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The Phase-out Clause in Minority Rights Legislation: A Comparison of the Swedish and Alaskan Methods

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Introduction

The Native resource rights legislated (or recognized in legislation) by a Nation-State can be compared and contrasted along many different axes. Current claims by Natives might be based upon quite different traditional concepts for the establishment of territorial rights: for example, the sacred site (point), the trap line (one dimensional use) or the grazing area (two dimensional use) (Ingold, 1983). Nation-States also predicate their Native resource legislation upon different premises: for example, rights founded upon ethnic membership, rights reserved for a specific occupational category only of the Native group, or rights based upon traditional utilization and/or need (Beach 1985a). In this paper I have chosen to consider an often forgotten but highly significant aspect of certain Nation-State's Native rights legislation -- the phase-out clause.

Broadly defined, a phase-out clause is a legal statement which successively diminishes the resource utilization of Natives. Such statements are not limited to any particular type of Native rights paradigm, but instead can appear in a number of guises in keeping with the different Native rights premises underlying them. One phase-out mechanism might involve the successive reduction of the scope of resources encompassed by Native rights, while another might instead involve the successive reduction of the category of Natives given special resource rights. There might be all manner of combined phase-out elements within one law, and the phase-out system they generate might not become apparent until considered in relation to economic realities (Beach 1983).

Two concrete phase-out mechanisms are compared and contrasted here, that of the Swedish Reindeer Act of 1971 and that of the Alaska Native Claims Settlement Act (ANCSA) also of 1971. In so doing, my purpose is to demonstrate how two seemingly dissimilar phase-out clauses, operating from within two highly different paradigms of Native minority rights, lead to similar consequences. These consequences may take many generations to become evident; yet, they are of such decisive character that in the long run they can become the dominant determinant of Native resource rights and cultural survival. I maintain, therefore, that in any categorization of Native rights paradigms, phase-out mechanisms be noted and given attention for their future as well as their present impact.

The Swedish Example

Elsewhere (Beach 1981, 1985b) I have addressed the effects of the currrent Swedish Reindeer Act of 1971 as a whole and will now confine my remarks to three important and interrelated aspects of its bearing upon the Swedish Saami (Lapps). First of all, this Reindeer Act, which encompasses the only legal expression of special Native rights for the Saami in Sweden, is a *reindeer* act, not a Saami Native Claims Act. The Swedish paradigm is basically an *occupational* one. Certainly reindeer herding is basically confined to Saami (certain Saami), but the so-called Saami rights to utilize State lands in ways beyond that of ordinary Swedish citizens rests upon the actual practice of herding. A Saami who does not herd cannot exercise his special rights.

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Moreover, once an active herder stops herding for some other occupation he might not be able to return to his former livelihood and practice his Saami rights. What is worse, according to paragraph 1 of the Reindeer Act, if a non-herding Saami does not have a parent or a grandparent who has once been an active herder, he is no longer even eligible to become a herder. This paragraph, combined with the State's economic policy for herding, constitutes an irrevocable phase-out mechanism for Saami resource utilization.

Government documents show that paragraph 1 was designed to do just that. According to paragraph 1, three distinct categories of Saami have been defined: 1) those who are active herders, 2) those who are eligible to be herders but who do not wish to or are not able to exercise this right, and 3) those who are not even eligible to seek herder status.

Paragraph 9 of the same act springs from the same occupational paradigm. If special land rights are given to a certain category of persons in order that they be allowed to continue herding, the law maintains that these special rights over land should not be exercised for any other purpose. In effect, to quote paragraph 9, The *Sameby* (social and territorial herding unit of Sweden), may not engage in any economic activity other than reindeer herding.

A further repercussion of this same line of thought concerns the *Sameby's* voting system. Only *active* herders have the right to vote on many important issues. Women in the *Sameby* who run the household and who support their husband's efforts in the field indirectly are not necessarily considered active, main herders and can be denied a vote (Beach 1982). Similarly, it is stated in the law that on matters of economic interest to the *Sameby* a *graduated* vote is to be used. That is, one's voting power is weighted according to one's reindeer property. Active herders (only) receive one additional vote for each newly started 100 head of reindeer. The graduated vote has resulted in numerous practical manipulations within the *Sameby*.

According to the Reindeer Act, it is the *Sameby* which votes to accept or refuse the membership application of an eligible-to-herd Saami, and, beginning in 1928 and continuing under the 1971 Act, all herders must be *Sameby* members in order to herd reindeer (See Cramér 1985 for a discussion on the origin of this constraint).

When bringing these elements of the law together with the realization that the Swedish welfare State frowns upon low-income families, families owning few reindeer, for example (Beach 1983), it becomes plain that a system is generated whereby small herders are driven from the field. They (or their eligible-to-herd offspring) are usually prohibited from (re-)entry into the *Sameby* by the graduated vote. Once out of the *Sameby*, a herder's grandchildren's children will come to lack even herding eligibility.

Today in Sweden there are only about 900 active reindeer herders, with families approximately 3,000 people who can, to various degrees, exercise special Saami resource rights. The State's rationalization policy for the reindeer industry advocates that the number of active herders be reduced by at least 30%. Economic pressures take their toll. Herders diminish, and in time most Saami will not only be hindered in the exercise of their Native rights, they will no longer be eligible for them at all.

The Alaskan Example

In contrast to the occupational paradigm of Sweden with its »closed shop« herding membership, its economic constraints and its phase-out clause based on occupational continuity, the Alaska Native Claims Settlement Act seems at first sight impressive. In the Native Regional and Village Corporations established by ANCSA,

Natives gained special land rights based on an ethnic rather than an occupational criterion.

The Corporations engage in numerous economic pursuits: hotel businesses, stone quarries, oil rigging, farming, and salmon fishing. Reindeer herding is but one of many projects run, for example, by the NANA Regional Corporation (Beach 1985a). There is no clause in ANCSA barring a Native from any corporation benefits simply because his parents or grandparents have not lived in a traditional fashion. There are, indeed, many interesting and praiseworthy aspects of ANCSA.

However, all the gains made in 1971 are seriously jeopardized by the so-called termination of exclusivity clause. According to this clause, corporation shares must be kept in Native hands for 20 years. They cannot be sold to Whites or even collected as bankruptcy payment. In 1991 all these changes, and the Native Corporations will be prey to non-Native infiltration. The termination of exclusivity issue is too big to treat fully here. Once again, I shall confine myself to a few points.

As of 1983, only about one half of the 44 million acres of land which were to be conveyed to the Natives pursuant to ANCSA had actually been conveyed. Is it meant that this land will be conveyed to a Corporation which after 1991 may be in non-Native hands?

Reindeer herding in Alaska is confined to Native practice by the Act of 1937. Native Corporations are considered Native persons by law and can and do herd reindeer. What will become of the NANA reindeer herd if after 1991 more than 50% of the Corporation comes under non-Native ownership?

The prosperity enjoyed by a few of the Native Corporations in Alaska, I fear, is short lived. Some corporations have floundered already, and others teeter on the brink of financial ruin. The NANA Corporation, one of the most prosperous, received 90% of its revenues from State and federal grants. The fear of 1991 in the NANA Region is readily evident in its *Spirit Program* which seeks to foster Inuit solidarity against stock sell-out to non-Natives (Beach 1984).

In order to impress upon its shareholders the advantages of keeping their Corporation in Native hands, Corporation leaders (quite commendably) often maintain unprofitable but socially beneficial projects. NANA's reindeer herding enterprise, for example, looses the Corporation hundreds of thousands of dollars annually. It is maintained for a number of reasons. Besides demonstrating Native shareholder concern, it constitutes one more legal link to land utilization and possibly can hamper implementation of the termination clause.

In summary one can say that both the Swedish Reindeer Act and the American ANCSA, despite the different Native rights paradigms they represent, contain phase-out mechanisms highly dangerous to the continuity of Native resource utilization and culture. The one tends to extinguish the reality of special Native land utilization by consecutively cutting back the number of people in the eligible and practicing categories. The other will not necessarily extinguish the reality of land utilization; it will instead tend to remove this utilization from Native hands by a kind of collective allotment act. From the Native perspective, the results are quite similar.

References

Beach, H. (1981), *Reindeer-Herd Management in Transitions The Case of Tuorpon Saameby in Northern Sweden*, Acta Univ. Ups., Uppsala Studies in Cultural Anthropology 3, Uppsala, Sweden.

(1982), The Place of Women in the Modern Saameby: An Issue in Legal Anthropology. in Antropologisk Forskning, *Ymer*, årgang 102. ed. Margareta Elg. Svenska Sällskapet för Antropologi och Geographi. Borgströms Tryckeri AB, Motala, Sweden.

(1983), A Swedish Dilemma: Saami Rights and the Welfare State. in *Production Pastorale et Societe*, bulletin de l'equipe ecologie et anthropologie des societes pastorales. Supplement a MSH *Informations*, Publie avec le concours du CNRS. No. 12 printemps. Paris.

(1984), Developing Spirit in Northwest Alaska. Ethnos, vol. 49:III-IV. Ethnographical Museum of Sweden, Stockholm.

(1985a), The Reindeer-Caribou Conflict in the NANA Region of Alaska: a Case Study for Native Minority Rights Issues. in *Nomadic Peoples*. Philip C. Salzman (ed.). Commission on Nomadic Peoples, International Union of Anthropological and Ethnological Sciences.

(1985b), Moose Poaching or Native Minority Right: a Struggle for Definition in Swedish Saamiland. in *Nord Nytt, Nordisk Tidskrift for Folkelivsforskning. udgivet af NEFA-Norden. Special-Trykkeriet Viborg a-s, Denmark.*

Cramér, T. (1985), Tappar SSR Folksolidariteten? *Norrskensflamman. May 30, 1985. newspaper. Luleå, Sweden.*

Ingold, T. (1983), Territoriality and Tenure--The Appropriation of Space in Hunting and Gathering Societies. paper presented at the Third International Conference on Hunter-Gatherers. in Bad Homburg, FRG.