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Indigenous Rights and Norwegian Law. The problem of Sámi Customary Law and Pastoral Rights in Norway

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Sámi pastoralists - culture heroes and falles angels

In Norway, Sámi reindeer pastoralists - representing the only exclusive Sámi traditional livelihood - were for many years vanguards and and emblem for Sámi issues and Sáminess, as for instance in providing a basis for establising Sámi land use rights in Norwegian jurisprudence, and for expressing the uniqueness of Sámi as an indigenous people.

This process came about quite recently, as a consequence of decisions by the Supreme Court where herders were acknowledged a right to compensations for major intrusions into their livelihood. The court decisions of the so-called *Altevann-case*[1] in 1968 and the *Kappfjell-case*[2] in 1975 confirmed a principle that herders, in terms of their traditional land use, had an established usufruct right[3]. Before this, herders - like any other Sámi interests - were simply ignored in terms of impact studies and compensations following state expropriations for developments projects in their pasturelands. Since then, other historical law documents, like the **Lapp codicill**, a supplement to international treaty between Sweden and Norway of 1751, which provides special legal recogniton of the interests of the Sámi who were exploiting the pastures across the national border as part of their traditional livelihood, have been used to advocate Sámi rights to land and self-government. However, after 1751, these legal measures were abolished and neglected for the establishment of legal system based on Norwegian statute law[4].

During latter years, reindeer herders remains in the public focus, but their significance has changed dramatically. To some extent it has been reversed. I will here discuss some of the problems and paradoxes of this development - in terms of the significance of Sámi

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[1] - **Rettstidende 1968**, s. 429-442. (Norwegian Hydro Authority vs the Sámi settlements Talma and Saarivuoma, Sweden).

[2] - **Rettstidende 1975**, s. 1029- .

[3] - Tønnesen, S 1972. **Retten til jorden i Finnmark**, dr.avh. 2. ed. 1979.

[4] - In March this year the Norwegian Government recognised that the Lappe Codicill is still current. Some Sámi leaders have recently used this to claim establishment of *separate Sámi courts* in Norway -a claim which was immediately rejected by the Ø. Meland, the permanent secretary ("statssekretær") of the Ministry of Justice. Since then Norway has got new laws forming the basis for Norwegian system of law, superceeding the codicill, which is seen as a "sleeping" law, with can only be used as "**a supplememt and as an argument of a political nature**" (quoted in Altaposten 24.04.95).

customary law (in reindeer herding), and how this is being defined in specific **courts cases** from Finnmark county Northern Norway. In spite of the continouing controversies, and the increased cultural and political significance of indigenousness, herders are no longer central characters in this - in many ways they are becoming less important - culturally speaking, as well as politically - to a large extent they have been reduced to economics and an ecological problem.

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Indigenousness and pastoralists

In 1990 Norway ratified the **ILO Convention no. 169 Concerning Indigenous Populations and Tribal Peoples**, which - in addition to establishing "*rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised*" with a special emphasis on "*nomadic peoples*" (Art. 13) - states that the application of national laws and regulations on behalf of indigenous peoples "*due regard shall be had to their customs and customary laws*" (Art. 8). This should all have lead to a situation where reindeer pastoralism should have been more significant, but this has not really happenened. Let us consider this paradox of pastoral indigenousness. But first let me review some of the crucial issues for indigenous peoples as they apply to Sámi herders:

1) The identity and culture of indigenous peoples are intimately connected to their use and occupancy of their traditional **territories**. The political progress among indigenous peoples today rest on their ability to secure legal rights and control over their homelands including the natural resouces of these areas. To this date, however, in terms of what has taken place elsewhere - in New Zealand, Canada, Alaska and Australia - little has happenened in Norway. Sámi rights are still an oustanding and ambigious matter. However, during the last decades, herders have not only achieved a measure of legal protection, but also established a significant political influence in terms of being officially recognised as an "**occupation**" by the Government. Herding has then become similar to fishing and agriculture - with its own interest association, financial agreements with the state, a separate state agency, and office in the Ministry for Agriculture etc. This incorporation has meant more "economics", less "culture" in terms the political agenda of herders. Thus, herders have become less "indigenous"; more separate, but stronger counterparts at the local and regional level - and busy as lobbyists in the capital. This are crucial developments, with far-reaching cultural and political consequences - which will underline the rest of this story.

2) There is an increasing recognition world-wide that local populations may have traditional systems of resource management which may complement national- and state-based systems, b) that resource use must be sensitive to local needs and local cultures. Indigenous peoples have here been advocated as "original" resource managers expressing their special relationship to their homelands and their natural resources for their ways of life and cultural identities. Local Sámi, and in particular pastoral Sámi, have for long been campaigning for greater control of their local resources and expressed resentment at governmental and centralist resource use and regulations. In fact, herders' defence for pastures against outside intrusion have always been a basic part of the Sámi movement - from its beginnings at the turn of the this century, which was finally recognised in terms of user's rights in the 1960's and 1970's.

3) In terms of social and economic conditions, the Sámi constitute a special case among indigenous peoples. Since WWII they have been provided the same social and economic benefits of the welfare state as every other citizen - even the pastoralists in what some eyars ago were the most rural and inacessible regions. In Norway, Sámi - including herders - were given ordinary rights as citizens as early as 1821. This has been a policy for everyone - but not an indigenous policy. An expression of in Norwegian legal-political culture is a marked hesitancy and ambiguity at interpreting Sámi-Norwegian relations as an instance of a *colonial relationship*, as expressed in the reports of the Sámi Rights Committee (see below)[5].

4) Alongside this incorporation in Norwegian society, Sámi have lost much of their traditional culture and society. Sámi herders, like Sámi in other livelihoods have never been administered in terms of "Sáminess", what autonomy people had formerly, have become hemmed in by regulations from outside, designed in an another culture. As an outside observes it, national politicians have been concerned for developing Northern Norway, but "the trouble is that have seen the problem as a loss of population rather than a loss of culture"[6].

5) Indigenous cultural presence in national society is another important issue. Sámi culture is increasingly used by the State for presention itself to the world - as in the Sámi section of the opening cermony of the Lillehammer Winter Olympics. In fact, reindeer and reindeer herders have a long tradition is such presentations - as well in terms of Sáminess. The visibility of reindeer pastoralism as a sign and emblem of Sáminess had had many effects - it was long time the only Sámi element that was given special consideration, in terms of a separate governmental bodies, and as with the present Law for Reindeer herding in Norway, herding is defined as the basis for Sámi culture. In Sweden reindeer herding IS Sámi culture.
In Norway, the herders are still the most "traditional" in terms of being an activity where Sámi language is the main and dominant langauge among its practioners.

As a result of these various developments, we have a situation where Sámi have been provided equal rights and freedoms from discrimination. Courts in Norway claim to treat Sámi *equally*. The former rights Sámi were provided have gradually been replaced and forgotten. When Sámi herders face the courts today they have recognised users' rights, but no territorial collective rights - Aboriginal, or Native Title - in terms of their indigenousness. Their rights is a right that comes from the general principles defined by Norwegian law and lawmakers.

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[5]. In the 1984 report of the Committee, the Sámi of Norway are found to share some characteristics with colonised peoples elsewhere. However, in comparing Greenlanders with Sámi, it is stated that Inuit in Greenland are typically colonial in terms of gerography and history. Sámi-Norwegian relations were found to be less so, in terms of how Sámi early were provided ordinary rights as citizens and for centuries of peaceful co-existence with the majority population. However, the report refrained from making any definite conclusion on the matter. However, the matter is still significant in terms of considering the basis for Sámi land rights - as unrecognised and valid from time immemorial - as an expression of the peoplehood of Sámi - or as something that evolves from the establishment of Norwegian sovereignty and law making.

[6] Jull, P 1995. "The White-Out at the End of History: A Visitor in Sapmi", forthcoming.

Let us now consider the implications of this particular context for Sámi pastoralists - in terms of a dual process; on one hand, the growing significance of **indigenousness**; on the other, the growing **incorporation** of Sámi herders and their livelihood into Norwegian society, economy and culture.

Towards a common (pastoral) tragedy

Genereally speaking, Sámi herders should - by advocating their indigenousness and cultural uniqeness - have been able to use this to their advantage, using it as a resource for participating in the political-ecomony of Norwegian society. Paradoxically, what herders have gained in this respect, have led to backlashes and problems in their overall position vis-a-vis other Sámi and Norwegian interests. Herders have been victims of being both "modern" and "indigenous", to the effect that herders and their livelihood is seen more as "problem", or "restriction", than a "resource" and "opportunity" for others. The "pastoral problem" constitute today a complex issue, with many different aspects, like adminstration, politics, legal rights and law, and ecology etc.

The adminstration of herding is formally represented by a separate state-byreacracy, its expertice based on the scientific disciplines of natural science and economy and a separate academic profession (reindeer herding agronomy) at the Agricultural College of Norway, focusing on pastures, animals and public administration. One expression of this is the focus on the concept of "sustainability" in terms of the relationship between pastures and the number of animals - the task of the administration is to regulate this at a sustainable level.

Herders have their own traditonal knowledge and practices for managing their herds, which is based on practical and local knowledge, expressed in Sámi systems of terminology. This knowledge and form of management has almost never been converted into scientific knowledge as basis for byreacratic decisions. Herders knowledge of herding is a matter that is not taught as part of any formal training concerning the livelihood. This expresses the cultural and social barriers between herders and the outside world - most of the scientists and byreacrats in this field comes from outside. This means that the current values and concepts that characterise this field is imported from outside the livelihood, Herders themselves have not been able to convert their perceptions and knowledge into premises for reseach and administrative measures to any extent. However, they have been more succesful in importing technology and knowledge from the outside to facilitate their adaptation, combining traditions and modernity. To herders, "culture" has not been separate from, but an implicit aspect of everyday life practice.

Indigenous practices and institutions still characterise the livelihood; winter pastures in the interior are allocated according to Sámi traditions to different households and working groups (siidas). For the state however - who in terms of current law sees itself as owner of 96% of Finnmark county - all pasturelands are owned by the state, providing the state byreacracy with an ultimate control and dominance over these traditional Sámi estates. This and other circumstances (like commercialisation, fences, transfer payments etc) has lead to an an increasing tendency towards privatisation (through enclosues and fences) and a gradual erosion of traditional practices and customary law, expressed in increased competition and

rivalry among herders - and as herding still is a household-based economy - to a growing number of animals[7]. To outsiders and the state, this is nothing but a classical case of the *tragedy of the commons*, where everyone are seen to be fighting a private battle against each other and where only the State has the interest and the opportunity to solve the problem - in terms of extending state control and regulate herders and animals. This is done by a state policy which includes the following measures:

> a) Organising herding in terms of territorial districts; regulating the right to herding to one person per family unit; b) Calculating the carrying capacity of pastures to establish the max. numbers of animals per district and per herding unit; c) Enforcing countings of herds and ordering reductions in herds if they exceed established limits, d) Policies encouraging herders to leave the livelihood altogether.

This has created a situation where herders' traditional common interest in their pasturelands - a traditional common and informal estate - vis-a-vis outsiders - are being fragmented, removing the basis for maintaining a shared tradition of customary law among pastoralists. As part of the same picture, herders appear less able to settle disputes amongs themselves. In consequence, they are increasingly trying to settle conflicts and disputes *among themselves* by turning to the local police, and to the courts. In Finnmark during the last years there has been a marked degree of legal charges and disputes presented in courts.

Going to courts, they have also quite literally left their pasturelands and entered another public Norwegian sphere; an academic and formal system of knowledge and decision-making; in effect, enforcing an image of themselves to outsiders as powerless and incapable of managing their own affairs. But herders also use the courts in *defending* their traditional interests vis-a-vis the state; a consequence of the increasing measures of state control and regulations over the livelihood.

The outside view of this situation is now well-entrenched and clear-cut - the situation in herding is an **ecological crisis**, expressing a crisis in **morals as well**. Herders are spoiling nature -and hence the common interests of other residents and users of that nature - as well as their own livelihood and future, as a consequence of their own greed. Any claims of herders to defend their interests as "stewards of nature", or as cultural vanguards of Sáminess, or in terms of their special indigenous knowledge, are either ignored or vigorously disclaimed. Herders have consequently lost their basis for outside support. They are basically reduced to their state of the previous century where they where regulated as a "problem" for others, and were made into "clients" of government and state patronage and tutelage - not to be trusted to act on their own behalf[8]. It is here where herders are being made victims of their indigenousness. To outsiders Sámi herders have for centuries been established as part of bthe exotic Other, in our time herders have been seen as closely connected and integrated with Nature - as expressed in the **joik**-section of the opening cermony of the Winter Olympics in Lillehammer 1994. The tragedy of the commons have served to "expose" their indigenous

[7] - Bjørklund, I 1995. "When natural reseources become common property: Sámi resource management towards the 21st century", unpubl. paper. Mosli, JH and Nilsen R, 1994.:

[8] - Bjørklund, I 1994.

authenticity as empty rhetoric, posing and a political strategy. This backlash is especially severe as outside critics do not alter their original view of Sámi herders as Nature. Instead they are denounced as having forfeited their "indigenousness" and their original own very Nature. They are exposed to be just like us others - just as greedy, egoistic, and interested in the same things as we are. That is why their case is even worse than ours - as their role was to be part of Nature, presenting an ideal we cherish, but have lost. In a way, they are seen and condemned as **"fallen angels"** - maybe to be forgiven, but not to be trusted.

Others have emphasized a very different view - of a *social and cultural* tragedy of Sámi-Norwegian relations and how it had over time lead to a disintegration of Sámi pastoralists systems if social organisation, resource management and land tenure[9]. However, it is still a view which is highly controversial and rejected by other academics and public officials involved in reseach and administration of the livelihood.

Not surprisingly the latter advocate a view of herding which emphasise the biologic and econmic matters; social and cultural dimensions appear less significant - if relevant at all. This nay in fact be significant and have other imlications. We shall now consider this in terms of how the Norwegian courts and and legal and other academic experts deal with the customary law of Sámi herders.

Sámi herders - and customary law - in court: The Bæskades case 1993-95

Let us take a look at one of these cases which has come up in recent years to expose some of the major features of this rather complex situation. The case I will refer to concerns a case between a small group of closely related herders ("the Bæskades group) and their struggle to reorganise their herding between two different herding districts:

In short, in 1967 the Bæskades group separated their herds from other herders they were organised with to use the summer ranges of Bæskades, which the family had previously used since the turn of the century. However, they were still part of the old district, and when this was reorganised (1970) they were still members of the other district - No. 40 Ordda. However, the Bæskades ranges were in 1967 part of the formal common *spring/fall* district No. 30. In the following years (1976 and 1980) they formally applied to establish Bæskades as a summer-district. However, the Herding Council ("reindiftsstyret")[10] did not accept this till September 1991 in an administrative instruction which included a maximum number of 1700 animals and that only three of the five herders were permitted the use of the area. The herders , with the support of the district's herder's council (områdestyret) protested to the low number of animals and that all five herders should be allowed use of the area. In 1992, the herding council confirmed its first decision; only three herders were allowed, the maximum

[9] - Bjørklund, I 1990. "Sami Reindeer Pastoralism as an Indigenous Resource Management System in Northern Norway: A Contribution to the Common Property Debate", in: **Development and Change**, 21: p. 75-86; Paine, R 1992. "Social Construction of the "Tragedy of the Commons" and Saami Reindeer Pastoralism", in: **Acta Borealia**, No. 2, p. 3-20.

[10] _

numbe of reinder per herding hunit was set to 566 animals. One family - a father, his son and family - reprenting two "herding units" - and their ca 2.400 reindeer - was without formal right to summer pasture. With no alternatives to turn to, they were in effect, without formal means to maintain their herding. What herding they did after - by using Bæskades in the summer -was consequently against the decisions of the herding council and the instructions from the State authority - hence illegal.

This court case has been contriversial for many and very different reasons. For many herders, the family in question was one of the most succesful and traditional - of not the most succesful - of all herders. They were well known and respected - in terms of their large herd, which was an expression of their particular Sámi competence - but also by the way they were managing their herding and husbandry[11] - and the fact that they had been able to do this without having to use the financial support provided to herders as part of the new government policies for herders. They were seen to use and respect Sami values and customs - which they also used for their defense.

For the herding administration they were the very opposite. They were in fact the most affluent of all herders in the region (Western Finnmark) with the largest herd. To the byreaucrats, they were the very esssence of problems which were becoming increasinly apparent in Finnmark - the tragedy of the commons.

In 1992 the herders took their case to the court, challenging the decisions of the herding authorities. In November 1993 the Lower Court of Alta reached its verdict - which was confirmed by the High Court of Alta April this year - which confirmed the decision of the state adminstration. The issue is not being applied for presentation to the Supreme Court.

In these years increasing attention was brought to the situation in Finnmark; sattelite research were documenting increasing erosion. Pastureland which now were also being openened up increasinly used for recreation (sports hunting, fishing, berry picking, skiing, driving with snowmobiles and dog teams, hiking etc) were something that people in large had more contact with and felt increasingly as their commons as well. The environmentalist movement in the North - as well as in the South - discovered that they their "own" northern nature was being made into another "Sahel". Mass media ran repeated decriptions of land erosion, starvation and death of reindeer and an unprescedented and escalating ecological crisis. Herders were exposed as materialistic, egoistic, unable to take care of their heritance, and fighting for survival, where only the ones with the largest herds and herders were able to survive etc.

The problem of the herders were that they were in the wrong place, at the wrong time. As stated by the Lower Court:

> **The optimism in the occupation had been to great, and there was a clear need to really tighten up. The way things had been developing had to be stopped. It was**

[11] - Paine, R 196 "Herding and Husbandry

urgent to regain the balance between the number of animals and resources, p. 19.

Thus, they refused to maintain herding licence (the right to have rights to a "herding unit") to the oldest member of the group - he was a pensioneer. The reason for refusing the right to his son, was 1) he had far too many reindeer, and 2) he had not provided the administration with an annual account of his herd, as stated in the Law for Reindeer Herding.

> **...by his behaviour he had shown that he did not respect laws and regulation which apply to the occupation of reindeer herding. He would hardly have followed voluntarily the command to reduce his herd to 566 animals if he had got permission to move in**, p. 22.

But if the herders were in a predicament, the state administration had the means and opportunities to do what they wanted. For them the timing was perfect. The Bæskades district was in fact the first to be formed *after* the passing of the new herding law (1978)
As stated by the Lower Court:

> **The Law for Reindeer Herding of 1987 gives the authorities right to establish maximum number of animals within a district, establish number of herding units, establish maximum number of animals per herding unit, and to employ coercive measures. Bæskades is the first district etsablished after the law came into force. Thus it is the first time the authorities have had opportunities to employ the means of the law**, p. 23.

Against this the herders argued their rights in terms of customary law ("sedvane"), traditional usage ("alders tids bruk") and Sami customary law ("samisk rettstradisjon"). Their family had used the area in question since ca 1910 - in three succeeding generations. So their application for becoming formalised as a separate district was not because they did not have a customary right, but because they wanted to "*...adjust to the Norwegian rules*". However, in the decision of the Lower Court, customary law is discussed as follows:

> **What may be a Sámi legal tradition in this field is highly unclear. In all probability there is no basis for saying that there is a tradition in this field which is sufficiently clear and consistent that it can be termed customary law.**

The lawyer representing the herders had argued his case in terms of traditional rules of conduct between herders in times of conflict. To this the Court stated:

> **...(before) it was the balance of power between the parties which decided who had to move away. This is now changed, and there are now officially appointed bodies which are making such decisions. In these public bodies the Sámi themselves are in majority, and it is to be expected that they have knowledge of Sámi legal traditions to the extent that this exist, and takes due consideration to**

it. The court cannot see that there is anything suggesting a neglect of Sámi tradition[12], s. 24.

However, in another perspective, we can see that the herders were *too* succesful, and *too* traditional. That is, their problem is that they no longer have the basis for continuing their livelihood within a society of Sámi pastoralists, as this society is now by law included within a larger Norwegian system. In fact, what is being used against them, is the very convern, not just for natural resources (sustainability), but for a sustainable herding - and hence Sásmi culture. For the public authourities, the case is also a principle one; it challenges their legal authourity and competence to regulate the development of the economy of reindeer herding.

As such, the case may be a bad one for indigenous herders. The state has an ultimate task on behalf of the natural resources. However, this case also highlights another role of the State and public authourities - that they do not only act in terms of owners of State lands/pasture lands, but as patrons of Sámi herders, their customary law and traditions, and as patron or guardian of Sámi culture[13]. The court decisions explicitly state that it is not a case of a Norwegian-Sámi conflict, but an internal conflict. Regardless, the issues brought up informs us as to how **customary law** - and here that of Sámi reindeer pastoralists - who advocate their "traditionality" in their management of their herd and pastures, are being interpreted in a Norwegian court.

What can we conclude from this? What whould could have been an issue of cultural and ethnic difference - between pastoralists practical and verbal knowledge - and the formal academic professional knowledge of Norwegian jurists, is clearly not the issue in this case. It is there, but it is not made relevant. It remains a question of defining *customary law* and *traditional usage* - concepts which are crucial for establishing usufruct rights in Norwegian current law. In this case, however, it is not really a matter of substance, or defining the content of Sámi legal traditions. It may be there, but we do not here much about it, and we do not need to document it. Because we have a system of reindeer management which involves Sámi, who are in a *majority*, and who *may be expected* to have knowledge about Sámi customary law, *if it exists*. What is this?

Co-management and customary law

At the bottom of the adminstrative hiearchy are the different herding districts, with a *local district board* or council (distriktsstyre) in charge of the affairs of the district, elected from the herders. Districts are organised in *herding areas*, or regions with a council of five members, appointed by the Fylkesting - the chief administrative body of a county. The council have decision-making authority and is supported by a herding offive with a reindeer agronomist. Finnmark has two such regions. Members of the council shall be herders, in

[12] - This is a remarkable interpretation of former Sámi customary law, with little basis in empirical facts and historical description, which implies in fact that relations between herders were in a virtual state of anarchy. See Solem E, 1930/new edition 1977. **Lappiske rettsstudier**. See comments below.

[13] - Paine, R 1992. "Social Construction of the "Tragedy of the Commons" and Saami Reindeer Pastoralism", in: **Acta Borealia** no.2, p. 3-20.

practice, minimum three are herders. Farmers are represented in the councils. They have decision-making powers over number of animals and herders, but these are referred to the final authority, the **national herding council**, of seven representatives, appointed by the Ministry of Agriculture. Appointments shall consider: geography, wide professional qualifications, general insight, and social experience[14].

Aborad there has been much emphasis on co-management, particularly in terms of indigenous peoples' management of natural resources within their homelands. Here, we have a Norwegian case of co-management - which no one to this date - as far as I know - have discussed in these terms. The answer to this rather curious fact may inform us about the cultural context and content of these institutions. They were established by the new Law for herding, which was launched from within the state administration and Government - and with opposition from the herders' national association (NRL). It is not a result of a process of negotiation with the Sámi herders, nor any other body of Sámi. It is designed as a system based on the adminustration of other economies, or livelihoods, but with far greater outside representation at the regional and national level. However, there is co-management in terms of representation, here are different interests from within and from outside the herding represented. At the grass root level, it represent the practioners and their interests. However, there is no mandate - and this is crucial - that brings in any way up the issue of Sámi customary law. It is something that may be relevant - if it exists. This is then soemthing very opposite from co-management elsewhere, as far as I can see it. "Culture" is something that is stated in the basis of the Reindeer Herding Law - in terms of the "central significance of herding for Sámi culture". But it is not specified - and it has been used to defend herding as well as an argument for hydro-electric development, against the interests of herders - but for the majority of Sámi who are not herders[15]. Till now, there has been almost no studies of this formal system, but people with a background in reindeer herding from Finnmark, sometimes express that at the local level and upwards, Sámi councillors seem to be not very assertive. As expressed by one who both has lived as member of a pastoral family and has a law degree, and expert on indigenous law:

> **"They (Norwegians) discuss differently from us. We tend to express what we disagree on - negative comments - what is not being raised - this is often what is really decided. Sometimes it almost becomes impossible to formulate any decisions from such deliberations. I have called it making decisions by "negative argumentation".**

Documenting customary law

What is then Sámi customary law in reindeer herding? In a recent report from the Sámi Rights Committee, from the so-called Property Rights Group ("rettsgruppen"), a sub-committee of Norwegian legal experts, the legal position of reindeer herding in terms of

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[14] - Paragraph 6, Law for reindeer herding.

[15] - Branteberg T, 1985. "The Alta-Kautokeino Conflict: Saami Reindeer Herding and Ethnopolitucs", in, Brøsted et al.(eds), **Native Power**, p. 23-48.

current Norwegian law, is reviewed. It states that a "*...if the area and district a local legal practice apply for, is significant, it may achieve character of a regular ("alminnelig") law*"[16]. But there is nothing about Sámi customary law in terms of Sámi legal traditions.

In another recent report of the Sámi Rights Committee, on the history of use of land and fresh-water in Finnmark, is a study which reviews the development of reindeer herding in this century[17]. As to the legal concepts in the livelihood this is the conclusion:

> **"Among reindeer owners as in society in general there are different views on what one may have right to and not. Many carry within themselves the old conception which dominated among the reindeer-herding Sámi. Other are more marked by and have taken on the Norwegian conception of law.**
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> **The conception of herders are largely that they have been exploiting reindeer pastures during centuries and that they have their rightful common areas of usage which they also have a claim for using in the future"**, p. 164.

But we have not heard much about cultural traditions and Sámi customary law as such. The cultural knowledge and practices - if they exist - are not described. However, there has been studies on Sami customary law. The most significant being Erik Solem's classic study: **Lappiske rettsstudier** (Studies of Lappish Law), published in 1933 (new edit. 1970). Basicly, since then, there has been almost no systematic studies on this topic. But the descriptions - like the ones referred to above, abound with descriptions of how reindeer herding have rights and duties in Norwegian law and administration. Of course, there are other anthropological or ethnographical studies of Sámi reindeer herding (Whitaker, Pehrsson, Paine, etc), but for some curious reason pastoral Sámi's cultural traditions of kinship and marriage, inheritance and the forms of social organisation in Sámi herding and husbandry is not considered, or hardly referred to in the public documents who strive to descrive this lovelihood and its customary law. The elements and operations of the **siida**-system, with leadership, decision-making and co-operation is not mentioned in terms of customary law neither. There seems to be a general blindness amongst academics who should know better. It may have to do with professional biases or a matter of cultural skills and cultural translation. There are now being studies written by Sámi academics on the cultural and social aspects of reindeer herding, but these do not show up in descriptions which we now consider[18].

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[16] - **NOU 1993: 34**, Rett til og forvaltning av land og vann i Finnmark (Right to and management of land and fresh-water in Finnmark), p. 199-228 and p. 223.

[17] - Prestbakmo, H 1994. "Bruken av urmarksressursene i Finnmark i dette århundret", in, **NOU 1994: 21** Bruk av land og vann i Finnmark i historisk perspektiv, p. 135-164.

[18] - Sara, MN 1988.

The Official Sámi View

The President of the Sámi Parliament - Ole Henrik Magga - in a paper presented on a seminar on the implementation of the ILO-Convention 169 (November 1991) in Karasjok, gives an intersting overview of Sami customary law. He states several instances where Sami customary law has been disregarded: 1) the rights to inheritance of the youngest child (**primogenitur**), which is common among pastoral and other Sámi. When the Allodial Law (Odelsrett) was passed (1974), the Norwegian Odelsting (its larger part) stated it would not make any exceptions for Finnmark, which till then had been outside its field of practice.
2) In Norwegian marriage law joint property is the rule, among Sámi, it is customary that each spouse maintain posession over the material wealth they bring into marriage.
3) Local rules for use of outfields are not considered, 4) In reindeer herding, he mentions "common pastures" - "fellesbeite" - a Norwegian administrative construction, which has been in conflict with and is replacing Sami customary practices where households and siida's have separate territories. 5) Another instance is the of "Reindeer herding unit" ("driftsenhet), introduced by the Herding Law of 1978, which was first a private personal right, ditributed not necessarily to all members of a family/household. Which has created much confusion, as reindeer are owned privately, by different members, sexes and generations in the family.
In terms of this perspective, Sámi herders are seen as a group of Sámi, whose interest are not so special as to provide them with special entitlement to self-government. Rather the the Sámi Parliement has since its establishment argued for a transfer of powers over the livelihood - from the State - to the Sámi Parliament. NRL, the oldest and most established association for herders, have boicotted two elections to the parliament in protest for not getting special seats for herders in the parliament.

The Sami Rights Committee - the legal perspective

Sámi customary law was part of the mandate for the Sámi Rights Committee which was esdtablished in 1980/81. The sub-committee which should investigate current Norwegian law, was to consider this issue[19]. However, in spite of a well-intended attempt, they honestly and quite frankly admit that they tried, but did not succeed this task:

> **"This is something which the Property Rights Group (the sub-committee) did not have competence, capacity, nor practical opportunities to accompish"**, p.17.

The members of the sub-committee were appointed May 1985, the report was finished during fall 1993 and published in December same year. The excursion of Norwegian lawyers into Finnmark searching for a tradition that is "sufficiently clear and consistent that it may be termed customary law" may be more comic, than serious[20]. The results of their search, by interviewing individual Sámi, were perhaps not so surprising. What they found was that there were highly differing views, not surprisingly. They conclude:

> **...it is often difficult to decide if the interview-objects express a differeing conception with regard to the content of current law as it laid down in laws and**

[19] - **NOU 1994: 34** Rett til og forvaltning av land og vann i Finnmark, Bakgrunnsmateriale for Samerettsutvalget.

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other material, or of they speak in terms of their own legal-political desired ends. The investigation seems to indicate that there today only to a small degree can be said to exist Sámi customary law and legal conceptions which significantly differ from the state of law which appear by an analysis of current laws, regulations, relevant legal practice etc. p 17.

In other words, in stating that Sámi had differing and unclear views, they concluded that Sámi had no consensus on the matter. A more thourough study was consequently not needed at it was only expected to confirm what they already had concluded at the outset. Why did thet not do a more thorough study? Because - **"it would have demanded a more comprehesive and time-consuming investigation of local conditions"**. The value of a study was also doubted because one assumed that it would be difficult to prove the existence of a **"unique Sámi system of law"**. The source material, predominantly oral traditions, would mean that one could only draw **"highly uncertain conclusions"**.

These findings are most controversial, and the committee immediately became target from critique. One thing is to have legal experts venture into the difficult field of collecting and documenting oral and customary traditions, across cultural, historical, linguistic and indigenous resource use frontiers. There are probably few issues in indigenous-European relations as problematic as different and conflicting systems of law. Another thing is that we see *why* they did not succeed. What they were looking for, has probably never existed in the form they were looking for. Reindeer herding is a form of tenure where legal arrangements (rettsorden) and patterns of practice are built-in each other - the customary law is not existing as a separate legal system as such. The lawyers may have looked for something which is not codified as a legal system. What is more important is regularities in practices which people may agree on; that people may have notions on what will happen when a pattern is disrupted or not adhered to; notions of rightness and wrongness. Lawyers analytical separation between a legal and a practical aspect, can lead to conclusions that there are no separate Sámi system of law. But this is ethnocentric. We know of course that all humans are carriers of *moral notions*, but that does not necessarily make them into *legal systems*, i.e. of the sort of text-based codified hiearchies of rules that lawyers operate in. Most indigenous and peasant socities do not have centralised formal systems of law. Their systems of customary law are local, oral and may exist in many variants, they may be situational and flexible; and legal debate may be crucial. The important point is that people in these contexts are managing their disputes and conflicts among themselves, in local councils or meetings. To demand that indigenous or other peoples shall have legal systems which are comparable with state-based systems of law may be definsible in terms of current Norwegian law. However, in terms of a inter-cultural and inter-ethnic perspective, it is clearly ethnocentric - and tautological. What you cannot see, does not exist. When your legal construction is true, the rights of those that did not have partook in the cnstruction - because they have a different langauge, culture and way of life - are non-existent. They are without a right of their own.

Let us return to the Lower Court-decision from Alta. As mentioned, herders were found to have a system of customary law which is based on the power of the strongest party. I do not know where this view comes from and how it is documented. But is may be seen to represent a current view among critics of modern reindeer herding in Finnmark. What it implies is -

anarchy - and power. It completely overlooks the agreements, interpretations, and explanations that herders do make use of. Why this was brought up is interesting - what we know is that in Norwegian courts dealing with Sámi customary law, herders try to speak for themselves, and Norwegian lawayers - who have little practical and cultural knowledge of herding - interpret and speak for their clients. It seems to be a context fused with a potential for inter-cultural misunderstanding and misinterpretation and which does not create a basis for a cumulative process of establishing and documenting Sámi customary law. The legal interviews of Sami witnesses in court cases by defence lawyers and public prosecutors may appear as classical cases of how not do to interviews in social sciences. It may be comic, but the results are not always so funny.

As a consequence of such a state of affairs it may not be surprising that Sami customary law in reindeer herding is still largely undescribed and undocumented. A paradox here is that we have all been waiting for the Sámi Rights Committee - and the lack of substantive knowledge has not only been a problem for the committee. It still exists because what one expected it would do - study Sami customary law - was not done, and we were not told about it till the fall 1993. The committee has kept its confidentiality till the final end - after 13 years of silence.

The story may be over for the customary law of herders. But not for committees and research. In February this year, the Ministry was so annoyed by the critique against the S\ami Rights Committee that it announced that another committee would have to be established - to study Sami customary law, with a steering committee of four members (Sami Parliament, the Sámi rights Committee, the Ministry of Justice, and a research institution). The report is supposed to provide a "good and satisfactory basis" for the coming debate following the proposals for law reform of the Sámi Rights Committee (1996). Its task is to reverse, or provide another -Sámi perspective - on what was started on in 1984-85 - namely the documentation of Norwegian current law.

What then - in conclusion - about herders indigenous rights. Their position is expressed by OH Magga in his paper on the ILO-convention (see above):

"The legal rights of different Sami groups as that of reindeer herders, is a user's right and a sub-category within the general collective right of Sámi. The right for each group of Sámi must be deduced from a shared Sámi right, and then be regulated internally among the suers. Such a regulation is the Sámi Parliament the right to do", p. 9.

Conclusion

Paradoxically, it may seem that we have reached a stage where both state intrusion and a particular version of Norwegian "co-management" have fragmented, neutralized, and overrun one of the most entrenched, and well-known, indigneous traditions of Sámi - to the effect that Sámi customary law appear as a matter of the past or emtpy rhetoric. Interestingly, this tragedy in the pastoral commons, seem to be overlooked or considered insignificant by both Sámi and Norwegians in general, as well among academics reseaching common property

isues. If indigenous peoples and other minority groups are making themselves increasingly visible, reindeers present a paradoxical situation - presenting an opposite or negative case - of indigenousness being made *invisible* and *insignificant.* This is most clearly expressed in terms when we consider Sámi customary law. So much for Sami customary law in legalising the commons.