

CHAPTER 12

THE LAW AND ABORIGINAL REINDEER HERDING IN NORWAY

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Abstract: The legal framework of reindeer herding activities of the Sami people of Norway is used to consider food security and legal access to natural resources. A description of how the Sami became 'the reindeer people,' and how herding became their main source of self-identification, sets the stage to analyze how herding activities have changed into an Aboriginal industry. A last section of the paper is devoted to the economic and ecological problems related to reindeer herding. In the final analysis, it is argued that it must be the responsibility of Sami political institutions, the *Sameting*, to make choices concerning the future of Sami reindeer herding activities in Norway.

1. INTRODUCTION

We cannot address the issue of sustainable development among and for the benefit of the aboriginal peoples of the circumpolar sphere without analyzing the way in which these peoples have historically taken charge of their own food security. In this article, our objective is to reflect on the legal framework for reindeer herding by the Sami in Norway¹. The legal framework for this traditional practice allows the preservation of an economic activity for the Samis, and the development of very strong cultural and identity-related roots. Reindeer herding has become not only an economic activity but a driving force and focal point of cultural identification. Today, the Sami people identify themselves by a culture of reindeer herding, even though only a small minority practice this activity.

We begin by considering the historical and socio-cultural origins of reindeer herding among the Samis and examining its current economic role. We then analyze the legal framework of this herding activity by emphasizing the main legal parameters. Finally, we introduce sociological and economic considerations related to the future of reindeer herding by the Sami people.

2. REINDEER HERDING: HISTORY AND STAKES FOR THE SAMIS

The Sami of Norway today identify themselves with a culture centering on reindeer herding. The image this creates is but a small reflection of their self-identification process. In anthropological terms, the Sami are known as the 'reindeer people.' It is important to point out that reindeer herding is not, in itself, a traditional activity in the historical sense. Instead, it is a modern activity that the Sami adopted knowingly, at a relatively late date, and with an economic goal in mind: to make rational use of scarce resources in Northern Norway. We begin by taking a historical look at reindeer herding before considering the current socioeconomic and cultural stakes associated with this activity.

2.1 On the History of Reindeer Herding

Reindeer herding is a modern activity that appeared in its current form in the 16th and 17th centuries. Indeed, the Sami people opted for extensive reindeer herding to solve an ecological problem.

Until that time, the Sami people had been fishers and hunters. The large scale harvesting of hunting resources resulted in an ecological catastrophe; like many others before them, the Sami literally exterminated the hunting resources of Northern Finland and Scandinavia through over-hunting. This greatly undermined the economic foundations and food security of these people. Indeed, the region continues to be very poor in resources available for hunting.

¹ In the past known as Lapps. We observe and note the fact that the form 'Sami' seems to be used increasingly in French to the detriment of the term 'samé.' See Melkevik (1992).

The situation that led to over-hunting is well known: the Sami paid their taxes in furs and they obtained a high price for fur resources. When the fur resources of the New World began to replace those of Northern Europe, the situation was already out of hand.

This ecological catastrophe led to the adoption of extensive reindeer herding as a substitute for depleted hunting resources. A clear cultural rift appeared between the Sami of the fjords practicing fishing and farming on a small scale, like the Norwegians, and the Sami of the interior plains of Northern Norway, especially in Finnmark,² who had converted to extensive reindeer herding.

To understand this conversion and its cultural value, it is important to point out that it did not occur *ex nihilo*. Although the Sami of the interior were first, and foremost, hunters, the anthropological and cultural data emphasize that reindeer have historically played an important role in their existence. The reindeer was first used for transport, allowing Sami families to move about easily on the Finno-Scandinavian continent to benefit from hunting and fishing opportunities. Sami transhumances were facilitated by the domestication of reindeer, an activity that dates far back in time. Indeed, all of the data validate the statement that reindeer were used as draft animals, bait for hunting, as well as an immediate source of food, milk and meat. This required a certain amount of domestic herding, mainly carried out by women and adolescents. Often, the reindeer belonged to Norwegians; the Sami were employed as herd keepers (Sami Research Institute 1990).³ These historical precedents show that the Sami used the availability of the resource prior to when extensive reindeer herding acquired an economic and identity-forming dimension in the 16th and 17th centuries.

2.2 Reindeer Herding as a Source of Identity

The key role of identity among the world's aboriginal peoples is well understood. This phenomenon has been examined in previous works, to which we refer the reader (Otis & Melkevik 1996). What needs to be emphasized here is that reindeer herding has acquired a very special place and status, both historically and culturally, in the Sami imagination, the activity having become the emblem of the people. Reindeer herding is the source of a culture and of a political-ethnic system particular to the Sami. The adoption of a culture

associated with reindeer herding as a source of identity seems to have occurred because of the inability of Sami languages to play such a role.

The fact is, reindeer herding has become an epiphenomenon as an economic activity. It is practiced by 2000 persons and indirectly affects a similar number. As a result, the culture associated with reindeer herding only concerns 5 to 7% of the Sami population. These figures must be compared with the fact that more than 90% of the Sami have other occupations. Indeed, it is mainly in the services sector that Sami are found, as is the case for Norwegians.

As stated by those members of the Sami Research Institute who act as spokespersons of Sami political authorities, 'Reindeer herding is not only a Sami economic activity, it is also a culture and a way of life (Sami Instituhtta 1990, Rowland Hill 1960).

2.3 Herding and the Use of Resources

One of the characteristics of reindeer herding of the Sami of Norway is that it is practiced as a transhumance herding (Delaporte & Roué 1986). Reindeer herding, as practiced by Norwegian Sami, is also very different from that of the Sami of Sweden and Finland, which is much more restricted. Whereas the latter practice *grosso modo* herding at specific locations, namely a practice characterized by moving herds between well-defined plains, the Sami of Norway continue to practice herding in large-scale transhumance form (Leroi-Gourhan 1936)⁴. Indeed, the Sami, who are mainly in Finnmark in Norway's Far North, practice transhumance between winter pastures on the country's interior plain and summer pastures on the coast and the coastal islands.

Reindeer herding in this region of Finnmark can be characterized as follows. It is an activity that requires a great deal of space and free access to immense territories. It is herding in a natural setting, overseen and guided by human activity. It is what can be called 'transmigration herding,' based on the natural migration of reindeer for access to food resources. In short, it is a form of herding that requires a great deal of resources.

² Literally, the Sami country.

³ This is the trip by Ohthere before 890 A.C.

⁴ Also see *Nomades*, catalogue prepared for an exhibition at the Musée de la civilisation du Québec, Québec, Fides, 1992 (pages 73-86 are devoted to the Sami people).

3. LEGAL FRAMEWORK OF REINDEER HERDING BY THE SAMI

This examination of the legal framework that governs reindeer herding by the Sami in Norway⁵ emphasizes the way in which this activity is supervised.

3.1 Legal Monopoly of the Sami People

The first legal aspect, and surely the very foundation of the system, lies in the legal monopoly granted to Sami descendants only. This is an ethnic right, an ethnicity linked more to a 'cultural' fact than to a 'racial' fact. It also should be pointed out that the criteria of 'Sami descent' are interpreted according to other laws that refer to the 'Sami aspect.' More specifically, the *Law on the Sameting and other legal positions of the Samis*, (1987), introduces fairly flexible criteria (Melkevik 1992,1991; Smith 1990). On the one hand, there is a so-called objective criterion, making the Sami language the vector of ethnicity. Using this scenario, an individual can claim Sami as a mother tongue (maternal or paternal side) or are considered Sami whose parents or his grandparents can. This criterion allows those Sami families that were 'Norwegianized' to re-establish their roots. On the other hand, there is a rather subjective criterion that requires self-identification. More precisely, an individual must be able to claim himself Sami. This self-identification criterion is found in several international normative documents concerning aboriginal peoples (Ostis & Melvevik 1996). Even though these criteria concern first and foremost the exercise of Sami political rights, they also serve as a guide for the question of Sami descent.

An additional requirement is even more important, both from a legal and a practical standpoint—that the right to practice reindeer herding is only granted if one of the parents or grandparents already practiced the activity and this represented the main source of income. Sami descent is impingent upon the perpetuation of the Sami herding tradition, which maintains the Sami monopoly on reindeer herding within Sami families. In practice, the legal monopoly on reindeer herding belongs to those families that historically and traditionally practiced such activities. Every other person is prohibited from herding or owning reindeer. Those Sami who meet the aforementioned criteria can be reindeer owners without

engaging in herding. As herding is traditionally a family activity in the broad sense of the term, the law permits such multiple ownership within a herd, precisely on the basis of family descent.

To meet the requirements of equality between spouses and those respecting adopted children, the law permits exceptions to the ethnic criteria. For example, the spouse of a Sami person can engage in reindeer herding with that person; and can inherit the right to continue herding. In the event of divorce, special reasons must be given to retain the right to continue herding reindeer. For example, such reasons may exist, especially when the couple's children intend to practice reindeer herding. In this case, their entry into the profession is facilitated. Adopted children will always be considered Sami.

The only disadvantage of this legal 'ethnicization' of reindeer herding is that it extinguishes the historical solidarity that existed between Norwegians and the Sami. Indeed, though the Sami practiced herding, often some reindeer in a herd belonged to Norwegians and cared for by the Sami, a system based on interdependence and solidarity. This way, Norwegian farmers had direct access to reindeer meat through 'their' Sami. It was their food security. As for the Sami, they were treated kindly and received aid during grazing on the coast and the coastal islands in summer or during the transhumance. This was a complex give-give system ensuring fewer conflicts between Norwegian farmers and Sami herders. Because it is based entirely on ethnic criteria, the *Reindeer Husbandry Act* severs all these ties, opening the way to conflicts.

3.2 What Type of Rights are Involved?

Technically speaking, the right to breed reindeer, although it is essentially a right to use the animal resource, encompasses such varied rights as the right to pasture, to transhumance, to hunting and fishing, to build cottages, to cut firewood, etc. To grasp the hybrid nature characterizing the right to breed reindeer, two observations may be made.

First, while clearly defined in the *Reindeer Herding Act*, this type of activity is based on customary rights. The historical use of the resource permits, according to cultural parameters, the practice of reindeer herding as a Sami industry.⁶

⁵ We will then refer to the Reindeer Herding Act of June 9, 1978 no 49 (amended several times).

⁶ In its 1997 report, the Royal Commission on Sami rights proposed a legal confirmation of these rights by a new article 1.A of the *Reindeer Herding Act*, in the following terms: "The right to breed reindeer is based on the use that took place in the places where reindeer herding was traditionally practiced".

To a certain extent, this type of resource use had to make way for changes in the territory. The transformation of coastal traditional lands into joint farming regions (Sami of the fjords and Norwegians) resulted in limiting customary rights. It has only been just recently that the Sami have received monetary compensation for this restriction of their inherent rights.

Based on these two observations, it is not surprising that in more recent times, the legal situation of reindeer herding has constituted primarily case law decisions and shrouded by political debate. For example, it was mainly the debate (between 1979 and 1982), regarding the harnessing of the Alta River—a conflict that dealt with the construction of a hydroelectric dam in a valley traditionally used by the Sami for reindeer grazing and as a transhumance route—that attracted attention. Not without reason, this dispute was interpreted as a conflict between state rights and customary rights. As for case law, it is progressing very slowly, on a case-by-case basis; but, this is in the very nature of the history of reindeer herding. The facts have taken on a plurality of forms reflecting in each case the way in which customary rights were shaped by local circumstances.

Regardless, it is on the Norwegian constitution that the Sami people are focusing their efforts. This constitution states that the Higher Authorities of the State are in charge of implementing measures so that the Sami People can ensure and develop their language, culture, and way of life.

Since everyone is in agreement that reindeer herding is associated with the Sami 'way of life' and that it must be protected as 'culture,' a more appropriate 'case-law respect' should be given to customary rights. It is precisely because these criteria are interpreted broadly to include the traditional use of natural resources, it follows that legislation on reindeer herding must also take such use into account. The body of international standards concerning aboriginal peoples, several still being developed, also points in this direction (Sami Instituhtta 1990:187, Mekkevik 1995).

3.3 Pasture and Transhumance Passage Right

Let us now take a closer look at the pasture and transhumance right, which is at the very heart of reindeer herding. We can begin by analyzing the pasture right.

The reindeer-herding zone in Norway extends from North to the South.⁷ In fact, there are six herding

areas, including the historical reindeer herding territory, limited to the south by wild reindeer herds. This herding zone is then divided into seventy-nine districts; the regions and districts administered by Councils. The Sami associated with reindeer herding legally form the majority in all of these councils. Because these Councils have both private and public jurisdictions under the law, the fact that the decision-makers and those who benefit from these decisions are one and the same may cause problems.

Whatever the case may be, these Councils settle all questions pertaining to the right to pasture. Regional Councils have the right to: determine the number of heads in a herds; prohibit certain activities that may be detrimental to reindeer herding; permit territorial changes; and, administer the pecuniary resources at their disposal to ensure a healthy industry.

As for District Councils, they manage more practical matters related to marking and counting reindeer, sharing of mixed reindeer herds, expulsion of reindeer from a reserved territory, etc.

The legal designation of each herder allows them to use the territory traditionally devoted to herding. They can use it freely, notwithstanding any ownership question; which, in practice means that they can use any territory not occupied by other defined economic activities. More precisely, they can use any non-cultivated land. The legal status of this territory varies enormously. Sometimes, the herders are 'owner-tenants,' in other cases, the lands are private or owned by municipalities or the state. The biggest herding territory, Finnmark, is considered a State property subject to the customary 'tenant' right of the Sami. In light of the plurality of legal categories surrounding reindeer herding, no one has really addressed this subject. However, the very scope of the interventions is such that changes are beginning to emerge regarding the territory used for herding. We will come back to this territorial question later.

Transhumance raises special questions. Indeed, its success depends on an active, expert, and on-going intervention by the herd-master. It also presents multiple sources of conflicts. After the winter, 'hungry' reindeer try to invade farmed territories. Occasionally, these reindeer can cause insurmountable and even catastrophic problems for farmers. The law has chosen to give a special status to traditional transhumance routes. For Finnmark, this represents the transhumance between the interior plain, occupied in winter, and the

⁷ See, Sami Insituttha, (1990). *The Sami People*, op. cit., p 176 which reproduces a geographical map of the reindeer herding

districts. On page 177 of this publication, there is a description of the administration of reindeer herding.

coast and the islands, occupied in summer. By favoring traditional routes, the law grants the Sami a preferential right of passage, in that it cannot be affected in any way.

As transhumance depends to a large degree on weather and pasture conditions, the notion of 'route' must not be understood in the strict sense of the term. On the basis of an orientation towards summer or winter pasture, a 'route' refers to any territory necessary to bring the reindeer, in a rational and responsible manner, to their destination.

As a result, there is great potential for conflicts. Local farmers, as we have just mentioned, often get the impression that they 'are being duped,' namely being sacrificed by herders who are incompetent or show no concern for the welfare of others.

3.4 Sharing of the Herding Territory

Let us now examine the sharing of the territory available for reindeer herding. This is surely one of the most practical elements of the industry. It is also one of the most sensitive questions among herders.

Historically, legislation has left this question to herders who had to find a compromise between the interests of all parties. The objective of the legislator was to form an alliance with the powerful herder families and the existing forces in their community; sharing the territory of the herding districts involved sharing between the various herder families in accordance with their influence and their power. As a result, these families considered a portion of this territory as their own. Regional Councils had no other choice but to respect these practices. If a family stopped herding reindeer, their territory would then be awarded to a new herding unit as determined by the laws of herding families.

However, this legal precedent gives rise to very unusual situations. The unclear situation concerning the right to herd has occasionally degenerated into very deplorable cases where accusations of stealing and abuse have come from all sides. A great deal of energy has been invested by each herder family to 'mark' its own territories. Similarly, insecurity, other than clan-related, has undermined the rational use of reindeer food resources. Families often practiced very intensive herding throughout the territory to establish their own use. In so doing, they brought about an over-harvesting of lichen, mushrooms, etc. in areas where a rational harvest would have ensured a rotation-based use allowing nature to regenerate itself. This situation is thought to have worsened the ecological situation associated with reindeer herding.

In 1996, a change in the law entrusted Regional and District Councils with a more interventionist role, both with respect to central administration and delegated power. The aim of this change was to rationalize internal sharing of pasture territories, and involved implementing a sharing policy that would make it possible to define this pasture right rationally. But the goal is mainly to take advantage of the fact that the Sami are in the majority on the Councils to create solutions that can count on Sami support. This is a process that is still in development.

3.5 Program to Compensate for Damages Caused by Reindeer

Reindeer herding, as practiced in Norway, makes extensive use of the territory. The tradition of large-scale transhumance can easily, if not necessarily, lead to damage and conflict with local farmers. As we mentioned, the very art of herding and of transhumance is in the way of anticipating these possibilities and preventing them. As a result, the rules advocate a regime of objective and joint responsibility.

The reindeer herder is responsible for any damage caused by his herd to the property of another person, notwithstanding considerations of fault or guilt. The herder is objectively responsible for all damages caused by the reindeer under his care.

Moreover, all reindeer herders in a district are jointly responsible for damage, which are shared on a proportional basis. This solidarity rule is linked to the frequent practical impossibility of identifying the reindeer owner at fault.

By introducing an objective and joint responsibility for damages, it is the District Council, *via* the Compensation fund, that is the recipient of claims and not the individual owner. However, recourse against the latter remains possible if he is known.

3.6 Responsibility for Supervision

The herder is responsible for his reindeer at all times and must make sure that he retains full control over their movements and actions. The *Reindeer Husbandry Act* introduces a 'good shepherd' criterion.

The problem lies in the fact that non-domesticated or poorly domesticated reindeer can destroy reindeer herding in every district. It is important to note that reindeer are traditionally considered wild animals, like the caribou of North America, their direct cousins. Without good supervision, nature may compromise 'herding.' Thus, there is a new responsibility toward farmers.

One aspect of the 'good shepherd' rule is an obligation to ensure that the reindeer do not transgress the territory allotted to owners. A good shepherd must always know where his reindeer are and make sure that there is no transgression, as there would then be the potential of destroying or ecologically undermining the territory of other reindeer herders. The aim here is to ensure a rational exploitation of resources. This responsibility—for transgressions of other herders' territories—is complemented by the right to expel reindeer that are foreign to the territory.

This responsibility, as well as the extensive exploitation of the territory and of transhumance, has led to a 'mechanization' of herding. The snowmobile is now replacing pack reindeer, and we are even seeing the use of helicopters or planes. The ecological aspect of this question will be examined later.

3.7 A Few Intermediate Comments

We can now introduce a few intermediate comments regarding the legal system. Two elements will be stressed. First, while Norwegian legislation serves as a framework for reindeer herding activities, it is the Sami who determine the practical system. Secondly, the legislation forms a framework that does not advocate any specific Sami cultural content. Within this context, a movement promoting a high pecuniary yield through increasing 'mechanization' is beginning to take shape.

4. THE FUTURE OF REINDEER HERDING IN NORWAY

We will now summarize a few of the problems that arise regarding reindeer herding by the Sami of Norway. We will limit this discussion to the problems that we consider the most important.

4.1 Dependence on an Economy Based on Transfers

If we take a cold, hard, look at the economic aspects of reindeer herding, we cannot help but ascertain that today this activity depends on transfers from the State to the economic units of herding. Indeed, this economic situation is the same as that of Guadeloupe and Martinique.

It is economic transfers granted by the Norwegian State to Sami herders that make it possible to maintain the current scope of reindeer herding. Without this form of economy, herding would not be profitable. Most of the reindeer herders are entirely

dependent on this system and, in the current situation, would go bankrupt if there was a halt to these transfers.

With the crisis of the Welfare State shaking Scandinavian countries, this system is increasingly being described as wasteful and as an unjustified 'benefit' granted to economic activities that are on the decline. Several claim, in private, that the system is only upheld to retain an electoral clientele. These views call into question the wisdom of the system.

This type of neo-liberal criticism seems very indifferent to the cultural and identity-related aspects of reindeer herding. Yet, it is a view that is attracting a growing audience. Indeed, there has been a certain dismantlement of the Welfare State and of the system of economic transfers that characterizes this state in recent years in Norway, without however the economic transfers to the Sami being affected.

4.2 Mechanization and Modernization of Herding

Thus far we have described Sami reindeer herding as a traditional cultural Sami activity that is associated with the identification of a people. If we move outside the tourist image of reindeer herders, the actual situation is quite different. Indeed, herding reindeer has become a meat production industry like any other.

As a result, the identity image that Sami have of themselves no longer corresponds to reality. Are they bearers of the Sami identity or meat producers using a modern method, like any other meat producer? No one can have any illusions about the discrepancy between reality and the identity image. This is the essence of the problem.

Indeed, the industrial transformation of herding creates a cultural and temporal discrepancy between the historical record and the current situation. The space associated with the traditional identity referent is beginning to empty.

4.3 Ecological Crisis

Reindeer herding is practiced in Norway from North to South by the Sami. Finnmark, at the northern tip of Norway, and especially the interior plateau of this region, represents the heart of the herding area. It is in this region that the Sami population is concentrated and that the seat of the Sami political movement is found. The interior plateau used for herding is increasingly threatened by an ecological crisis in Finnmark.

Indeed, there are too many reindeer and, as a result, excessive utilization of ecological resources are showing signs of desertification may be observed. An

ecological crisis of the type experienced in the 17th century is on the horizon.

4.4 The *Samiting* and the Choices to be Made

These three forms of crises together—economic, identity and ecological—we can say that with the advent of the Sami Parliament (*Samiting*), it is henceforth largely up to the Samis to solve their own problems. On the one hand, the Sami consider this an opportunity to develop various policies that can meet the expectations of the Sami people. The current emphasis on aboriginal rights appears to be a strategy to ensure the continuation of the granting of transfers from the Central State to reindeer herders. If it indeed involves a 'right' to receive these transfers, such a strategy protects the system from neo-liberal attacks. It then becomes important to 'firmly entrench' aboriginal rights in terms of the cultural and economic stakes of the Sami.

On the other hand, a withdrawal by the Central State would present an opportunity to strengthen Sami political authorities, particularly the *Samiting*. It could become the "natural" setting for a new Sami political identity. The *Samiting* could prove itself to be a place of choice for Sami political decisions.

However, without the involvement of the Norwegian central government, there could be a turnaround in the situation. The indifference that the Sami have shown with respect to their political institutions can serve as a lesson. The economic and ecological problems certainly cannot be resolved by the *Samiting* alone, at the risk of losing the political support of the Sami population on which it depends. Rather, it is in the interest of the *Samiting* to align with the Central State to be able to play on its legitimacy when painful decisions must be made concerning the future of reindeer herding.

5. CONCLUSION

Our analysis of the legal and normative situation surrounding reindeer herding by the Samis of Norway clearly illustrates the crisis on the horizon. It also shows how a legal monopoly of Sami over reindeer herding made it possible to build a meat production industry; and, finally, how this industry has become dependent on economic transfers from the State to herders. A radical (and surely painful) transformation lies ahead.

With the advent of a Sami parliament, the *Samiting* in 1989, a new factor emerged. It is impossible to predict the choice the *Samiting* will make regarding cooperation with the Norwegian State. However, we can predict that it is not only the cultural roots associated

with reindeer herding that are at stake, but also the historical and cultural sources of that identity.

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