

Rettsmekling i norske eiendomstvister¹

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Jørn Kjell Rognes and Per Kåre Sky: Legal mediation of land disputes in Norway

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As a consequence of the recent revision of the Norwegian Land Consolidation Act, legal mediation has been introduced as a method of resolving land disputes in Norway. We discuss here the regulations for legal mediation and present qualitative and quantitative data on its initial application in the courts. Legal mediation has been put into practice in only 10 of 34 courts one year after the regulations went into force. The reasons for this are discussed.

Key words: Legal mediation. Land use disputes. Boundary disputes. The land consolidation court.

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1 Introduction

Norway is, to our knowledge, the only country having a special land consolidation court system that is a part of the judicial system. This differs from other countries that typically handle land consolidation issues through specialized administrative bodies, with right of appeal to the regular civil courts. In this paper we discuss the introduction of legal mediation as an alternative to traditional judgement in the Norwegian land consolidation courts, and present qualitative and quantitative data on its initial application in the courts.

In Norway, land owners can choose between the ordinary civil courts and the land consolidation court in the first instance. The parties choose to use the land consolidation court in more or less all boundary disputes (Falkanger and Falkanger 2007:111). Sevatal (1986) suggests that they do so because the cases have not developed into real disputes in the legal sense (a requirement in the civil courts); the legal situation regarding the land is obscure; one of the owners wants an independent institution to investigate the

matter; the land consolidation court procedure does not require that parties be represented by a lawyer; and finally, because the land consolidation court, unlike ordinary courts, has the technical equipment and competence needed for the cadastral work that typically follows a verdict in the court.

It is not an easy task to give an overview of the land consolidation court's jurisdiction. The court's jurisdiction has evolved successively from the middle of the 19th century until the present. Present legislation regarding land consolidation covers land consolidation in urban and rural areas, valuation court in special situations and finally a court which handles property boundaries disputes and land use disputes.

Compared to the other Nordic countries, Norway has a large number of property boundary disputes per year (Goodale and Sky 2001). In Denmark, for example, 50 cases involving boundary disputes were handled by «chartered surveyors» (landinspektører) each year. Only 5 of these were brought to the civil courts (Kristiansen 2006:54). In contrast, the land consolidation

1. This paper was presented at the 1st European surveyors congress and 39^{ème} congrès de l'Ordre des géomètres-experts, français in Strasbourg 18 september 2008.

courts in Norway heard 550 cases involving boundary disputes or land use disputes in 2006, comprising more than half of the total of 948 cases heard in those courts (Courts Administration 2007b).

One main reason for the large number of boundary disputes is that Norway had a system in which laymen were responsible for division of landed property from 1764 to 1980. This was called «skylddeling» and the outcome of such a case was a written description of the boundaries, with no cadastral mapping.

The Norwegian Land Consolidation Act has been recently revised. This change must be viewed together with the revision of the Dispute Act which came into effect 1 January 2008. The working group (Tvistemålsutvalget) said in their summary that: «*The need for rational and appropriate dispute resolution of a high quality would also suggest that alternative dispute resolution methods should be available in addition to resolution by judgement. A keyword is increased use of judicial mediation.*» (NOU 2001:32 Vol. 2, p. 1099). The Norwegian reform of civil procedure is discussed in Backer (2007).

As a consequence of the reform, legal mediation has been introduced as a method for resolving land disputes. Mediation is defined as assisted negotiation (Rognes and Sky 2007). Legal mediation is limited to two types of cases: boundary disputes (§ 88 in the Land Consolidation Act) and land use disputes (§ 88a)².

In the following we will first present and comment on the legal mediation procedure, then evaluate the status of legal mediation after one year in practice and finally describe the training programme for land consolidation judges.

2 The procedure

Here we will present and comment on some sections of the regulations. The comments are partly based on our own reflections and

experience and partly on data from three sources: (a) 34 interviews with chief land consolidation judges,³ (b) responses to a questionnaire sent to all land consolidations courts, and (c) discussions with participants in courses on mediation.

§ 1. Scope

The trial programme concerning legal mediation pursuant to § 89b of the Norwegian Land Consolidation Act applies to all land consolidation courts, but not to the land consolidation courts of appeal. The trial programme covers cases pursuant to § 88 and § 88a of the Land Consolidation Act, filed after 1 April 2007. If the parties agree to same, legal mediation on the basis of these provisions can also be applied to similar cases filed with the land consolidation courts prior to this date.

Comments:

The trial programme does not cover traditional land consolidation cases pursuant to § 2 in the land consolidation act.⁴ This means that cases dealing with dissolution of joint ownership, reallocation of landed property through exchange of land and organisation of joint measures are not covered by the regulations.

In Ot.prp. nr. 78 (2004–2005) the Ministry of Agriculture and Food proposed that legal mediation also should cover traditional land consolidation cases, but the ministry has not yet made the regulations for these types of cases. It is our experience that mediation is useful in several situations. One example is cases in which the parties need regulation of use of a private road (§ 2c). These cases involve issues such as who has the right to use the road, what is the precise location of the road, how much each party should pay for maintenance, and so on. Mediation is also an appropriate method, we feel, in small cases dealing with exchange of land (§ 2b).

In 1997 Rognes and Sky (1998:11) made a survey of the ordinary mediation activity in

2. Clarifying and determining conditions relating to property and rights of use under joint ownership and in other areas subject to joint use by estates, when this is necessary with a view to rational use of the area.

3. Anne Kristine Pedersen (2008) finished her master thesis at The Norwegian University of Life Sciences, Department of Landscape Architecture and Spatial Planning in May 2008. She has been affiliated with our project and this paper is based partly on her studies. Professor Per Kåre Sky was her supervisor.

4. An unofficial and not fully updated translation of the Land Consolidation Act is published at: <http://www.ub.uio.no/ujur/ulovdata/lov-19791221-077-eng.pdf>

land consolidation courts showing that in boundary disputes one used less mediation than in ordinary land consolidation cases. This indicates a large potential for mediation of traditional land consolidation changes such as dissolution of joint ownership (§ 2a), reallocation of landed property through exchange of land (§ 2b), prescribing rules relating to use of areas with joint use (§ 2c), developing joint measures (§ 2e) etc.

§ 2. Decision to apply legal mediation

As soon as all parties have been informed of the claim, or as soon as possible thereafter, the land consolidation judge preparing the case shall decide whether legal mediation is to be applied. Before any decision regarding legal mediation is made, the parties are to be given the opportunity to state their opinions. Legal mediation may be applied without the parties having stated their opinions on the issue when the land consolidation judge considers this to be appropriate.

In deciding whether to apply legal mediation in specific cases, emphasis is to be placed on certain factors including: whether the parties agree to legal mediation, the likelihood that legal mediation will lead to settlement, the extent to which legal mediation may simplify the matter (regardless of whether it leads to settlement), and whether legal mediation is a viable option given the relative strengths of the parties and/or the costs involved.

The decision of the land consolidation court concerning legal mediation cannot be appealed.

Comments:

We do not yet have exact statistics about the proportion of cases from the total caseload that is mediated in the land consolidation courts.

In the ordinary courts, 15.7 % of cases are mediated in the first instance courts and 9.6 % in the appeal courts. Fairly few cases are mediated in the land consolidation courts so far (see point 3 below). In our view there is not a great difference in the suitability of legal mediation in the ordinary courts and the land consolidation court. In our experience, 20 percent or more of all boundary disputes

are suitable for legal mediation. Each year approximately 500 boundary disputes are brought to the land consolidation court. We expect that at least 100 cases are suitable for legal mediation.

The land consolidation courts are divided in their view of the usefulness of legal mediation. A common objection to use of legal mediation is inefficiency. If the backlog is less than one year of work, most courts found that legal mediation will delay the process. Instead of legal mediation they hold a preliminary hearing. If the parties agree, the judge mediates under the frame of § 8-2 in the dispute act or they immediately start the main proceedings.

Court districts with extensive backlog are more positive to legal mediation as they think it can reduce the backlog. Some also propose use of mediators from outside the court to reduce backlog even more.

It is important to notice that in most boundary or land use disputes, surveying and mapping are part of the proceedings. The court needs to have sufficient engineering capacity to do the technical work immediately after a successful mediation.

Legal mediation may be initiated without the explicit consent of the parties, but Pedersen (2008:76–83) found that this happens very rarely in the land consolidation courts. Here it is important to note that the disputing parties can stop mediation at any time in the process, that mediation is voluntary and that some parties prefer a verdict to a mediated solution.

§ 3. Legal mediators

Legal mediation is to be performed by the land consolidation judge preparing the case, another judge at the land consolidation courts or another person with insight into legal mediation and/or the issues raised by the case. Only exceptionally can a legal mediator whom the parties do not accept be appointed. The decisions of the court pursuant to this provision cannot be appealed.

With the agreement of the parties, an assistant to the legal mediator may be appointed. This assistant is to have insight into legal mediation and/or the issues raised by the case.

The president of the land consolidation court can prepare lists of people outside the purvey of the court who may be qualified to serve as legal mediators.

Comments:

As far as we know there is only one person outside the land consolidation courts who practices as a mediator, a retired land consolidation engineer. We also know that 4 of the 14 people who have started with legal mediation are engineers from the land consolidation court the others are land consolidation judges (Pedersen 2008:83). Seventeen of the engineers in the court have participated in a formal mediation training course that gives them some background to start as mediators. While the regulations do not require any formal competence in mediation, the Ministry of Agriculture and Food did not bring the regulations into force until after the 30 land consolidation judges had completed a course in legal mediation.

Since the land consolidation court is a court of particular jurisdiction, mediators with special qualifications are in our opinion not needed.

§ 4. Performance of legal mediation

Legal mediation is performed outside the court sessions. The legal mediator and/or the assistant determine the legal mediation process. They may decide, for example, whether to hold mediation meetings separately with each party or hold joint meetings.

The legal mediator takes minutes of the mediation meetings. The minutes state the name of the land consolidation court; the time and place of the mediation meeting; the case number; the names of the mediator/the assistant, the parties and the lawyers; whether the parties attended the proceedings in person: and if not, who is deputising for them. If witnesses or experts are heard, this shall also be noted in the minutes. The minutes shall briefly summarise the result of the mediation proceedings and are to be stored as case documents.

The legal mediator decides whether, and to what extent, evidence is to be presented during the proceedings. Evidence cannot be presented without the agreement of the par-

ties and the person who is to present the evidence or provide an explanation.

The legal mediator, the parties and the lawyers are bound to confidentiality corresponding to the Norwegian Dispute Act § 8-6.

Comments:

There will often be an imbalance of information. The mediator needs to obtain permission to share information with the opponent from the parties. This is also discussed in a report from Courts Administration (2007a:76–78). The mediator needs to be careful in situations where many elements are brought into the mediation, as it can be very confusing for the parties.

As the mediator is normally a trained judge, the result of the mediation is expected to be reasonable and just.

§ 5. The tasks of the legal mediator

The legal mediator is to attempt to reconcile the parties through mediation, and may suggest settlements on all or some of the issues under consideration. The legal mediator is to inform the land consolidation court of the results of the mediation process.

Comments:

It is important to note that in more informal mediation, i.e. not legal court-based mediation, Dispute Act § 8-2 forbids the court from holding separate meetings with each party or receiving information which cannot be communicated to all parties involved. Further, the court shall not present proposals for a solution, offer advice or express points of view which may bring into question the impartiality of the court. The new Dispute Act (2005) emphasizes this more strongly than the previous act (1915).

In legal mediation, on the other hand, the mediator can hold separate meetings with the disputing parties. This breaks with the adversarial principle. Some judges acting as mediators felt this to be unfamiliar and some mediators commented on the ethical challenges of holding separate meetings. Pedersen (2008:92–100) discusses the use of separate meetings. She found that such meetings are used in approximately 2/3 of all cases mediated. While most mediators experienced no

ethical problems related to using separate meetings in legal mediation, some mediators found separate meetings unfamiliar since they are used to mediate under the system of the adversarial principle.

§ 6. Settlement

If the parties reach agreement, the settlement can be entered into a legally binding resolution. For the formal court a court session is needed, led by the land consolidation judge. The land consolidation court will further process the legally binding resolutions pursuant to § 17a, sections 4 and 5 of the Land Consolidation Act. If the parties agree, the settlement can also include a statement to the effect that the land consolidation court shall not mark, measure or map the boundaries laid down in the settlement. Settlements reached through legal mediation are public. The land consolidation court shall report to the responsible cartographical authority with regard to boundaries, etc.

Comments:

The engineers who work as mediators cannot close the case with a settlement in court. What they can do is to prepare a legally binding resolution, which finally is ratified in a court session. Pedersen (2008:86) found that some courts were positive to a proposal that engineers can also acquire competence to close a case with a settlement in court. Since the engineers do all the surveying in connection with the legal mediation we find this proposal reasonable and efficient.

A settlement in court is not always the preferred final outcome in legal mediation. In some cases, issues included in the settlement are very dynamic (for example rules for the use of a road) It is not advisable to close such a case with a settlement in court because such settlements cannot be changed very easily.

§ 7. Procedure should agreement not be reached

The land consolidation judge who acted as mediator can only participate in the future processing of the case if the said land consolidation judge consider it appropriate to do so, and when the parties do not wish to change land consolidation judges.

Comments:

If agreement is not reached, the case is typically transferred to another judge to hear. Similarly, if an engineer has mediated unsuccessfully it is advisable to let another engineer assist the judge during the hearing and in the survey afterwards. In some courts this can be very problematic since there is only one judge or one engineer, and it is very costly to transfer the case to another court. This argument is used against legal mediation and may lead the court to avoid legal mediation and start the main hearing immediately.

A complete translation of the regulations concerning the trial programme of legal mediation for the land consolidation courts can be found at <http://www.ub.uio.no/ujur/ulovdata/for-20070122-0080-eng.pdf>

3 Evaluation of the status of legal mediation after 1 year

Legal mediation was put into force April 1, 2007 and Pedersen (2008) evaluated implementation after one year. She interviewed all 34 chief land consolidation judges in Norway. She also used a questionnaire to collect information about mediation activities in separate 34 cases from 8 courts and 10 mediators.

Only 10 courts had started using legal mediation 1 year after the jurisdiction was put into effect. Those who had not started not using legal mediation gave the following explanations: impartiality concerns, no backlog in the court, preference to mediate at the pre-trial review meeting, or mediation under the limitation of section 8-2 in the dispute act.

There were 561 court cases in 2007 (550 in 2006) involving boundary disputes and/or land use disputes that could be considered for legal mediation.

Table 1. Type and number of cases considered for mediation or mediated.

Type of case	Number of cases
§ 88	28
§ 88a	1
§§ 88 and 88a	5
Total	34

Pedersen (2008:56) found that most of the cases considered for mediation or mediated are boundary disputes (§ 88). Boundary disputes (§ 88) constituted 28 out of 34 cases,

land use disputes (§ 88a) 1 out of 34 and combined cases boundary and land use disputes 5 out of 34 cases.

Table 2. Number of parties, boundary length and area.

	Number of parties	Boundary length (m)	Area (m ²)
Variation	2–12	10–8.000	14–2.000.000
Mean	3,82	585,3	90.394
Median	2	100	150
Number of cases	34	30	24

Pedersen (2008:56) investigated the characteristics of the cases that were mediated and found that they had few parties and limited boundary length and area.

First, the average number of parties per case was only 3.82, and ranged from 2 to 12. The average size of the disputed area was 90.394 m² (n = 24). The area was 500 m² or less in 17 out of 24 cases. The average length of the disputed boundary was 585 m (n = 30). Closer examination of the data reveals that the boundary length was 100 m or less in 20 out of 30 cases.

The conflict level was high or very high in 16 out of 32 mediated cases. In 12 cases the level was neutral and in 4 cases there was no conflict or a low level of conflict.

4 Training

Before the regulations were put into force, land consolidation judges and engineers received a three-day course of training in mediation. The curriculum included the following topics: presentation, discussion and evaluation of the regulations for the trial programme of legal mediation for land consolidation courts; presentation and discussion of legal mediation in the ordinary courts; the initial phase of legal mediation; mediation theory; mediation techniques; and contract law.

An important part of the training was a role-playing exercise where a mediator (judge) mediated between two parties in a complex boundary dispute. The participants also wrote an essay applying mediation theory to a practical situation.

5 Conclusion

The extent of legal mediation at present is limited. The present regulations came into effect on 1 April 2007 and so far we have limited experience on how this new measure will work in practice. Three possible explanations for the limited use of legal mediation so far are that the land consolidation judge preparing the case may not find cases suitable for legal mediation, that the parties may not want to take part in mediation, and that it will take some time before mediators are trained and comfortable with legal mediation.

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