

# Philosophy of Law in the Arctic

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*The term "Arctic" is not only ecological but also mythical. The term refers to the areas which were thought to be located under the constellation 'Ursa Major' (the Great Bear).*

J. Pentikäinen, *Shamanism and Culture*, Helsinki 2006, p.120.

*If we shadows have offended,  
Think but this, and all is mended,  
That you have but slumber'd here  
While these visions did appear.  
And this weak and idle theme,  
No more yielding but a dream,  
Gentles, do not reprehend:  
if you pardon, we will mend (...).*

William Shakespeare, *A Midsummer-Night's Dream*,  
*Epilogue*, Cambridge University Press 1924.

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## 8.

### **The Agricultural Argument and Sami Reindeer Breeding Rights: Reflections on Legal Philosophy in the Arctic**

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#### **Abstract.**

The paper is to shed the light on the agricultural agreement in the light of Sami reindeer breeding rights. These are reflections on legal philosophy in the Arctic.

#### **1. Introduction**

The expansion of settler states over the lands and territories of indigenous peoples is a world-wide phenomenon (see, e.g. Green & Dickason, 1993; Keale, 2003). The legitimacy of this expansion was based on the idea that indigenous peoples lacked a political or “civil” society of their own. Therefore, the political system of the intrusive colonizing society was imposed on the lands and over the way of life of the “Native” inhabitants. Even if the colonizers were aware that these lands were not physically uninhabited, they were somehow perceived as being “legally uninhabited”<sup>83</sup>. But this process of large-scale transmission of “civilized” law into “primitive” lands does not mean that the Native inhabitants were defined as living outside of any kind of legal rule. Beginning with the conquest of indigenous lands in the 16<sup>th</sup> century by the Spaniards, European philosophers had begun to develop ideas of a natural legal order, protecting and binding even those humans who were living outside of the reigns of civil society and Christian statehood. On the following pages, I will discuss how the debates on indigenous peoples living in a “state of nature” also influence the way how the rights of the Sami peoples of Northern Europe have been designed and limited. The consequences of political theories about indigenous people, living in a so-called state of nature, can be detected not only in overseas territories discovered in remote parts of the world, but also in Nordic indigenous territories conquered by settlers from neighbouring civilized nations. Only recently the law of the Nordic states has begun to overcome the unjust discrimination that was the outcome of the “state of nature”-doctrine.

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<sup>83</sup> Discussing in detail the „legally uninhabited“-rule: Secher, 2007.

## 2. Sámi territorial rights in Sweden

As Christina Allard states in her comparative study on Sámi territorial rights in the Nordic countries, during most of the 1900s, these countries “assumed that the Sámi semi-nomadic and wide ranging use of lands did not qualify for establishing rights to land and resources” (Allard, 2001, 7).

In 1886, Sweden enacted for the first time a legal framework for reindeer grazing of the Swedish Sami people. In a very ground-breaking publication, Eivind Torp (Torp, 2013) discusses the relevance of the legislative history of this 19<sup>th</sup> century statute for a critical understanding of Sami land and land use rights. The members of the Swedish Parliament shared a general understanding that the planned legal regulation did not have the purpose of *establishing* the rights of the reindeer Sami, but a new law rather should define the limits between their rights and the rights of Swedish peasants, whose ancestors had colonised large parts of Northern Sweden since the 16<sup>th</sup> century, arriving from the South and from the shores of the Gulf of Bothnia in the East. Since its origin approximately 1000 years ago, semi-nomadic reindeer herding in Scandinavia is based on a complex, geographically wide-ranging land use pattern, and involves the use of different pasture areas, especially in summer and in winter time. In summer, intense herding took place in the mountainous areas in the West, near to the (modern) border with Norway, while in winter the herders came down to the lower forest region near the sea, to what they considered as their winter pastures since centuries. However, most of these winter pasture lands have been colonized and settled by Swedish people, who had been pulled into these Northern regions through tax exemptions and other privileges issued by the Swedish Crown.

Allard states in her doctoral thesis: “The idea of colonising the north was coupled with the so called parallel-theory, a belief that the agricultural purposes for colonising those areas were so different from the uses that the reindeer herding Saami were making of the land, that the Saami and the non-Saami could coexist without difficulty.” (Allard, 2007, 34).

Although actually there had developed a certain pragmatic coexistence between (nomadic) Sami and sedentary Swedish settlers, “in the late 1800s, antagonisms between the two livelihoods had become an increasingly tangible problem” (Torp, 2013, 47). This situation, as it is explained briefly, is the background of the legislative debates taking place in Sweden in 1886.

An interesting consideration on the reindeer breeding rights of the Sami as indigenous rights in the modern sense of the word are expressed by the parliamentary committee, in the following words:

“It was the Lapp who first claimed the northern reaches of our country. Before the first settler felled the first tree in the forests of Norrland, the Lapp was already there. Over the centuries, he has without objection used the land from the mountain ridges of the Scandians to the Gulf of Bothnia as pastureland for his reindeer. And the right of the first claimant to the land must be considered stronger than that of he who [...] later arrived.” (Appendix to the Parliamentary Record for 1886, cited by Torp, 2013, 48).

So, the committee members recognised, and seemed to have had no serious doubts, about the “stronger” historical rights of the reindeer breeders, valid in the North of Sweden. But did these rights of the Sami, as “first claimants”, come close to the attributes of ownership rights, in the sense of Swedish official law?

It is worth the effort to reproduce the words, also cited by Torp from the parliamentary record of 1886, because of their unusual clarity:

“But the Lapp’s claim was, by nature, not such that it encompassed all the powers that belong to the concept of ownership. It did not extend beyond that required by the limited needs of the nomadic life. It referred only to, first, the use of the land as pasture for the reindeer, in the mountain regions during the summer and in the forests in the winter, and, second, to the fulfilment of the needs that were a prerequisite for or a consequence of the use of the reindeer pasture. For this reason, the nature of the Lapp’s right to the land was from the beginning such that it did not prevent the parallel rise, so to speak, of ownership in the sense understood by civilized society” (Appendix to Parliamentary record, cited by Torp, 2013, 49).

So, the historical right of the Sami breeders over their grazing lands were not only distinct from the comprehensive attributes of “full” ownership rights of civilized society, because they were limited to guarantee the exercise of reindeer breeding; they also did not stand in the way of “real” ownership rights over land, introduced by Swedish peasant settlers into ancient Sami territory.

The Parliamentary Committee also expressed its view about the legitimacy of introducing private settler ownership into this territory:

“And such ownership emerged and spread with cultivation, and finally included the areas as yet unclaimed by cultivation, because about 300 years ago in our country, the fundamental principle began to be expressed and applied that ‘such lands that lay unbuilt belong to God, the King and the Swedish Crown.’” (Appendix to the Parliamentary Record for 1886, cited by Torp, 2013, 49).

So, even if the emerging ownership of land cultivating settlers did not extinguish as such the rights of Sami reindeer herders, the Swedish crown – in other words, the state power

that had not been established and created by the Sami themselves – could extend legal claims over areas “unclaimed by cultivation”. The claims of the Swedish state, of “the King and the Crown” over territories used by the Sami nomads had been established against their will and laid the foundation stone for the speedy privatization of lands into the hands of the Swedish land cultivating settlers.

The basic idea expressed by the Record was that private property over lands was related to cultivation of the soil. In view of this, the rights of the Sami were limited to fulfil the needs required by reindeer breeding (and possibly by other traditional subsistence activities). Only a sedentary way of life of agriculturalists – associated with a “civilized society” – was supposed to give rise to “full” ownership rights. This idea sounds familiar to anybody aware of the history of western legal philosophical thinking about the origins of state, law, and legal institutions.

### **3. John Locke's justification of limited ownership of the Native Americans**

One of the most important and best known contributions to a theory about the relationship between nature and ownership was developed by John Locke (1632-1704). This influential thinker of the English Enlightenment, sometimes called the “Father of Liberalism”, developed a theory how individual ownership of goods and property can be justified. “According to Locke, God created the world and gave it to men in common to use for their sustenance in the state of nature” (Flanagan, 1989, 592). During this early era, according to Locke, men lived in a *pre-political condition*. But even if the world was owned in common, each man had private ownership of his own person. As expressed in Locke’s own words: “The labour of his body, and the work of his own hands, we may say, are properly his” (Locke, orig. 1689, para. 27).

The starting point for Locke to justify individual ownership over things and goods was labour. According to the views of Locke, when a person exerts labour upon a natural object, that labour enters into the object. Thus, the object becomes the property of that person. Or, in the words of Locke: “He by his labour does, as it were, inclose it from the common.” (Locke, orig. 1689, para. 32). So, original appropriation is justified by mixing individual labour with the resources of Nature (Flanagan, 1989, 592). “[L]abour, in the beginning, gave a right of property” (Locke, orig. 1689, para. 45). Such a claim of property does not need, to be legitimate, the consent of others, as it is directly authorized by the law of nature.

In other words, the origin of private property did not require human conventions – and no civil society – but was based directly on nature. According to the law of nature, Locke however adds additional condition that this “original appropriation” by labour as legitimate:

First, appropriation must be based on the application of one’s own labour – a limitation inherent in man’s equal natural liberty;

And, secondly, appropriation based on natural law, should leave enough in common for others, and should not extend to more than could be used without spoilage – conditions that are based on the idea that even the acquisition of unowned Commons, according to natural law, is legitimate only if it does not worsen the position of others.

For Locke, labour, in the form of agricultural cultivation, is the key to justify the appropriation of land. As secretary to both the Council of Trade and Plantations, and the Lord Proprietors of Carolina, he was especially interested in questions related to the creation of ownership in the American colonies. On the one hand, his considerations based on natural law did not exclude the American Indians from the benefits of ownership: “Thus this law of reason makes the deer that Indian’s who hath killed it; it is allowed to be his goods, who hath bestowed his labour upon it, though before it was the common right of every one (Locke, orig. 1689, para. 30).

Therefore, American Indians were the owners of the animals they had taken from nature; the same principles which regulate private appropriation of products of nature also apply to the soil. But the only natural justification for the ownership of the soil was agrarian use or, in Locke’s view, agrarian appropriation. The Native Indian had his right over his fruit or game, but this did not interfere with the claim of the Englishman, who was coming from the Old World into America: Locke compares the idleness of “several Nations of the Americans” with the industriousness of the English, or civil men (Arneil, 1996, 62).

Locke writes: “God gave the world to men in common; but since he gave it them for their benefit, and the greatest conveniencies of life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated” (Locke, orig. 1689, para. 34). Nature and soil, in their original state, have very little value for human beings. Is it human labour, the input of human industry, that are creating the value of natural resources; even the original inhabitants of non-tilled soils, like the American Indians, will profit from the appropriation and the economic improvements of their former common lands.

According to the ideas of European enlightenment thinkers, the Indians of the New World, as nations living in a State of Nature, were entitled to what the Law of Nature gave to them – because these natural entitlements are not based on human convention: They were

using the land, by taking fruits from it. But using the land was not the same like cultivating the land. Why should the natives be the owners of a land that was still unsubdued, unimproved, uncultivated and unfenced?

The rights of the Indians were limited to what they could claim by natural law (Banner, 2005, 33). Only those nations who had reached the level of civil government developed human legal institutions that allowed the ownership over uncultivated lands. This is the reason why, according to European thinkers, cultivation was not a prerequisite to for ownership over land in Europe. “Anybody knew that [in Europe] land could be owned even it was not being farmed, and indeed even if it was not being used or occupied at all”<sup>84</sup>. As the European colonizers also introduced the legal systems of their country of origin this facilitated the extension of ownership claims over lands that even had not been cultivated by European settlers.

But what is the specific attribute that makes the distinction between the latter and the former?

Of course, according to Locke, the English settler cultivates the lands<sup>85</sup>. Agricultural labour is the special foundation of the appropriation of land in North America. But, according to Locke, the cultivation of the land also goes hand in hand with the enclosure of the land. Enclosure, or “fencing” is seen as an essential aspect to mark out the boundaries of cultivated lands, and underlines the allotted parcels of settlers, taken out of the common goods of all. So, it was completely legitimate for civilized European people, to establish themselves in a country whose inhabitants had not established positive legal institutions, and who were taking fruits from the land, but had shown no will to establish private property.

Locke was not the only influential thinker of European state philosophy, justifying the taking of lands of “uncivilized” peoples: As Ulla Secher explains:

“Gradually [...] the doctrine of *terra nullius* was extended to justify acquisition of inhabited territories by occupation if the land was uncultivated or its indigenous inhabitants were not ‘civilised’ or not organised in a society that was united permanently for political action.” (Secher, 2007).

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<sup>84</sup> Id.

<sup>85</sup> It is a striking aspect of Locke’s theories on the legitimacy of the establishment of ownership, relating to the Native American Indians tribes of Eastern North America, that most of these peoples practiced a slash-and-burn type of native agriculture, based on the combination of corn, beans and squash. It is an open question if Locke, familiar with a very different agrarian system in England, misunderstood this flexible form of native American Agriculture and classified it as “nomadism”, or if he simply misinformed his readers about the cultural attributes of native Americans of his time. It is a fact that in his famous treaties, Locke treated American Indians *as if* they were only wandering nomadic tribes.

#### **4. "Uncivilized nations" and property in the theory of international law**

The famous Swiss 18<sup>th</sup> century philosopher Emer de Vattel, also considered as one of the founding fathers of modern international law, states: "All mankind have an equal right to things that have not yet fallen into the possession of any one; and those things belong to the person who first takes possession of them. When, therefore, a nation finds a country uninhabited, and without an owner, it may lawfully take possession of it: and, after it has sufficiently made known its will in this respect, it cannot be deprived of it by another nation." (Vattel, cited after Keale, 2003, 101).

It was an expanded notion of a terra nullius theory, based not only on the idea of the positive effects of an expansion of "Western" civilization, but also grounded in the view that the non-tilled lands otherwise would remain uncultivated (Patapan, 2000, 114).

It seems that one of these natural law thinkers explicitly neglected the possibility that people living in the state of nature could be the holders of private property as such. But property should be established by the criteria of Western civilization, especially by using the land and cultivating it. The flexible and sometimes communitarian way by which indigenous people, especially nomadic and seminomadic societies, were using the land, could not fit into this schedule of property, especially as they were not fencing their land. Especially the ideas of Locke were based on a Western concept of individual freedom, industrious work and property. Therefore, the native could be the legitimate owner of the deer he has killed, but not the owner of the land on which he was just wandering around.

#### **5. The philosophy of Swedish Reindeer Grazing Law**

This philosophical view is the underlying intellectual background of the opinions expressed by the members of the parliamentary committee, debating the Swedish Reindeer Grazing Law in 1886. The Sami nomads had the right to pursue reindeer herding, but this did not mean that they had the same powers as owners of the land (see Torp, 2012, 48/49). At the same time, the land of the Sami had been considered as "open" for the settlement by civilized farmers, and for the Swedish state to introduce civil legal institutions, protecting individual appropriation and land ownership.

Like in other settler states, traditional indigenous land use was not seen as sufficient qualification to establish "real" ownership over lands and resources. As mentioned above, this situation has not changed until recently.

Still in the famous Taxed Mountains case<sup>86</sup>, a land mark case decided by the Swedish Supreme Court in 1981, the Court ruled that the Sami land use was not sufficiently intense or exclusive in character to establish ownership (see summary in Allard, 2011).

## **6. Conclusions**

Only very recently things seem to change. The Swedish Nordmaling case<sup>87</sup>, decided by the Supreme Court in 2011, has attracted attention because Sami claimants succeeded and their reindeer herding rights were upheld. But a most significant aspect of the case is the foundation of this verdict:

The rights over the winter pasture lands are founded on Sami customary law. It is an open question if the term customary law, as it was used by the Supreme Court, will be sufficiently adjusted to Sami tradition and to conceptions about land use. In that case, Swedish law would possibly leave behind its unique and exclusive liberal philosophical foundation of rights over land, based on the ideas of agrarian cultivation and privatization of the commons.

## **Bibliography**

### **Literature**

Allard, Christina (2006), *Two Sides of the Coin. The Interface between Environmental law and Saami Law Based on a Comparison with Aotearoa/Nez Zealand and Canada*. Doctoral thesis, Lulea University of Technology: Lulea.

Allard, Christina (2011), "The Nordic countries law on Sámi territorial rights" *The Arctic Review*, 159-183.

Arneil, Barbara (1996), "The Wild Indian's Venison: Locke's Theory of Property and English Colonialism in America" *Political Studies*, Vol. XLIV, 60-74.

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<sup>86</sup> A very comprehensive analysis of the case and an English translation of the text can be found in: Jahrskog, ed., 1982, see summary also in Allard, 2011.

<sup>87</sup> Case No. T 4028-07, decided on April 27, 2011.

Banner, Stuart (2005), *How the Indians lost their Lands*. Harvard University Press, Cambridge and London.

Flanagan, Thomas (1989), "The Agricultural Argument and Original Apporiation: Indian Lands and Political Philosophy" *Canadian Journal of Political Science*, Vol. XXII, 589-606.

Green, L.C. & Olive P. Dickason (1993), *The Law of Nations and the New World*. University of Alberta Press: Edmonton.

Jahrskog, Birgitta (ed., 1983), *The Sami National Minority in Sweden*. Almquist & Wiksell: Uppsala.

Keale, Paul (2003), *European Conquest and the Rights of Indigenosu Peoples. The Moral Backwardness of International Society*. Cambridge University Press: Cambridge et al.

Locke, John (orig. 1689), *Two Treatises of Government, Book II*, online: [https://en.wikisource.org/wiki/Two\\_Treatises\\_of\\_Government/Book\\_II](https://en.wikisource.org/wiki/Two_Treatises_of_Government/Book_II)

Patapan, Haig (2000), *Judging Democracy: The New Politics of the High Court of Australia*. Cambridge University Press: Cambridge.

Secher, Ulla (2007), "The High Court and Recognition of Native Title: Distinguishing Between the Doctrines of Terra Nullius and Desert and Uncultivated' " *University of Western Sydney Law Review*, Vol. 11, 1-39.

Torp, Eivind (2013), "The legal basis of Sami reindeer herding rights in Sweden" *Arctic Review on Law and Politics*", Vol. 4, 43-61.