

The legal basis of Sami reindeer herding rights in Sweden

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Abstract: This article discusses the basis of the Sami right to pursue reindeer herding, and how that right has been regulated in law. Two aspects of this right are particularly significant: establishing which land areas are covered by the reindeer herding right and clarifying what the right entails. The legal institution of ‘immemorial prescription’ has long been considered highly significant in judicial trials concerning the reindeer herding rights. In the wake of a ruling by the Swedish Supreme Court, that picture has now changed.

Key words: Sami reindeer herding, customary law, immemorial prescription, occupation, Swedish Supreme Court.

Introduction¹

The right to pursue reindeer herding in Sweden is exclusive to the Sami people.² Even though only a fraction of the Sami pursue reindeer herding, reindeer husbandry is considered a prerequisite for the continued existence of Sami culture.³ Accordingly, the Swedish parliament has established that in the future a reasonable number of Sami must be permitted to earn their livelihood from reindeer

1. The article is based on material previously published in *Svensk JuristTidning* 2012 pp. 708–722.

2. See Reindeer Husbandry Act (RHA) s 1.

3. The Sami population in Sweden is estimated at approximately 17,000. Fewer than 2,500 individuals pursue reindeer herding. Swedish government report SOU 1999: 25 p. 14.

husbandry.⁴ Reindeer herding requires access to large land areas: as a point of departure, more than 50 percent of Sweden's total land area constitutes reindeer pastureland.⁵ In principle, the Sami right to pursue reindeer herding is severed from the issue of who owns the land upon which reindeer are herded. Reindeer herding is pursued on both state-owned land and privately-owned land. A large proportion of reindeer pasture is thus made up of forested areas held by private property owners. The right to reindeer herding exists independently of contracts with the property owner. One consequence of this situation – that two holders of rights, regardless of contracts, have rights vis-à-vis the same natural resource – is that conflicts easily arise between the rights-holders. In recent years, several complex legal actions have been brought in which the central matter at issue was the Sami right to pursue reindeer herding on private land.

In spring 2011, the Swedish Supreme Court issued its ruling in the Nordmaling case (Nytt Juridiskt Arkiv, NJA 2011 p. 109), in which a group of property owners in the municipality of Nordmaling sued two Samebys⁶ for having used their land for reindeer herding without prior agreement. Even though the Supreme Court affirmed the ruling of the Court of Appeal, the ruling has nevertheless been described as «a new course of direction for the legal basis of the Samebys' right to winter pasture,» in part because the Supreme Court clarifies how the Reindeer Husbandry Act (RHA) should be applied in questions regarding the Sami right to winter pasture.⁷ There is no doubt the ruling will be highly significant in relation to future legal disputes concerning the Sami right to winter pasture.⁸

The Supreme Court ruling has been reviewed by Bertil Bengtsson (*Svensk JuristTidning* 2011 p. 527) and Christina Allard (in *Karnov Nyheter*, 2 June 2011 and *Juridisk Tidskrift* 2011–12 p. 117). Both authors interpret the Supreme Court ruling to mean that the legal basis of reindeer herding differs in various parts of reindeer herding territory.⁹ Bengtsson writes:

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4. Swedish Government Bill 1976/77:80 [prop. 1976/77:80], Committee on Cultural Affairs Report 43 [KrU 43], Riksdag Communication 289 [rskr. 289].
 5. Swedish government report SOU 2006: 14.
 6. The term «Sameby» refers to an assembly of Sami, organized as an association, who pursue reindeer herding within a defined territory, as well as to the geographical territory within which the members of the Sameby are entitled to pursue reindeer herding.
 7. Allard, Christina, «Nordmalingsmålet: Urminnes hävd överspelad för renkötselrätten?» in *Juridisk Tidskrift* 2011–12 p. 117.
 8. See for example the Court of Appeal for Southern Norrland, case no. T 879–05 and District Court of Östersund, case no. T 1919–11.
 9. See RHA s 3 (1971: 437) for the legal definition of the term «reindeer herding territory.»

In the Court's opinion, the right seems to have a different basis on year-round lands and winter pasture lands. On year-round lands, the right is based on immemorial prescription (in some cases combined with occupation); this was established by the Reindeer Husbandry Act s 2 and the ruling in Taxed Mountains [skattefällsmålet], and there is no reason to call on customary law in this context. In respect of the winter grazing right – a complement to the more comprehensive right to the year-round lands that can most nearly be likened to an easement – the decisive factor is, however, the customary law that the Supreme Court discussed in greater detail in the ruling.¹⁰

Allard is somewhat more categorical:

As a result of the case, there seems to be two concepts for recognizing the Sami reindeer herding right: immemorial prescription for the year-round lands and customary law for the winter pasture lands.¹¹

In the following, I will more closely examine the authors' conclusions regarding the legal bases of the reindeer herding right.

What has changed by reason of Nordmaling?

The Supreme Court ruling in Nordmaling means that the Sami right to herd reindeer outside the year-round lands during the period of 1 October to 30 April must be examined against the RHA s 3, and not in accordance with rules related to the legal institution of immemorial prescription, as has occurred previously in several lower courts. The Supreme Court held that it has never been prescribed in law that the Sami have a right to winter pasture only to the extent that such a right can be invoked on the basis of the rules on immemorial prescription laid out in the old Swedish Land Code of 1734 (OLC). The Court concludes the legal position in the matter as follows:

In summary, it must be held that there is no support in any law text or drafting history for the notion that the rules of the Old Land Code on immemorial prescription shall be applied to the right to winter pasture.¹²

The Court makes a very important point here. In the Härjedalen case, for example, the Court of Appeal for Southern Norrland concluded as follows:

10. Bengtsson, Bertil, «Nordmalingsdomen – en kort kommentar» in *Svensk JuristTidning* 2011 p. 527.

11. Allard, Christina, «Analys: Rätten till vinterbete baseras på sedvanerätten — nytt vägval av HD» in *Karnov Nyheter*, Thomson-Reuters, 2 June 2011.

12. NJA 2011 p. 109, para. 9.

...the right to winter pasture has in all legislative processes been considered based on a custom that meets the conditions for immemorial prescription as provided in the Land Code 1734 Ch 15.¹³

Immediately thereafter, the Court of Appeal argued the following:

Since 1993, it follows directly upon the Reindeer Husbandry Act s 1 that immemorial prescription is considered the basis of the reindeer herding right.

It seems logical to understand the latter sentence to mean that the Court of Appeal believes that there is no question that subsequent to 1993 the right to winter pasture must be tried against the rules on immemorial prescription in OLC Ch 15.

The Supreme Court held that support for lower court opinions on applying the provisions of the OLC (in particular, the following statement by the head of the ministry in the government bill proposing the RHA: «In disputes, we presume the matter of whether customary law is applicable will be tried by the courts on the basis of such evidence required under general law to prove immemorial prescription»)¹⁴ applies only to the evidence, and moreover that the cited ministerial statement refers to the time before the current Land Code, which is based on the principle of examination of the evidence. The Supreme Court's opinion in this part means that cases concerning Sami rights to winter pasture must be tried according to legal principles established in relation to customary law. The implications, according to the Supreme Court, include that a right can first be considered established after long-term use of the land: longer than a generation but not necessarily 90 years (the standard for immemorial prescription), but also that the use must have been «uncontested and unhindered,» which is consistent with the wording of the OLC regarding immemorial prescription. The question then is what conclusions can be drawn from the Supreme Court ruling in Nordmaling concerning the legal basis of the Sami right to pursue reindeer herding.

Bengtsson and Allard do not further elucidate the grounds for their conclusions, but as far as can be determined, they seem to arise from the Supreme Court's argument in its ruling that under RHA s 1 the reindeer herding right is based on immemorial prescription – and yet the Court also held that the right to winter pasture must be tried against the rules of customary law. The Supreme Court does not explicitly say that it finds there are different legal bases for the reindeer herding right, but on one occasion the Court uses the wording «the reindeer herding right based on customary law» in reference to the Sami right to pursue reindeer herd-

13. Court of Appeal for Southern Norrland, case no. T 58–96 R. 21, p. 16.

14. Swedish Government Bill 1971: 51 p. 158.

ing outside the year-round lands during the winter season.¹⁵ The question is thus whether the Supreme Court's conclusion that the Sami right to herd reindeer on private land during the winter should not be tried in accordance with the rules on immemorial prescription laid down in OLC Ch 15 constitutes sufficient grounds for conclusions as to the legal basis of the Sami reindeer herding right. And what, exactly, is meant by the expression «the legal basis of the reindeer herding right»?

Proceeding from the fact that the right to pursue reindeer herding in Sweden is the exclusive right of the Sami people,¹⁶ I will then attempt to address the following issues:

- What is the basis of the Sami right to pursue reindeer herding?
- How is the right regulated under law?
- What are the consequences of Bengtsson and Allard's discussions of the ruling in Nordmaling in relation to how the reindeer herding right is regulated under law?

The basis of the Sami right to pursue reindeer herding

The laws that regulate the Sami people's right to pursue reindeer herding have largely had the same legal formulation ever since the first reindeer grazing law was enacted in 1886.¹⁷ The most exhaustive discussion of the basis of Sami rights was in connection with the enactment of the first reindeer grazing law. Thus, the 1886 law is the most important source toward further understanding of the background to the Sami right to pursue reindeer herding.¹⁸ Accordingly, next take a closer look at the drafting history of the law.

There were several weighty reasons the government found it necessary in the 1880s to regulate Sami reindeer herding.¹⁹ One important reason was to manage recurring conflict between «the nomads and the farming population.»²⁰ In the late 1800s, antagonisms between the two livelihoods had become an increasingly tangible problem. It was thus an important goal for the Commission of Inquiry investigating the matter to be able to present draft regulations that would reduce

15. NJA 2011 p. 109, para. 11.

16. See RHA s 1.

17. Bengtsson, Bertil, *Samerätt*, 2004 pp. 14 and 18.

18. Relatively speaking, preparatory work is ascribed high significance in Swedish law.

19. For a summary of the rationale for the bill, see the minister's report to the parliament, Parliamentary Record for 1886 [riksdagens protokoll 1886], Upper House, 3 vol., no. 29, p. 9 ff, and the Parliamentary Record for 1886, Lower House, 3 vol., no. 40, p. 18 ff.

20. Parliamentary Record for 1886, 2 coll., 2 sect., 1 vol., Commission Report no. 1, p. 64.

conflict between these groups.²¹ The general motivation for the law must still be said to be an interest in ensuring that the Sami people would be able to pursue their traditional livelihood in the future, and thus preserve their culture.²² In the 1886 parliamentary debate, several MPs also discussed the special responsibility incumbent upon a nation made up of two peoples, but where only one had the power to establish laws that would apply to both.²³

The question of the basis of the Sami people's right to pursue reindeer herding was given little attention in the Commission's report, but the special parliamentary committee did address the issue.²⁴ The parliamentary committee states the following:

For the Lapp genuinely has a right to invoke so that he can practice the trade which is, by ancient tradition, his livelihood. 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.²⁵

Thus, in the parliamentary committee's view, there was no doubt that the Sami had laid first claim to the land. And it was this circumstance which constituted the basis of the right of the Sami people to pursue their traditional livelihood. The committee found, however, that the right to pursue reindeer herding did not

21. *Ibid.*, pp. 3–4 and 64.

22. See the special parliamentary committee, appendix to the Parliamentary Record for 1886 [bihang till riksdagens protokoll], 8 coll., 1 sect., opinion no. 1, p. 18 and Minister von Steyern's speech in the parliament, Parliamentary Record for 1886, Upper House, 3 vol., no. 29, p. 10. Cf also the speech by Waldenström, Parliamentary Record for 1886, Lower House, 3 vol., no. 40, p. 23. It is of particular interest in this context to note that the same arguments are expressed in the drafting history of the current Reindeer Husbandry Act; see the Parliamentary Committee on Agriculture 1971: 37, p. 35.

23. This aspect was addressed in the Upper House mainly by the minister; see von Steyern, Parliamentary Record for 1886, Upper House, 3 vol., no. 29, p. 10. With respect to the Lower House, see for example speeches by MPs von der Lancken, Waldenström, and Nordenskiöld, Parliamentary Record for 1886, Lower House, 3 vol., no. 40, p. 10, p. 23, p. 35. Justice Olivecrona, however, had a completely different view: he believed the state had a responsibility to actively prioritize «higher civilization» by «protecting and expanding the rightful interests of this civilization,» Parliamentary Record for 1886, 2 coll., 2 sect. 1 vol., Commission Report no. 1, p. 10.

24. NJA 1981 p. 1, on page 224.

25. Appendix to Parliamentary Record for 1886, 8 coll., 1 sect., opinion no. 1, p. 18.

mean that the Sami held the same powers as owners of the land.²⁶ The committee's remarks on this matter included the following:

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 fulfillment 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.²⁷

However, the Sami people's possession of the land was already established when the crown began to lay claim to the land areas that would gradually come to constitute Swedish territory. The committee expresses the following opinion on this:

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.» But thereby, the Lapp's right, based on the earlier claim, to the necessary conditions for his existence as a nomad, can so much less be regarded as having become invalid, as this right was by its nature such that it could endure in addition to the private and state ownership later acquired. And the Lapp's right has also endured and been exercised to the present time.²⁸

There was no discussion of these fundamental principles concerning the Sami right to pursue reindeer herding on Swedish territory when the parliament dealt with the bill. This may to a certain extent be due to the fact that at the time, the Sami right to pursue reindeer herding was already established in other legislation.²⁹ Several members of parliament, however, pointed out that the Sami had previously

26. This was a central issue in the Taxed Mountains case, and the Supreme Court's finding in this matter was unequivocal, cf NJA 1981 p. 1, on page 249.

27. Appendix to Parliamentary Record for 1886, 8 coll., 1 sect., opinion no. 1, p. 18.

28. Appendix to Parliamentary Record for 1886, 8 coll., 1 sect., opinion no. 1, p. 18.

29. This was evident in the drafting history; see appendix to Parliamentary Record for 1886, 1 coll., 1 sect., 2 vol., bill no. 2, p. 36, Parliamentary Record for 1886, 2 coll., 2 sect., 1 vol., Commission Report no. 1, p. 64 ff, and the Special Parliamentary Committee, appendix to Parliamentary Record for 1886, 8 coll., 1 sect., opinion no. 1, pp. 7–10. Several MPs also referred to existing legislation in the parliamentary debate.

been alone in the areas where the permanent population had gradually settled.³⁰ The MPs who objected to parts of the bill also held that the Sami had an inalienable right to pursue reindeer herding.³¹ The right of the Sami to their traditional livelihood was thus never questioned during the legislative process in connection with the reindeer grazing law of 1886. The premises and opinions that the special parliamentary committee argued, that the Sami were the first to claim the land, were thus accepted by the parliament. The actual basis of the Sami right to pursue reindeer herding must in these circumstances be considered their claiming of the land, which we currently refer to as «occupation.»

Regulation of the right under the law

The debate concerning the 1886 law came to focus on the extent of the reindeer herding area. Or more precisely: whether or not the Sami would have the right to «winter migrations»³² and thus whether the Sami would have the right to pursue reindeer herding on private land.³³ This was a sensitive issue that roused the passions of several MPs. The Commission's report went so far as to discuss the possibility that the practitioners of the different livelihoods could use different land areas, but, the report concluded, such a principle would be very difficult to implement. In this context, the Commission argued the following:

As already put forth, the Lapps sojourn in different areas at different times of the year. If, then, all the lands of which they had a need in order to pursue their livelihood had been reserved for their exclusive use, cultivation would have been prevented from spreading to such parts of the country where the nomad needs sojourn only in the winter.³⁴

30. See for example the speech by Wagenius, Parliamentary Record for 1886, Lower House, 3 vol., no. 40, p. 15. See also the opinion of Justice Olivecrona, appendix to Parliamentary Record for 1886, 1 coll., 1 sect., 2 vol., prop. no. 2, p. 6.

31. See for example the speeches by Ericson in the Upper House; Parliamentary Record for 1886, Upper House, 3 vol., no. 29, p. 30 and by Farup in the Lower House; Parliamentary Record for 1886, Lower House, 3 vol., no. 40 a, p. 9.

32. Cf the speech by MP von der Lancken, Parliamentary Record for 1886, Lower House, 3 vol., no. 40, p. 11.

33. In respect of the Upper House in particular, see the speech by Ericson, Parliamentary Record for 1886, Upper House, 3 vol., no. 29, p. 3 ff. and in respect of the Lower House, the speech by Farup, Parliamentary Record for 1886, Lower House, 3 vol., no. 40 a. The matter had previously been addressed by the Norwegian-Swedish Committee of 1843 and later by the Norwegian-Swedish Committee of 1866, see Strøm Bull, Oskal & Sara, *Reindriften i Finnmark 1852–1960*, Cappelen, Oslo 2001, p. 90 ff.

34. Parliamentary Record for 1886, 2 coll., 2 sect., 1 vol., Commission Report no. 1, p. 64–65.

The Commission held that the Sami had the right to winter migrations and that the right was based on customary law:

But the same right to winter migrations which was said above to accrue to the Lapps of the two northernmost counties seems also, according to old custom, to accrue to the Lapps within Jämtland County.³⁵

The Commission predicted that their conclusion in this part would «encounter opposition from some quarters,» and thus examined in particular whether it might be that the Sami could, in connection with land grants, be allotted «that part of the space they needed.»³⁶ The Commission's conclusion on this matter was, however, unequivocal:

As the Lapps within Jämtland County have from days of old and to the present been allowed to move around with their herds during the winter unchallenged and it is only within the most recent times that any objections from the farming population have been discerned, and as it is undisputed that cultivation has encroached upon large areas that were originally used only by Lapps, the presumption that the Lapps' rights to winter migrations within Jämtland County are based on customary law seems entirely justified.³⁷

It encountered serious opposition in the Supreme Court, which issued an opinion on the bill: four of the seven justices advised against putting the bill before the parliament. The reason was that they believed the bill relied on unsustainable premises because:

The custom the Lapps have had of, at certain times of the year, roaming the lower, cultivated land with their reindeer herds and there grazing their herds, hunting, fishing, and taking the necessary wood, would be elevated to a right established by law, which would entail serious infringement of the rights of ownership and usufruct of the settled population in these areas.³⁸

Thus, the issue of greatest concern to the four justices was what the legal consequences of a statutory establishment of the Sami right under customary law would be in relation to the rights of ownership. None of the dissenting justices denied that the Sami had by ancient custom used the lands outside the areas designated for them, but they believed it would be an error to regulate this in law. Justice Olivecrona expressed this as follows:

35. *Ibid.*, p. 66.

36. *Ibid.*, p. 66.

37. *Ibid.*, p. 70.

38. Appendix to Parliamentary Record for 1886, 1 coll., 1 sect., 2 vol., bill no. 2, p. 2.

But if the Lapps' wanderings, based on old custom, over the property of the settled landowners outside the Lapp territories and the so-called «Taxed Mountains» [skattefäll] set aside for them in Jämtland were to be explicitly recognized in law as an entitlement, if the former's claims to the right to enjoy the latter's property should be established in settled law, then, in my opinion, the reasonable interests of the state would be set aside to a disquieting extent and the law which has thus far protected the right of private ownership of land would be abandoned.³⁹

Olivecrona's point was that ancient custom according to the Land Code of 1734 Ch 1 s 11 could be applied by the courts when enacted «law does not exist,» but that this was an exception and that customary rights must always be subordinate to rights that emanate from written law.⁴⁰ The special committee responded to these opinions and pointed out that the cited section of the law referred to custom as the norm for the administration of justice, while the matter at issue was instead custom as material for legislation. The committee went on to argue the following:

As the custom of the Lapps to migrate with their reindeer unchallenged is a factual circumstance that has endured since time immemorial, it is far removed from the letter or the spirit of the 1734 law to constitute any barrier to the incorporation of the custom at issue in the law whose enactment is now under discussion; that it would on the contrary be unreasonable for this new law to take its fundamental reasoning from anywhere other than old custom.⁴¹

In addition, the committee specified that the Sami's right was older than the state's, that the state could not grant the use of land with stronger rights than the state itself possessed, and that the Sami winter migrations (in Jämtland) were well known by the settled population and that these constituted «an obvious easement laid upon land in the county.»⁴²

Olivecrona's opinions were also rejected by the minister, who argued in the bill that the settled population in the areas in question had not objected to the Sami's winter migrations⁴³ and that the Sami right to migrate to the areas they had visited according to old custom must therefore be presumed a genuine right, not merely tolerated trespass, even if there was no explicit statutory support for this. In that connection, the minister stated the following:

39. *Ibid.*, p. 7.

40. *Ibid.*, p. 6.

41. Appendix to Parliamentary Record for 1886, 8 coll., 1 sect., Special Parliamentary Committee, no. 1, p. 20.

42. *Ibid.*, p. 19.

43. Other than when damage had been caused.

The conditions laid down in the Land Code Ch 15 s 1 under which a right may be based on immemorial prescription [...] have clearly been met in the matter of this custom.⁴⁴

There was, however, no serious debate about whether or not the conditions in OLC had been met. While one MP in the Lower House dissented from the minister and the special committee's interpretations of the OLC provisions, he hastened to add «I am not a lawyer.»⁴⁵ In broad strokes there seems to have been consensus between the government and the dissenters in the parliament that the state had not adequately safeguarded Sami rights.⁴⁶ There was thus presumably full consensus in the parliament that reform was necessary.⁴⁷ The government's reference to the provisions of the OLC was not further discussed in the parliament, and the following opinion may be an apt illustration of how several MPs understood the situation:

But we could not invoke the 1734 law as the legal basis of immemorial prescription in cases like this, which existed long before the law of 1734 was enacted. It is indisputable that the Lapps have since time immemorial sojourned in the areas now in question. But as the definition of immemorial prescription provided by the 1734 law is also applicable to the rights of the Lapps, this circumstance provides further reason to give them the rights they had before the 1734 law.⁴⁸

Much of the parliamentary debate came to focus on whether or not the Sami right to winter migrations should be established in law.⁴⁹ It is noteworthy in this context that the main opponents to the bill in the parliament did not dispute the legal basis of the Sami right to pursue reindeer herding; their arguments against the bill were based on the consequences the law would entail for private freeholders.⁵⁰

44. Appendix to Parliamentary Record for 1886, 1 coll., 1 sect., 2 vol., bill no. 2, p. 35.

45. Parliamentary Record for 1886, Lower House, 3 vol., no. 40, p. 25.

46. In respect to the Upper House, see for example the speech by Ericson, Parliamentary Record for 1886, Upper House, 3 vol., no. 29, p. 5. Cf also the petitions from the dissenting MPs, Parliamentary Record for 1886, Lower House, 3 vol., no. 40, pp. 3–4. In respect to the Lower House, see for example the speech by Waldenström, Parliamentary Record for 1886, Lower House, 3 vol., no. 40, p. 31.

47. See in particular von Steyern's speech in the Upper House, Parliamentary Record for 1886, Upper House, 3 vol., no. 29, p. 10 ff.

48. Parliamentary Record for 1886, Lower House, 3 vol., no. 40, p. 39.

49. Having access during the winter to pasture outside the mountain area was considered essential. See for example the speech by MP Hellgren, Parliamentary Record for 1886, Lower House, 3 vol., no. 40, p. 5.

50. Parliamentary Record for 1886, Upper House, 3 vol., no. 29, p. 7.

The two fundamental principles of the law: «the Lapp's exclusive right to the mountain region and his customary right to visit other areas at certain times»⁵¹ were emphasized by the minister in both houses of parliament. But several MPs argued that the justification for the bill must be considered based on certain general legal principles.⁵² This was most clearly expressed in the following opinion:

The point here is not, based on a decidedly clear legal precept, to conscientiously balance the various rights and obligations which must follow thereupon as a logical consequence. I would rather characterize the legislation now in question as a peace treaty between two different civilizations, two different peoples, of which one stands at the pinnacle of human refinement and the other has yet to take the first stumbling steps towards advancement.⁵³

Parliament passed the bill and thus established the fundamental legal principles upon which the law is based. These are expressed in the law in the provision in section 1, which states that a) «the Lapps are entitled to [...] sojourn with their reindeer [...] within the Lapp territories in the counties of Norrbotten and Västerbotten and on the land set aside for them in the county of Jämtland» and b) «on privately owned land [...] however, the Lapps may sojourn without the concerned landowner or farmer's consent only in the months of October, November, December, January, February, March and April.»⁵⁴

The fundamental legal principles are expressed as follows in the 1971 Reindeer Husbandry Act: a) «Reindeer herding may be pursued [...] all year in the Lapp territories in the counties of Norrbotten and Västerbotten [...] on the reindeer grazing mountains in Jämtland County» and b) «from 1 October to 30 April [...] in such areas outside the Lapp territories and reindeer grazing mountains where reindeer herding has of old been pursued at certain times of the year.»⁵⁵

The present Reindeer Husbandry Act is thus based on the same fundamental legal principles as the first reindeer grazing law.⁵⁶ The principle of «the Lapp's exclusive right to the mountain region» is expressed in the current RHA through the seemingly non-peremptory wording «reindeer husbandry may be pursued.» It is

51. *Ibid.*, p. 10.

52. Many MPs touch upon such aspects, but Nordenskiöld most clearly, Parliamentary Record for 1886, Lower House, 3 vol., no. 40, p. 35.

53. Parliamentary Record for 1886, Lower House, 3 vol., no. 40, p. 10.

54. Section 1 of the Act (1886: 38) Concerning the Right of Swedish Lapps to Reindeer Pasture in Sweden.

55. RHA s 3 (1971: 437).

56. Cf NJA 1981 p. 1, on page 244. See also the Parliamentary Committee on Agriculture 1971: 37, pp. 34 and 38 ff.

important to remember that the rules on immemorial prescription were never discussed in relation to the Sami right to herd reindeer in the mountain region when the parliament passed the first reindeer grazing law in 1886. That reindeer herding had been pursued since «time immemorial» and was thus to be understood as a «custom» was another matter. Immemorial prescription was actualized only in relation to the Sami people's so-called winter migrations. In this light, one might well ask why immemorial prescription is now so prominent in discussions as the basis of reindeer herding rights. In the following I attempt to answer this question.

The question of immemorial prescription

In the Taxed Mountains case,⁵⁷ five Samebys in Jämtland sued the state for stronger rights to certain lands referred to as the Taxed Mountains. In simple terms, the Samebys wanted the court to try whether the Sami had «full rights of ownership» to the areas in question.⁵⁸ In this case, the basis of the Samebys' complaint was that they had lived in the area since the Ice Age and that the Sami had claimed the area from time immemorial to the present day. As the basis of their claims, the Samebys invoked occupation and immemorial prescription and specified that their claims referred to private law, which exists independently of the Reindeer Husbandry Act.⁵⁹ In light of their claims, the question of immemorial prescription naturally became a central point in the case. The Supreme Court held that the claims of the Samebys meant that their right to the land must be tried independently of the Reindeer Husbandry Act.⁶⁰ It thus became vitally important to examine their right to the land before the law of 1886 came into force. In the case, the Supreme Court made no explicit references to the basis of the reindeer herding right, that is, concerning the right as such. The Court did, however, repeatedly discuss the question of the Sami's possible rights of ownership to the land in question, and in such contexts expressed opinions that relate to the basis of the Sami right to pursue reindeer herding. The Supreme Court stated the following concerning whether the Sami could acquire rights through occupation according to older Swedish law:

As to the possibility of acquiring unclaimed mountain lands through occupation without cultivation or permanent settlement in the area, it is doubtful which requirements applied concerning use of the land. It seems most likely that guidance

57. «Skattefällsmålet» in Swedish.

58. The claim covered a total of 14 points with the matter of ownership rights to the land at the core. NJA 1981 p. 1, on page 20.

59. NJA 1981 p. 1, on page 166.

60. *Ibid.*, p. 179.

could be found in the rules on owner occupation in connection with immemorial prescription. It must reasonably be presumed that at least as much is required concerning the use of the land in connection with occupation. Here, as when it referred to immemorial prescription, a certain setting of land boundaries must have been significant. In consideration of that said, it is thus impossible to clearly differentiate between the conditions for occupation and for immemorial prescription; that said about the one also applies to a great extent to the other. It should be noted however that the matter at hand is not the typical situation in which the rules on immemorial prescription are actualized, since it is undisputed that the Taxed Mountains were unclaimed lands when the Sami began using them.⁶¹

Based on the Supreme Court's task in the case – to answer the question of who owned the land within the Taxed Mountains – the Court's finding that it is difficult to differentiate the conditions for occupation and immemorial prescription is understandable. However, the argument is not fruitful if the purpose is to clarify the basis of the Sami right to pursue reindeer herding. If that had been the purpose, it would have been more meaningful to keep the conditions for occupation and immemorial prescription separate. Although the Court notes in this context that the Taxed Mountains were unclaimed lands when the Sami began using them, it seems immediately plausible that the aforementioned reasoning was central to the Court's conclusion that the Sami reindeer herding right is based primarily on immemorial prescription. Concerning the Sami rights to the Taxed Mountains before the 1886 law, the Supreme Court delivers the following opinion:

This was a matter of rights that were from the beginning based on immemorial prescription and whose content has changed over the course of time as the practice of their livelihood by the Sami evolved and took on partially new forms.⁶²

The Supreme Court's conclusions as to the basis of the Sami right to pursue reindeer herding thus depart from the fundamental legal principles that the legislature cited as the basis of the 1886 law. Where the legislature in the 1880s expressed the opinion that the basis of the right was the Sami's occupation of certain parts of the territory, the Supreme Court in the 1980s expresses the opinion – albeit not in entirely precise terms – that the right proceeds primarily from immemorial pre-

61. *Ibid.*, p. 185.

62. *Ibid.*, p. 233.

scription.⁶³ This is also how the ruling has been understood.⁶⁴ The Commission of Inquiry on Sami Rights (1982–1991), for example, writes the following:

According to the Supreme Court in *Taxed Mountains* (p. 248), the Sami have a strongly protected utility right of a special kind that is ultimately based on immemorial prescription.⁶⁵

The lower courts have also without exception thus understood the Supreme Court.⁶⁶ The Supreme Court's opinions on immemorial prescription would prove significant in relation to the Reindeer Husbandry Act. The Commission of Inquiry on Sami Rights took the following position on the matter:

The confirmation that the reindeer herding right is based on immemorial prescription and not upon land grants, legislation, etc., is significant to the status of the reindeer herding Sami and the security of their livelihood.⁶⁷

The crux was thus the Supreme Court's explanation of the legal consequences of its opinion, that the reindeer herding right is an «enduring utility right based on private law» which «under the Swedish Constitution Ch 2 s 18 is protected in the same way as ownership rights [are] protected against expropriation without compensation.»⁶⁸ Interestingly, the minister in 1886 expressed the same opinion:

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63. The judge rapporteur in the case, Bertil Bengtsson, dissented with regard to the justification in a certain matter, and in reference to Sami hunting and fishing rights in the *Taxed Mountains* case he stated that the rights «are ultimately based on immemorial prescription» whereupon he continued: «It is their enduring rights of old that have in somewhat modified form been established in law through the reindeer grazing laws and presently through the Reindeer Husbandry Act.» NJA 1981 p. 1, appendix, p. 3.
64. Swedish government report SOU 1989: 41 pp. 262–263 and government bill 1990/91:4 p. 21. Cf the Court of Appeal for Northern Norrland, case no. B305/99. See also the Court of Appeal for Northern Norrland, case no. FT 5/81, where the Sameby partially amended its claim between proceedings in the district court and the court of appeal after the Supreme Court had handed down its ruling in *Taxed Mountains*.
65. Swedish government report SOU 1989: 41 p. 258. There is reason to note that in the context to which the Commission refers, the Supreme Court does not argue that the right is based on immemorial prescription.
66. Cf for example NJA 2011 p. 107, para. 5, Court of Appeal for Northern Norrland, case no. B 305/99. See also Court of Appeal for Northern Norrland, case no. FT 5/81, where the Sameby partially amended its claim between proceedings in the district court and the court of appeal after the Supreme Court had handed down its ruling in *Taxed Mountains*.
67. Swedish government report SOU 1989: 41 p. 263.
68. NJA 1981 p. 1, on page 248.

It [the legislative process] is a matter of nothing other than due and proper protection of a right, which requires protection equal to that accorded ownership rights, and the setting aside of which the 'reasonable interests of the state' in no way permit.⁶⁹

On this basis, the Commission of Inquiry on Sami Rights recommended that the Reindeer Husbandry Act should clarify that the reindeer herding right is based on immemorial prescription.⁷⁰ When the bill was passed by the parliament three years later, the main motive was that the parliament wanted to eliminate misunderstandings about the nature of Sami rights,⁷¹ but it is doubtful whether the legislature's aims in this respect have been achieved.⁷² In Taxed Mountains, the Supreme Court held that the 1886 law entailed a codification of the legal position.⁷³ What conclusions can be drawn from this have since been a topic of discussion.⁷⁴ It is difficult under any circumstances to find support for the notion that the 1886 law was based on «the understanding that Sami rights in the area of reindeer husbandry, including the right to reindeer pasture, are constituted of a utility right based on immemorial prescription» as the government argues.⁷⁵ One effect of Taxed Mountains seems to be that we have retroactively ascribed greater significance to immemorial prescription as a basis of the 1886 law than what was actually the case.⁷⁶ In light of the foregoing, the question in the final section becomes extremely interesting.

What will be the legal consequences of basing the reindeer herding right on immemorial prescription?

Although RHA s 1 now specifies that the reindeer herding right is based on immemorial prescription, the Supreme Court held in Nordmaling that the rules for

69. Appendix to Parliamentary Record for 1886, 1 coll., 1 sect., 2 vol., bill no. 2, p. 35.

70. Swedish government report SOU 1989: 41, p. 263 ff. See also p. 260 regarding the Commission of Inquiry's mandate in relation to the conclusions in the Supreme Court ruling in Taxed Mountains.

71. Government bill 1992/93:32 p. 90.

72. In this matter, see Swedish government report SOU 2006: 13 p. 388 ff.

73. NJA 1981 p. 1, on page 228.

74. Government bill 1990/91:4 p. 22 and government bill 1992/93:32 p. 90.

75. Government bill 1992/93:32 p. 90.

76. See for example the report of the «Boundary Committee.» In support of the claim that the drafting history to the 1886 law argued that the reindeer herding right was based on immemorial prescription, the Boundary Committee referred to a line of reasoning in the government bill that refers only to the matter of Sami rights to winter migrations. Swedish government report SOU 2006: 14 p. 385 footnote 24.

immemorial prescription under OLC should not be applied to reindeer herding rights in areas outside year-round lands. The question then becomes whether the rules for immemorial prescription under OLC should apply to judicial review of reindeer herding rights on these year-round lands. To answer this question, I first return to Bengtsson and Allard's commentaries.

In his article Bengtsson does not touch upon the consequences of the argument that reindeer herding rights may conceivably have different legal bases according to whether the territory in question is either year round or winter pastureland for reindeer. Allard, however, writes the following:

Considering that the Supreme Court has taken great pains in Nordmaling to explain why the right to winter pasture should be tried on the basis of customary law and not immemorial prescription, one can on firm grounds claim that the Supreme Court has laid the foundation for a new perspective on reindeer herding on year-round lands as well. One might even go so far as to claim that in Nordmaling the Supreme Court has rejected immemorial prescription as a legal basis of the reindeer herding right as such. I cannot however advocate such a far-reaching interpretation of the opinion, but I would nevertheless argue that it has become somewhat uncertain whether the reindeer herding right on year-round lands should be tried in accordance with immemorial prescription.⁷⁷

Allard argues – despite her reservations that there is some uncertainty – that the Sami right to reindeer herding on year-round lands should be tried «in accordance with immemorial prescription,» which should reasonably mean in accordance with the rules that emanate from the OLC of 1734. This is also the logical consequence of both authors' conclusions that the reindeer herding right has different legal bases in different parts of the reindeer herding territories.⁷⁸

In a recently published commentary on the bases of the reindeer herding right, Allard explained that she has no theoretical misgivings about the use of immemorial prescription rather than customary law, «as long as the terms are adjusted to actual use and the preconditions associated with reindeer herding and its traditions.»⁷⁹ This is however an unreasonable assumption because case law in the area points in the opposite direction: Swedish case law shows that terms are

77. Allard, Christina, «Nordmalingsmålet: Urminnes hävd överspelad för renkötselrätten?» in *Juridisk Tidskrift* 2011–12 p. 117.

78. Cf Bengtsson, who writes: «On year-round lands, the right is based on immemorial prescription (in some cases combined with occupation).»

79. *Svensk JuristTidning* 2012, pp. 864 – 867.

not adjusted to actual use or to Sami traditions.⁸⁰ As legal scholars, this is naturally something we cannot disregard. The point in this context is not to weigh immemorial prescription against customary law as legal instruments, but rather to show that legal support for applying the rules of immemorial prescription to the Sami year-round lands is weak. The Supreme Court's ruling in Taxed Mountains may be thought to contradict this conclusion. Allard has argued that «as long as we have nothing else to go on, this case sets a precedent which indicates that the right is founded upon immemorial prescription.»⁸¹ As I have already pointed out, the Supreme Court's conclusion was that the Sami reindeer herding right is based on immemorial prescription *combined with occupation*. I find this clarification by the Supreme Court highly significant because it informs us that we cannot blithely assume that the Sami right to pursue reindeer herding, on the year-round lands for instance, must be tried according to the rules that apply to the legal institution of immemorial prescription. And if such were the case, new legal problems would arise.

In the first place, we can determine that if it is true that the reindeer herding right should be tried according to the rules of customary law for winter pasture lands, and according to the rules of immemorial prescription on year-round lands, this would put the Sami in a very tricky legal position, since the right to reindeer herding on year-round lands where the right is more extensive – consider Bengtsson's wording: «a complement to the more comprehensive right to the year-round lands that can most nearly be likened to an easement» – would then be tried according to stricter rules than for winter pasture lands. This could lead to trials in which the Sami successfully proved their right to winter pasture, but failed to prove their right to herd reindeer on the year-round lands. The consequence thus could be that a Sameby would have the right to pursue reindeer herding only during the winter months.

In the second place, one must ask whether the legislature's aim in incorporating wording into the RHA that the reindeer herding right is based on immemorial prescription was that the law should be examined according to the rules that emanate from OLC. There is no support for the notion that this was the legislature's aim. The reason given, beyond that already mentioned, was to clarify that the right is not dependent upon land grants or legislation.⁸² That is to say, the legislature wanted to express the basis of the right, rather than to express a regulation of the

80. Torp, Eivind, Betydelsen av samiska traditioner i svensk rätt, *Arctic Review on Law and Politics*, 2011 pp. 77–101.

81. Allard, Christina, «Renskötselrättens grunder – en replik», *Svensk JuristTidning* 2012 pp. 864–867.

82. Government bill 1992/93:32 p. 90.

right. In respect of the latter, it is likely that the legislature believed that it has been adequately regulated in RHA s 3. This provision makes it clear that reindeer herding may be practiced all year on year-round lands, with no conditions stated for how or when the right should be considered exercised.⁸³ As qualifying conditions are absent from the provision, it is highly unlikely that the right to reindeer herding on year-round lands can be tried according to the rules for immemorial prescription in OLC.

In agreement with what the legislature argued in 1886 on «the Lapp's exclusive right to the high mountain regions»⁸⁴ the wording «areas that have been set aside for the Lapps' exclusive use» was used in the laws of 1898 and 1928.⁸⁵ When lawmakers chose other words to designate these areas in the 1971 law, the legislature clarified, among else with reference to s 3, that the new law did not in this part entail any restriction of Sami rights.⁸⁶ In light of this, it must be considered highly doubtful that the Sami right to reindeer herding on year-round lands should be tried according to the rules on immemorial prescription.

Правовые основы северного оленеводства в Швеции

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Резюме: В статье обсуждаются основы права саамского народа на ведение северного оленеводства и как данное право отрегулировано в существующем законодательстве. Особенно существенными в отношении северного оленеводства являются два правовых аспекта: установление размеров пастбищных угодий и разъяснение вопроса, в чем заключается существующее право. Правовой институт «пользования пастбищами с незапамятных времен» долго считался очень существенным в судебных разбирательствах по делам оленеводства. После включения в разбирательство по судебным делам по оленеводству Верховного Суда Швеции картина изменилась и автор рассматривает эти изменения.

Ключевые слова: Саамское оленеводство, обычное право, пользование пастбищами с незапамятных времен, занятие, Верховный Суд Швеции.

83. I disregard here that stated in the provision concerning reindeer herding in forests below the cultivation boundary.

84. Parliamentary Record for 1886, Lower House, 3 vol., no. 40 p. 18.

85. Cf s 31 of the Act (1989: 66) Concerning the Rights of Swedish Lapps to Reindeer Pasture in Sweden and s 56 of the Act (1928: 66) Concerning the Rights of Swedish Lapps to Reindeer Pasture in Sweden.

86. Parliamentary Committee on Agriculture 1971: 37 pp. 38–39.