

Case Review: The Swedish Nordmaling case

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Introduction

In spring 2011 the Swedish Supreme Court took a new course of direction when it held that the Sámi reindeer herding right on so called winter-pasture areas is based on customary law (*sedvanerätt*), and not immemorial prescription (*urminnes hävd*) as has been applied earlier. This case, the Nordmaling case,¹ has also attracted attention nationally, and to some extent internationally, because it denotes the first time Sámi rights claims succeed. Sami villages, the administrative and geographical units for the management of the reindeer husbandry, have earlier lost several cases in lower courts regarding rights to winter-pasture on privately owned lands.

Two immediate results of the Nordmaling case can be emphasized. Firstly, as an important precedence, the case clarifies under what conditions rights with respect to reindeer husbandry on winter-pasture areas are established. Here the Supreme Court clarifies some issues that previously have been unclear. Secondly, as a result of the case there seems to be two concepts for recognizing the Sámi reindeer herding right: immemorial prescription for the year-around-areas and customary law for winter-pasture areas, which might not be so practical.

At least for winter-pasture areas the Supreme Court has with its verdict disregarded immemorial prescription as an expedient proprietary concept for explaining the establishment of the Sámi reindeer herding right, something that was also mentioned explicitly. When it comes to pasture on year-around-areas, it could be argued that with the Nordmaling case it has become *somewhat* uncertain if the rules on immemorial prescription shall be applied. A firm answer to that question could only come from the Supreme Court; if and when such a statement exists we have to live with the two different concepts.

However, the Supreme Court is seldom called to examine fundamental legal issues on Sámi rights – a trouble in itself when fundamental legal issues remain unresolved. Last time was in 1981 with the Taxed Mountain case, which only concerned year-around-areas.² Noticeable is that the respondent in this case was the Swedish State and not private land owners as in the present Nordmaling case.

Rights to be examined on the basis of customary law

The case originated when some hundred private landowners in Nordmaling Municipality sued three Sami villages claiming that no right to winter-pasture existed on their properties. The Supreme Court held that such rights did exist on the basis of customary law. In the two lower courts the Sámi villages were also victorious, but their long-standing land use was tried under the old rules of immemorial prescription. The essential evidence was public commission reports, i.e. background material to older reindeer husbandry legislation from the late 1800s and beginning of 1900s. These reports investigated *where* reindeer husbandry were conducted at the time.³

¹Case No. T 4028-07, decided on April, 27, 2011. Translations of citations are done by the author.

² NJA 1981 s. 1. This complex case regarded above all claimed Sámi ownership to an area called taxed mountains, but included an examination of the reindeer husbandry legislation. In this part the Supreme Court held that the reindeer herding right was a civil right founded on immemorial prescription and shielded by the constitution against takings without compensation.

³ See the case at 7.

It has been unclear how the applicable provision in the Reindeer Husbandry Act⁴, section 3, should be interpreted with respect to winter-pasture. The provision only mentions that certain areas subject to winter-pasture can be practiced from 1st of October till 30th of April, where such usage has been conducted “of age” (*av ålder*).⁵ As said, the Supreme Court found that rights to winter-pasture shall be tried on the basis of customary law.⁶ Simultaneously, the Court established that the rules on immemorial prescription in the old Property Code (from 1734) “do not fit well with the recognition of nomadic reindeer herding rights of the Sámi”.⁷ This statement must be understood as an important explanation of why the Supreme Court chose to refrain from the rules of immemorial prescription.

However, when declaring that customary law shall be used as the legal basis, some conditions must guide the assessment and here the Supreme Court used a few conditions from immemorial prescription.⁸ As a starting point some 90 years of land use should be required for establishing a right, and moreover, the reindeer husbandry on these lands must have been continuous.⁹ Another condition to be applied is that the reindeer husbandry, during the time the right is established, must be undisputed and unhindered (*okvald och ohindrad*), which allows the Court to take into account protests from land owners and others using the same areas on the basis that reindeer husbandry is illegitimate. Finally, the burden of proof was placed on the Sámi villages.

Regarding these conditions, I can only see that the Court used two of them directly: an undisputed and unhindered use and the onus of proof. While the Court found that a customary right to reindeer herding already was established at the latest in the very beginning of the 1900s (on the basis of old commission reports),¹⁰ it was not necessary to apply the two other conditions.

Despite the fact that the Court used a few conditions from immemorial prescription, they firmly held that a freer assessment of facts can be done, and with the basis in how reindeer husbandry actually is carried out.¹¹ With other words the actual and specific Sámi land use is to be taken into account, a very important step forward that show considerable similarity with the important Norwegian Selbu case from 2001.¹² It is however somewhat vague how the Supreme Court has considered the specific features of the reindeer husbandry in the Nordmaling case. In relation to their discussion on the geographic extent of the reindeer herding right, they emphasized weather conditions during the winter season as directly determinative for the reindeer’s migration and the need of spare areas, and the available pasture differs thus from year to year.¹³ A consequence is that the reindeer husbandry is in need of vast areas. The Court found accordingly that reindeer herding rights existed in the whole Municipality.

Short conclusion

As said, the Nordmaling case is an important step forward for the recognition of the Sámi reindeer herding right in Swedish law. By turning to customary law as the legal foundation of the right, the

⁴ Swedish Code of Statutes (*SFS*) 1971:437.

⁵ The word ”of age” is seen as synonymous with the older expression used, ”by old custom” (*efter gammal sedvana*). See at 7-8.

⁶ See the case at 9.

⁷ See the case at 9.

⁸ See the case at 12-13 and 15.

⁹ Interruptions in the land use due to natural causes were accepted.

¹⁰ See the case at 48 and 54.

¹¹ See the case at 10.

¹² Rt. 2001 s. 769. This was a Supreme Court case in plenum regarding reindeer husbandry on private lands.

¹³ See the case at 28-30 and 56.

Court has developed a wise and creative judgment which elegantly and effectively has solved what the Swedish legislator has not been able to. Such explicit law-making is rare to see in Swedish courts where the element of judge-made law is restrained and subordinate. There is a distinction between customary law and immemorial prescription. Principally, while the concept of customary law denotes unwritten law, it is chiefly maintained and developed by courts, something that gives the court a larger margin of discretion.

There are nevertheless still legal issues regarding Sámi rights to use land and natural resources that are unsolved, both concerning reindeer husbandry and other traditional activities (chiefly hunting, fishing and handicraft). Hopefully future Supreme Court cases can shed light on some of these issues.