Land Tenure Conflicts: Suitable for Mediation?

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SUMMARY

This paper discusses some key attributes of land and the fact that mediation is a suitable dispute resolution technique. Land is a limited resource and has a fixed location. Disputing parties often have long term relationships, at least as neighbours. Properties are inherited and often stay in families for generations. Owners become intimately linked with their property and this makes it difficult to separate people from land. In addition, people have different relationships to their property and this affects mediation and has to be taken into consideration in the dispute resolution process.

Absentee ownership complicates the mediation process and the future relationship between the parties. This is a growing movement which can be seen everywhere and which is highly correlated to industrialization of society. This paper discusses the question of differences between mediation in urban and rural areas.

Mediated settlements are of great importance for sustainable development. People tend to follow decisions that they have actively taken part in. Research shows that interest-based mediation provides better solutions for the parties than rights-based adjudication. I discuss the challenge of transforming a land dispute from a distributive situation to an integrative one.

Finally, I describe a new method proposed for solving unsatisfactory property structures in urban areas in Norway. Mediation is introduced as an alternative to land readjustment or expropriation in urban areas. It is organized outside the land consolidation courts, but the mediator has experience as a land consolidation judge.

The paper is based on a literature review and the author's experience as a judge in the land consolidation courts. As an overall conclusion I find that land tenure conflicts are suitable for mediation.

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1. INTRODUCTION

In this paper I will examine the question of whether mediation is a suitable dispute resolution technique for solving land tenure conflicts. My discussion is based on a literature review and also my experience adjudicating land tenure disputes as a judge in the land consolidation courts. I will begin by highlighting some key characteristics of land and land conflicts.

Land is a *limited resource* and as an economic variable its importance is difficult to overestimate. Land registration is highly correlated with *economic growth* and the *development of a market economy* and land also forms the foundation for loans and other types of investment security (de Soto, 2000). Properties are *inherited* and often stay in families for generations. Owners become *intimately attached* to their property and this makes it difficult to separate people from land. In addition, people have *different relationships* to their property. This affects mediation and has to be taken into consideration in the dispute resolution process. Disputing parties often have *long term relationships*, at least as neighbours. Improvement of *communication* is a key issue in land disputes.

Mediation is generally defined as the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the parties in voluntarily reaching the mutually acceptable settlement of issues in dispute (Moore, 1996:15).

One of the earliest recorded mediations occurred more than four thousand years ago in Mesopotamia when a Sumarian ruler helped avert a war and develop an agreement in a dispute over land (Kramer, 1963 and Carnevale and Pruitt, 1992:561). Several unsolved international conflicts today, e.g., the Israel – Palestine conflict and the Cyprus problem (Karouzis, 1976), involve disputes over land. The mediation activity in these cases focuses to a large degree on land issues.

Compared to the other Nordic countries, Norway has a large number of property boundary disputes per year. The frequency of boundary disputes is highly correlated to the quality of the land register. In Denmark, for example, 269 cases involving boundary disputes were handled between 1990-1996 by the chartered surveyors (*landinspektør*), the group charged with resolving such disputes. By contrast, the land consolidation courts in Norway heard 359 cases involving boundary disputes in 1996 alone (Goodale and Sky, 2001:195). In Denmark professional surveyors are responsible adding to the land register. In Norway this was done by laymen until 1978. The division of land (called *skylddeling*) resulted in a document that gave a written description of the property, and where the boundaries were marked, but no map was made of the location. This was the situation in rural areas and in small towns. In urban areas, at least the larger towns, the municipalities had a well functioning surveying department and better quality land registers and cadastral maps.

2. RELATIONSHIPS TO LAND

The reallocation of land holdings is often an emotional process for the parties involved. An otherwise effective planning program nevertheless results in conflict due to personal and social changes accompanying the land consolidation process. We have the same situation when boundary disputes are handled in the court. We have to take into consideration the parties' different, and complex, relationships to the property in question.

Figure 1 shows how complex the relationships involved in mediation can be. I have divided these relationships to land in four: (1) social relationships to land; (2) economic (as an enterprise) relationships to land; (3) investment relationships to land; and (4) land used for consumption (hunting, wildlife, leisure).

Goodale and Sky (1998:267) have proposed a new methodology of qualitative research that both recognizes the social relationships of the land in dispute, and seeks to determine what these relationships are. One part of this methodology requires planners or mediators to interview parties on the property itself (for greater elaboration, see Goodale and Sky 1998). This is crucial, because parties are often unable to fully articulate the meaning of the social relationships to land in a sterile confines of the official session in the courtroom. Moreover, economic relationships can also be determined by interviewing the parties on the property, as well as by supplementary accounting analysis.

This is only one example and the alignments shown in figure 1 are often more complex. I could also add land as security and as power. Each individual owner could have his own personal set of relation to his property. In cases when we deal with communal ownership, we have a group of persons, where each has its own relationship to the land. Communal ownership is more frequent in rural areas compared to urban areas. And the situation becomes even more complex if we take into consideration properties that have usufructs on the disputed properties.

	Individual ownership		Communal ownership	
Individual	Social	Enterprise	Social	Enterprise
ownership	Consumption	Investment	Consumption	Investment
Communal	Social	Enterprise	Social	Enterprise
ownership	Consumption	Investment	Consumption	Investment

Figure 1: People have different relationships to land.

3. MEDIATION IN LAND TENURE CONFLICTS

In this article I will highlight some results from a research project on mediation activity in the Norwegian land consolidation courts. Rognes and Sky (2003) found that judges in the land consolidation courts spent considerably more time mediating *integrative* planning disputes than *distributive* boundary disputes. The results show that the judges spend considerable time mediating the cases; on average more than four hours in planning disputes and about two hours in boundary disputes. Rognes and Sky also hypothesised that judges increase mediation

effort with case difficulty. This hypothesis was supported in planning disputes. That judges mediate significantly more when conflict levels increases, when the area is large, and when there are many parties (people complexity). In boundary disputes, however, time spent mediating can hardly be predicted from the case characteristics examined here. There are no relationships between mediation time and conflict level or people complexity of the cases. Mediation activity increases only with length of the boundary. In general, judges seem to be less sensitive to case difficulty when they mediate boundary disputes than when they mediate planning disputes.

The results show that mediation often is effective. Mediation reduces backlog, and the mediated decisions often are perceived as more satisfying than a judicial decree. The parties have greater control over the case. In interviews of the judges they gave consistent and rational answers for why they mediated. They mediated because they were convinced that the parties often would be better off with a consensus-oriented settlement than with a court decision. In particular they focused on the future relationships between the parties (Rognes and Sky, 2002).

Absentee ownership complicates the mediation process and the future relationship between the parties. This is a growing movement which can be seen everywhere and which is highly correlated with industrialization of society. Absentee owners are not so closely tied to the local community. Often they do not take part in joint activities, like voluntary communal work, social life in general in the village, and participating in meetings in different owners associations. They are, in other words, more distant from the property and their relationship changes from a more social or economic one to a relationship of consumption (hunt in the Autumn, use it as a vacation home, etc). As a practising judge, and often a mediator in the land consolidation court, I often feel that these two groups of owners have totally different views on development of an area. The established owners accuse the absentee owners of "betrayal"; a common sentiment directed toward the absentee owners is "you left us behind to take care of agricultural production."

People tend to follow decisions that they have actively taken part in. Research shows that interest-based mediation provides better solutions for the parties than rights-based adjudication (Rognes and Sky, 1999). That is of great importance for development both in urban and rural areas.

One of the most challenging situations for a mediator is to transform a land dispute from a distributive situation to an integrative one (see Lewicki and Litterer, 1985:75-128). To succeed in this one needs among other things experience, creativity, and a systematic approach. This should include a session where the mediator surveys each party's interest and then conducts an analysis of the situation. An example can illustrate this. Two farmers A and B have a dispute concerning a right of way. A claims that he has a right of way; B disagrees this and they bring the case to the court. The court is primarily concerned with the parties' conflicting statements. When analysing the case the judge/mediator found that B was worried about the condition of the road and future maintenance. A was willing to pay a maintenance fee and even share in the work. What the parties actually needed was a set of rules regarding maintenance of the road. This example shows the transformation of a dispute from right-

based adjudication to interest-based mediation. This is challenging work for a mediator. Rognes and Sky (1999) found over 50 different methods used in mediation by land consolidation judges. Judges used mostly logical mediation strategies, but some combined different methods and showed considerable creativity.

4. PLANNING AND MEDIATION IN URBAN AREAS

The Norwegian planning system can be characterized as controlled by rules, and framed by a public planning instrument under the control of politicians (Garnåsjordet, 2000). Municipalities and other public organizations were earlier responsible for the detail planning; now this is more or less a private activity. There is no regulation in the current Building and Planning Act regarding mediation. What then when conflicts arise?

Susskind and Ozawa (1984:5) have argued that planning and allocation conflicts are not suitable for the judicial process and the court system: "Indeed, the essence of many allocation conflicts may be left unexamined because constraints imposed by adjudicatory rules and procedures. The legal process tends to give greater consideration to conformance with procedural ground rules and legal precedent than to fairness and efficiency."

The Ministry of Environment in Norway has now proposed a new Building and Planning Act (NOU 2003:14) where mediation and negotiation make up a greater part of the legislation, for example the negotiation of development agreement. This is a step in the direction of more negotiation in the planning process.

A working group appointed by the Ministry of Agriculture in Norway has gone further and proposed a totally new method for solving unsatisfactory property structures in urban areas (Landbruksdepartementet [Ministry of Agriculture], 2003). Mediation is introduced as an alternative to land readjustment or expropriation in urban areas. It is organized outside the land consolidation courts but administered by this court. The mediator must have experience as a land consolidation judge or other relevant experience (lawyer, planner, architect, etc.).

The reason for this proposal is that the government wishes to improve land use across property boundaries. Often property boundaries create an artificial boundary in a development area. This results in unnatural zoning or inappropriate development from a planner's point of view. The costs of infrastructure become more expensive than necessary. The existing mechanisms to handle these issues are expropriation, division of land and regulation of inconvenient boundaries (only minor adjustments), elimination of perpetual rights or transformation of rights, dissolving a system of joint ownership, market based solutions, or public buying of land. These measures are spread to different courts and organizations. The aim of the new measure is to reduce the transaction costs for the owners by establishing an arena for mediation. Mediation often reduces the level of conflict and this will most likely also reduce the number of comments to the proposed plan (Rognes and Sky, 2003).

I will summarize the proposal. Petitions for mediation have to be made by one owner of a registered property in the planning area where the public has required or suggested a detailed

plan, or where the owners have agreed to develop such a plan, or in an area where there are disagreements among the owners. The municipality can also demand mediation, but they can only participate in mediation when they own property in the actual area.

The first step in the mediation process is for the mediator to give information about the public planning process and rules for expropriation. Second, the mediator must survey each owner's individual opinion and wishes for development of the area and analyze if there are any overlapping interests. Third, the mediators must do his best to help owners to agree on other planning issues, the planning process, and the shared costs of development. The mediator decides on how the mediation process is to be done.

Affected owners have a duty to participate in mediation at the same level as witnesses in civil cases if the mediation is paid for by the government.

In a mediation session they can agree on new initiatives for development or processes they must begin regarding detailed planning, changes of boundaries or the layout of land, the elimination of usufructs rights, the establishment of an owners organization, or the sale of properties.

5. CONCLUSION

As one can see, mediation in land issues is gaining more popularity in Norway. People have different relationships to land, and are intimately linked to their property. As described above, these are complex relationships. A proper investigation of these relationships requires other dispute resolution techniques than the formal adjudication process. Rights-based adjudication often does not solve the real problem between disputing owners of land. Research in the Norwegian land consolidation courts shows that judges mediate often in land issues and parties tend to be satisfied with interest-based mediation. The proposed new measure – mediation in planning – is a new step in the direction of more mediation and promises a reduction of transactions costs for the involved parties.

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BIOGRAPHICAL NOTES

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