it is possible to achieve an improved property structure, a gain or a net benefit in relation to the present or a planned future situation, e.g. the building of a new road or railroad. The benefit is primarily of an economic nature.¹⁴ The reason for demanding that the court prescribe rules related to use will likely be a need to improve an unfortunate land use situation. The purpose of the case in concrete terms will then be to prescribe rules that improve the use of land.

Thus, the requirements of a land consolidation case will not, unlike in a traditional court case, be connected to a dispute or an unclear legal situation but more to “potential to improve the property situation”. It may not be assumed, however, that all affected parties will profit from the case. In a case heard by the Appeal Committee of the Norwegian Supreme Court in 2001, after the High Court (The Court of Appeal) had previously dismissed it, the Appeal Committee stated that there cannot “be any conditions when presenting a land consolidation issue to ascertain that all affected properties are difficult to utilize in a proper way and that each must benefit through land consolidation.” After basing its findings on the assumption that the appellant would benefit, and that the respondent would not sustain any losses, the Court further stated that “the exchange of land will result in gain overall, without any of the properties suffering loss. The conditions for considering land consolidation are therefore in place.”¹⁵

2.2 There must be means which can improve the situation

Article 2 of the Land Consolidation Act lists the means which a land consolidation court might use to improve a property situation. Since a land consolidation court, as a court of special jurisdiction, has positively limited competence, section 2 is considered to list exhaustively the means which a land consolidation court has at its

disposal in *land consolidation cases*. In other words, it is a procedural requirement that the court find a means in section 2 of the Act that is suitable for improving the present property structure or land use situation. Chapter 6 of the Land Consolidation Act, in which section 2 is found, gives detailed rules on how to use the allowable means.

2.3 Limitations on prescribing rules related to use

Prescribing rules related to use in the Land Consolidation Act is limited to areas of *joint use of real estate*, or when there are *attendant circumstances*. An example of the latter might be prescribing rules for big game hunting. According to the regulations governing the size of hunting areas, in many instances individual landowners do not have enough property to support hunting; i.e., based on the individual pieces of land, one cannot provide the conditions necessary for hunting. By combining the properties of a group of owners into one area, however, there would be enough. Prescribing rules related to use in this case means establishing rules that govern who can hunt (from year to year), voting, and how to divide the value derived from the hunting. The rules must be prescribed according to the productive value of each participant's property.

One procedural principle is that a court will not undertake a more extensive process than is necessary to solve the problems and improve the situation. Prescribing rules related to use means setting out legal rules related to use instead of changing the property situation. This is a less radical and more reversible process than a traditional land consolidation process and has to be investigated before considering the possibilities of dissolving joint ownership or reallocating plots.

2.4 Guarantee against losses

The Land Consolidation Act contains provisions that protect individuals from incurring a negative outcome or losses in a case. The term “guarantee against inflicted loss” is at the opposite pole of that about useful property (see section 3, point a, of the Land Consolidation Act). This procedural premise is absolute, and transfer of land for money, as it is prescribed in section 30 of the Land Consolidation Act, cannot fulfil the requirement.¹⁶ The condition is primarily a guarantee of legal protection for individuals who may voluntarily or involuntarily become participants in a land consolidation case.

3 Prescribing rules related to use in reindeer husbandry areas

3.1 Theoretical and methodological problems

The Land Consolidation Act was amended in 1996¹⁷ to the effect that land consolidation can take place in the form of “prescribing rules related to use in areas in which reindeer husbandry is conducted pursuant to section 2 of Act 49 on Reindeer Husbandry of 9 June 1978”.¹⁸ The rule was included as item 3 of point c, section 2. This item also stipulates that the court cannot “regulate relations between the parties conducting such reindeer husbandry”. Section 35, point i of the Land Consolidation Act provides instructions on how such rules related to use can be prescribed:

Rules related to use and joint use may comprise, e.g. arranging relations between reindeer husbandry and land owners and other estates in areas where reindeer husbandry is conducted according to Section 2 of Act 49 on reindeer husbandry of 9 June 1978, regarding grazing, migration routes and so on.

A revision of the Land Consolidation Act on 12 May of the previous year, adding a new section 34a, made it possible to “establish common measures for the relation between reindeer husbandry and the land owners and other estates.”

The third edition of Austenå and Øvstedal’s commentary on the Land Consolidation Act mentions the provision in section 2, point c, item 3 of the Land Consolidation Act. The authors state that “it is not the individual reindeer owner who is party to the land consolidation, since each reindeer owner does not have an individual right to reindeer husbandry. The Saami reindeer husbandry right is of a collective character.” As we might see from practice of the Supreme Court of Justice, this statement is probably based on a bygone view of the rights of the Saami reindeer owners.¹⁹ Austenå and Øvstedal then proceed to list what prescribing rules related to use might comprise. The list includes “deciding on the maximum number of grazing animals in one particular area. The Land Consolidation Court might also limit the grazing season, or prohibit the utilization of specific areas”. As mentioned above, a regulation of use pursuant to the Land Consolidation Act must be based on the existing legal situation. This often requires a clarification of the legal situation. Moreover, rights have to be assessed in order to arrive at a size - or value - which each party then brings to the settlement of the case. Rights or property may very well be *relocated* or *changed*, but the extent of the rights, the property or the usufructs cannot be *reduced*.

For land consolidation issues that are traditionally subject to prescribing rules related to use, methods have been established for assessing input values such as farming land and forests. Established methods exist for calculating the exchange value for replacing cultivatable land with cultivated land, or young forest with mature forest that is ready for felling. Deciding upon the legal status of traditional

land and forest properties including usufructory rights, can be more complicated, but there are established methods for this as well.

The rights of reindeer owners to land as a collective group can be assessed in the case of purchase or expropriation by authorities, land developers and others that make the land unavailable for reindeer husbandry in the future.²⁰ Thus far these are the only methods in existence. They only involve a limitation of the area to be expropriated, in which the production potential is estimated and capitalized with the aim of finding a collective economic compensation for the reindeer husbandry district. This method is not applicable to grazing rights, which are still part of the pastures of one or more groups of reindeer herders (*siida*).

The limitation issue takes on a different character when the area is to be used for reindeer grazing in the future. Little or nothing has been done to determine the distribution of rights or shares among the individual groups of reindeer owners in the above-mentioned cases. Such a definition is essential in the process of prescribing rules related to use.²¹

Thus, it must be admitted that at present there exist no practical methods that can be used in a land consolidation process for assessing the value of reindeer owners' rights to the pastures or for prescribing rules related to use. When it comes to clarifying and defining reindeer pasture rights, the court might use traditional juridical methods. Source material, however, is scanty. In addition to the problems related to sources and methods, cases become no less complicated in having to organize use between matters that juridically are very different in scale: the "collective" right to reindeer pastures and the value of or usufructory right to a traditional agricultural or forestry property.

3.2 Determining pasture distribution between reindeer husbandry siidas

In connection with the current process of change in the Reindeer Husbandry Act, the *Reindeer Husbandry Legal Committee* has proposed that the Land Consolidation Court be allowed to examine in court rules related to use of pastures.²² The model for this proposed permission is found in the rules in sections 3-7 and 6-3 of the Act on Common Lands. According to section 33, last subsection, of the Land Consolidation Act, the Land Consolidation Court may prescribe rules related to the use of common land pastures for domestic animals if the board overseeing the common land has already prescribed pasture rules for the area. The Committee based its proposal on the following statement:

In several contexts it is natural to compare a reindeer husbandry district with common land, and the Committee believes that the development has shown that inside reindeer husbandry districts, there might be need of a comparatively detailed set of rules related to the use of the resources.²³

Opportunities to bring cases before the court are limited: the County Reindeer Husbandry Board must first sanction the rules and even then access is limited to trying the reasonableness of the rules or whether they conflict with rights acquired due to special legal considerations - most probably prescriptions - use since time immemorial, rights acquired by consuetude, or the like.

This proposal gives the Land Consolidation Court a re-examination or appeal function. Since it is a matter originally sanctioned by the County Reindeer Husbandry Board, the process becomes a re-examination of a decision made by an administrative body, not a lower court or a private possessor.

3.3 Basis for defining the share ratio lacking

The idea of “prescribing rules related to use in areas in which reindeer husbandry is conducted” seems to have emerged out of a desire to resolve conflicts within the reindeer husbandry industry in a simple way. In the report on the Ministry of Agriculture’s preparatory work, it is stated that prescribing rules related to use is an alternative

where the Land Consolidation Court under certain circumstances can prescribe rules related to use in the area. The Land Consolidation Court has extensive experience in resolving conflicts relating to agriculture and pastures. Although the kind of animals involved and the legal basis for the use of the pasturelands will be different, such conflicts will, in principle, be the same as those we find in ordinary agriculture.²⁴

On balance, it seems safe to say that the Ministry of Agriculture’s point of view on how to define the legal basis, or the share ratio, and its significance for the process of prescribing rules related to use was probably a simplified one. Neither at that time nor later was any clarification provided as to how to find this basis or share ratio. Nor have any legal sources been available that could have helped resolve these issues.

The work required of the Land Consolidation Court in 1996 was thus both formidable in quantity and overly complex in nature. The Ministry then performed a complete reversal from its first proposal “to extend the content of the Land Consolidation Act to also include utilization conflicts within reindeer husbandry, between reindeer husbandry districts and between reindeer owners” to “after giving matters a more thorough consideration, finding it impractical [to let the Land Consolidation Court handle conflicts within reindeer husbandry]”.

As a result, the competence of the Land Consolidation Court became limited to handling cases between two parties with very different legal foundations. I will come back to the kind of problems this would lead to for handling assessments and legal matters.

3.4 Some examples from the Land Consolidation Court

There have not been many cases regarding the prescribing of rules related to use in reindeer husbandry areas since the Land Consolidation Act was changed in 1996. It is too early to determine the reason for this trend, however. An inquiry addressed to the land consolidation courts situated in the reindeer husbandry areas in Norway revealed that only three cases based section 2, point c, item 3, of the Land Consolidation Act have been heard, of which two were in Finnmark County and one in Troms County.²⁵

All three cases were based on conflicts involving the grazing of reindeer and domestic animals. In each case, the Court's position regarding the legal basis was "vague". Apart from this common feature, the cases seem rather different.

The first case was raised by *Statskog SF*²⁶ in June 1996, only a few months after the new item 3 was approved and actually before it came into force. The case, which was located in Langfjorden in the western part of Finnmark County, was taken to court because of a need to secure the migration route for the reindeer owners in *Reinbeitedistrikt (reindeer husbandry district) 27* before Statskog SF could rent a forest area to a farmer for purposes of cultivation. According to the Land Consolidation Court, this area, with its "crossing land use interests", seemed to be a typical example where prescribing rules related to use could improve the possibilities for use, both for farming and reindeer husbandry. The case was resolved by a settlement reached in the Land Consolidation Court between the reindeer husbandry district and the farmer who needed more land. The settlement resulted in the migration route being marked in the terrain and protected against cultivation for farming purposes. Reindeer migration was allowed on some of the private ground close to the sea, and the farmer agreed to cover all the expenses of erecting a fence around the areas to be cultivated.

The case *Store Bekkarfjord Beitelag v. Reinbeitedistrikt 24 A* occurred on an island in the western part of Finnmark County. The matter was taken to court because in 1995 some sheep owners started to bring sheep into an area serving as an important spring pasture and calving area for reindeer. The area had not been used as pasture for sheep in the past 40 years. The case was largely constricted by previous rounds in Alta Municipal Court, as well as by a settlement reached during the appeal process. Experts on both ordinary agriculture and reindeer husbandry presented their statements to the Court. Considering, among other things, section 15 of the Act on Reindeer Husbandry, and reindeer husbandry's being more established in the area, the Land Consolidation Court concluded that a section of the conflict area should be protected against domestic animals. Some of the domestic animals were to be transported back to the mainland in exchange for financial support in erecting a fence serving the needs of herding.

The case *Reinøy Utmarkslag v. Reinøy Reinbeitedistrikt* occurred on Reinøya ("Reindeer Island") not far from the city of Tromsø. This case was only recently decided by the Nord-Troms Land Consolidation Court and the decision is not yet

in force. The conflict here was over how many animals could graze in a particular area (Reinøya).

The Land Consolidation Court determined the maximum number of reindeer that could graze in a certain area. The Court based its work on an expert report from a survey of the grazing potential. Based on the grazing potential of the particular areas, the expert provided advice as to the maximum number of domestic animals and the highest number of reindeer the area could support. The number of domestic animals belonging to the plaintiff was not reduced compared to the present number. On the other hand, the number of reindeer appears to have been adjusted to match the “remaining grazing capacity” as defined in a botanical survey.

The question whether the Land Consolidation Court may define the maximum number of reindeer in a specific area was appealed to Hålogaland High Court, which declared: “the Land Consolidation Court has a legal right to determine the maximum number of grazing reindeer in the consolidation area.” This ruling was appealed to the Supreme Court, whose Appeal Committee unanimously dismissed the appeal.²⁷ The legal basis of this ruling was not discussed.

In this case, it might seem like there has not been any examination of the parties’ basis or share ratio in the common grazing area. Moreover, the distribution of the limited pasture resources is based on a situation in which there has been no reduction in the number of grazing domestic animals, while the number of reindeer has been limited to an amount lower than the recommendation of the Reindeer Administration Authority. This case may therefore serve as an example of how the practices regarding the prescribing of rules in reindeer husbandry areas have not become a set of rules aimed at prescribing *legal* rules related to use but, rather, a regulatory mechanism for scaling down and limiting the rights of reindeer owners.

3.5 Concluding remarks

The cumulative conditions in sections 1 and 3, point a, of the Land Consolidation Act are the basic tangible requirements for submitting a land consolidation case. This means that it must be possible to improve the situation when viewed as whole. At the same time, no individual party should suffer a loss due to the outcome of the case. In other words, no party’s costs and disadvantages should exceed the benefits. The absence of a point of view regarding the tangible legal basis, or share ratio, of the reindeer owners makes it impossible to examine whether this provision in section 3, point a, of the Land Consolidation Act is being observed. Under certain circumstances, this situation may lead to an arbitrary result, which in its worst form is probably a violation of the European Human Rights Convention’s provision on the right to a fair trial.²⁸

The proposal of the Reindeer Husbandry Legal Committee to allow the Land Consolidation Court to try the rules related to the use of pastures according to the model used for common land does not solve the problems of assessment and

defining the legal basis. However, the set of problems related to these issues have been simplified and become easier to deal with. The Land Consolidation Court need not define the basis or share ratio but only examine whether an already prescribed rule violates existing rights or “has unreasonable effects for some individuals”.

Thus far, the principle of prescribing rules related to use in reindeer husbandry areas has not, as noted above, become a legal “instrument” for solving problems and conflicts related to reindeer husbandry. This is unfortunate, because the methods used in prescribing such rules are an effective instrument in other primary industries involving land use.

In order to be such a “problem-solver” or to give real content to the principle of prescribing rules related to use in reindeer husbandry areas, methods for *determining the extent of reindeer owners’ usufructory rights to pastures* must be developed. Moreover, the criteria for assessing the value of these rights must be discussed and established. The production potential of the pastures may not always be a good starting point for valuation, particularly in reindeer husbandry areas where a number of different *siidas* share the pastures. On the other hand, it may be relevant to start with what is indisputably private, individual property, the reindeer and their qualities, the meat production, and the taxable income examined over a certain period of time. Prescriptions, historical use, use since time immemorial, rights acquired by consuetude or customary law, where these can be determined, may also be of interest.

Groups of reindeer herders or owners operating together through a social and industrial network, the *siida*, need to emerge as a natural legal entity with defined rights and obligations. In order to achieve this, the *siida* needs to be given a more defined form and more space in the reindeer husbandry legislation. Steps in the right direction have been taken in the proposal regarding the Reindeer Husbandry Act.²⁹

On the other hand, steps have yet to be taken in the direction of defining methods to determine the extent of reindeer owners’ rights to pastures and the criteria for assessing the value of these rights. Such steps will be necessary if a legal framework is to be established that gives Saami reindeer owners the same possibilities to define their rights and to use a conflict-solving body as owners of domestic grazing animals have.

Endnotes

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¹ See <http://www.lovdata.no/all/nl-19791221-077.html> (01.12.03). An English version can be read at <http://www.ub.uio.no/ujur/ulovdata/lov-19791221-077-eng.pdf> (01.12.03).

(Note that the latter does not reflect the latest changes).

² Land Consolidation Act, section 2, point c, item 1.

³ Land Consolidation Act, section 2, point c, item 2

⁴ Land Consolidation Act, section 33.

⁵ Land Consolidation Act, section 76.

⁶ Austenå, Torgeir og Øvstedal, Sverre. *Jordskifteloven. Med kommentarer* (The Land Consolidation Act. With comments), 3rd edition, Oslo 2000, p. 196.

⁷ *Lov angaaende Jord og Skovs Udskiftning af Fællesskab af 18. august 1821* (Act on Land and Forest Land Consolidation [Severance] of 18th August 1821) and *Lov om Udskiftning af Jord og Skovs Fællesskab af 12. oktober 1857* (Act on Land and forest Land Consolidation [Severance] of 12th October 1857).

⁸ *Lov om utskiftning m. v. av 13. mars 1882* (Act on Land Consolidation m. o. of 13th March 1882).

⁹ Land Consolidation Act of 1950, section 3, item 3.

¹⁰ Christensen, Helge. *Jordskifteloven. Med kommentar* (The Land Consolidation Act. With comments), 2nd edition, Oslo 1962 p. 29.

¹¹ Christensen, p. 29.

¹² In Norwegian it is called “Stats- og bygdeallmenning”. Such areas are regulated by *Fjellova av 6. juni 1975* (the act on mountains of 6 June 1975), and *Lov om bygdeallmenninger av 19. juni 1992* (the act on common land of 19 June 1992).

¹³ Land Consolidation Act, section 2, point c, item 3, and section 35, point i.

¹⁴ NOU 1976:50 *Revisjon av jordskifteloven* (Norwegian Public Report 1976: 50 *Revision of the Land Consolidation Act*) s. 89.

¹⁵ Rt (*Norsk rettsidene*; consists of legal decisions from the Norwegian Supreme Court of Justice). 2000, p. 1119 on page 1122.

¹⁶ RG (Rettens Gang; consists of legal decisions from the High Court (the Court of Appeal and lower courts). 1988 page 488, where the High Court (p. 497), states that section 3 point a of the Land Consolidation Act “would lose its meaning if were possible to compensate disadvantages by paying money” is an example of this.

¹⁷ By Lov av 23. februar 1996 nr. 8: Lov om endringer i reindriftsloven, jordskifteloven og viltloven. (Act of 23 February 1996 no. 8: Act on changes in the Reindeer Husbandry Act, the Land Consolidation Act, and the Act on Game).

¹⁸ The Act on Reindeer husbandry can be found at <http://www.lovdata.no/all/nl-19780609-049.html>

¹⁹ Austenå-Øvstedal, p. 38. Compare Rt. 2000, p. 1578.

²⁰ I discussed this issue in my master’s dissertation *Vegframføring i reinbeiteland – med hovedvekt på verdsetting i ertstatningsrettslig sammenheng* (Road construction in reindeer husbandry areas - with emphasis on valuation in a juridical-compensatory context), Ås-NLH 1987. Among the issues dealt with were the methods used for measuring compensation in some civil court cases in the 1980s.

²¹ In a case before the Supreme Court in 2000, Rt. 2000, p. 1578, the issue of grazing rights for a small group (a *siida*) inside a district was examined in relation to compensation. The Supreme Court ruling also touches on the limitation issue. The judgment raises the question of what are known as “marginal grazing estimates”, which has often been the crux of cases regarding compensation for reindeer pastures.

²² NOU 2001: 35 *Forslag til endringer i reindriftsloven* (Norwegian Public Report 2001: 35 *Proposal for changes in the Reindeer Husbandry Act*), pp. 176-177.

²³ NOU 2001: 35, p. 175.

²⁴ St.meld. (Report to the Storting [The Norwegian Parliament]) nr. 28 En bærekraftig reindrift (Sustainable reindeer husbandry), p. 109.

²⁵ Case no. 3/1998 before Nord-Troms Land Consolidation Court and case no. 11/1996 and case no. 6/1998 before Finnmark Land Consolidation Court. An additional, small number of cases were heard, in which reindeer husbandry was involved or was a part in the County of Finnmark and the County of Nordland. These cases were tried before the Act was changed in 1996.

²⁶ Statskog SF is a semi-commercial State Forest company, which administers and is formally the owner of the so-called state property in Finnmark County.

²⁷ Appeal Committee of the Supreme Court, case no. HR-2003-00794-1.

²⁸ Convention for the Protection of Human Rights and Fundamental Freedom of 1950, section 6, adopted by Norwegian legislators in the Human Rights Act of 21 May no. 30 1999.

²⁹ NOU 2001: 35, pp. 91 – 100 and pp. 137 – 143.