

SHORT REPORT

THE 2011 SWEDISH SUPREME COURT RULING: A TURNING POINT FOR SAAMI RIGHTS

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In 1998 a lawsuit was filed at the Umeå District Court, Sweden, by 120 landowners in Nordmaling against the three Saami villages of Ran, Vapsten and Umbyn. The complaint concerned the entitlements to lands in the territory of Nordmaling, owned by the plaintiffs but habitually accessed by the Saami as winter pasture for their reindeer. The question was whether the Saami villages fulfilled the legal requirements of use over time and had the right to herd according to customary right. In 2006 the landowners lost their claims in the District Court, which ruled in favour of the Saami, establishing the Saami villages' customary right in the disputed territories. The landowners appealed to the Court of Appeals in Övre Norrland, but lost again in 2007. The case was then appealed to the third and highest legal instance, the Swedish Supreme Court, which reached its verdict on 27 April 2011, ending the 14-year-long legal process. The Supreme Court upheld the previous verdicts, ruling that the Saami reindeer herders are entitled to graze their animals in the territory of Nordmaling according to the principle of customary rights. This is the first major legal victory for the Saami after decades of defending their right to herd reindeer on privately owned lands. Had the three Saami villages lost access to these winter pastures, the herders would have had to choose either to stop their herding practices overall, or to reduce significantly the number of animals, putting at risk the survival of their livelihood and culture as pastoralists over the long term. Besides granting herding rights in Nordmaling to the herders of Ran, Vapsten and Umbyn, this final ruling provides important guidelines about Saami land rights more broadly. The court confirmed that customary rights form the strongest legal principle for herding rights on winter pastures, and defined herding rights as collective rights that apply to the whole Saami reindeer herding population, and cannot expire. These new legal guidelines represent a call for a redefinition of state responsibilities in these matters, as well as stronger political measures to understand and solve the periodical local conflicts between Saami herders and landowners.

Legal Precedents to the Nordmaling Case

The Saami victory in the Nordmaling case needs to be understood against the long list of similar cases that preceded it. The first major legal process where Saami villages claimed stronger rights to land and water was the Altevåtn case, tried in the Norwegian Supreme Court and closed in 1968. In that instance,

Swedish Saami herders obtained confirmation of their ‘immemorial’ land rights (sw. *Urminnes hävd*) to summer grazing in parts of Norway. The Altevatu victory sparked a similar legal contest for land rights in Sweden, known as the Taxed Mountain case (sw. *Skattefjällsmålet*) which closed in 1981. The Saami asked for confirmation of their user rights and possibly even ownership rights (based on ‘immemorial right’), over specific contested northern territories that are used year-round for herding purposes. The Supreme Court ruled against the Saami claims, but confirmed that a nomadic population *could* acquire ownership rights to land and water through ‘immemorial use’, defined as occupation and use gained so far back in time that no one knows or can remember when their ancestors first came to be there. The ruling for the Taxed Mountain case also established that the burden of proof for immemorial right rests with the Saami and must be secured in court for each contested land area. The Saami have since been fighting for their rights to use lands for grazing through drawn-out and costly legal processes, which they have most often lost.

In the 1990s a number of forest companies joined seven hundred landowners in a lawsuit against Saami herders in what came to be known as the Härjedalen case. The land owners claimed that the Saami lacked customary rights to herd their reindeer ‘below’ the border of the defined year-round grazing areas² in the territory of Härjedalen, and accused the reindeer herds of damaging newly planted tree saplings. Contrary to the Taxed Mountain case, where the Saami had been up against the Swedish State, it was now private landowners who opposed them in court. Nevertheless, the burden of proof remained with the Saami: they had to show evidence for their immemorial occupation and use of the land for grazing purposes. The first trial of the Härjedalen case ended in 1996, when the District Court ruled in favour of the landowners and argued that the Saami herders did not fulfil the requirements to continue to use the disputed territories for herding purposes. As a consequence, the Saami herders in Härjedalen were no longer able to use their main winter pasture areas without encountering a grazing fee. The Saami villages appealed the ruling to the Court of Appeals in Norrland, but lost again in 2000. The legal process came to an end in 2004 when the Supreme Court decided not to grant permission for trial. Following this outcome, other private landowners and forest companies were swift to file their own claims against Saami winter grazing usage. Often lacking the financial means for legal representation, or not being able to afford the risk of paying all the legal fees should they lose the case, the Saami villages lost territory after territory.

In an effort to meet growing national and international criticism, a number of political initiatives were introduced during the 1990s by the Swedish State. The Saami Parliament was established in 1993 as a state authority and simultaneously as a democratically elected Saami political representation, with the overall assignment to monitor issues related to Saami culture. In the years following the Härjedalen case, several government investigations were also formulated in order to clarify Saami entitlements to land and water within defined all-year grazing

areas and seasonal herding areas. However, as there was a lack of political will to implement the findings of the investigations, they only led to additional investigations, without materializing in actual legislation.³ This state of affairs has attracted more international reproach to Sweden for failing to meet its obligation to protect Saami culture, livelihoods and indigenous rights.⁴

The Legal Reasoning in the Nordmaling Case

A key argument presented by the landowners during the Nordmaling trial was that the court should strictly enforce the old Land Code (sw. Gamla Jordabalken) basing herders' entitlements to winter pastures on the possibility of proving 'immemorial right', as with the all-year pastures in the Taxed Mountain case. On the other hand, the Saami villages argued that the principle of immemorial right was not appropriate to the nature of the litigation, since it required proof of intense use and ancient documentation of borders that would automatically rule out their intermittent use of winter pastures.

Indeed, the legal principle of 'immemorial right' is formulated on the basis of property law with an ownership focus and therefore more applicable to disputes with and amongst residential agricultural and forestry communities. As such, 'immemorial right' is far more difficult for a nomadic population to obtain due to their discontinuous use of the territories. In their ruling, the Supreme Court confirmed this point and stated that it has never been prescribed in law that the Saami have right to winter pastures only on the basis of immemorial right as set forth in the old Land Code.⁵ Instead, the Supreme Court ruled that the legal guidelines for Saami entitlements to winter pastures should be ruled according to the principle of customary right, which it found more applicable, since it allows for a broader consideration of Saami herding culture as a whole.⁶

The Supreme Court thereby set new significant guidelines for the kind of evidence that is required by the Saami reindeer herders to prove customary right to a territory, which can have a number of implications. As opposed to the principle of immemorial right, the principle of customary right is not tied to the old Land Code (expired in 1971), thus the use of land for herding, even if started after 1971, can still give rise to a customary right. Based on evidence from official investigations from the late 1800s and early 1900s on the presence of reindeer herding in the disputed areas, the court found that customary right to reindeer herding was already established in 1886, when the first reindeer herding law came into effect. Accordingly, the Saami herders need not show evidence of continuous use stretching over ninety years previous to 1886 in order to prove customary rights to a grazing area. This is contrary to previous court rulings and is significant, since it makes it practically possible for the Saami villages to substantiate such claims. Concerning the burden of proof (to prove the occupation and use of land) which in all previous land trials has been on the Saami herders, in the Nordmaling case the court adopted the so-called free assessment of

evidence, which means that the burden of proof is shared by both parts of the dispute.

Concerning the evidence (mainly based on archival research) that the customary right to herding had already been established in Nordmaling at the end of the 1800s, the landowners argued that even if such customary right had existed at one point in time, it had ceased to exist due to ensuing passivity of pastoral activity in the disputed landscapes, as evident from the very lack of documented conflicts between landowners and Saami herders. Faced with this argument, the court had to consider whether an established customary right could actually be annulled due to passivity, and whether the lack of documented conflict could be used as evidence to show the absence of herding practices. The court argued that a conclusion on lack of contrary evidence (conclusions *e silentio*) did not apply, as the mere absence of conflict could also reflect a situation in which the landowners were aware that the Saami had a customary right to herd their animals on the land and did not question it.⁷ The Supreme Court ruled that the only way in which customary rights can be annulled is if the Saami herders collectively agree to the annulment of their land rights on specific areas.

Potential Impacts of the Supreme Court Ruling

Overall, the Supreme Court paid great attention to the nature of reindeer herding, especially with regard to its dynamic use of the environment and the necessity of grazing reserves to overcome the periods of scarcity. This was in keeping with the argument presented by the Saami villages, that even if a particular pasture area is not used for many years in a row, it still retains an important role for the overall sustainability of the herding culture. Based on similar considerations, the Supreme Court also found it impossible to determine the size of specific herding pastures before considering the entire seasonal system of reindeer pasture needs in the whole area of Nordmaling. The court ruled that it is the character of the use that determines the geographical scope, and that the Saami villages have customary right to use the entire area of Nordmaling as winter pasture land.

Legal scholars specializing in Saami land rights see the shift from ‘immemorial right’ to ‘customary use’ as a very positive alternative development.⁸ Customary use is an unwritten law, while immemorial right is established in the old Land Code of 1794. Since the principle of customary use does not have a specific legal provision, the court is freer in its interpretation of the evidence, and has in this case shown a willingness to adapt legal requirements to cultural realities of land use in a region: something Saami herding representatives have long asked for.⁹

The ruling by the Supreme Court strengthens Saami herding rights in the whole national herding region and sets a critical precedent for other court cases by clarifying applicable legal measures. As a consequence, the spreading of lawsuits by landowners against Saami herders is likely to slow down, as landowners now run a substantial risk of losing and having to pay the expensive court costs.

Based on the legal guidelines established by the Supreme Court, the ruling against the Saami in the Härjedalen case in 2000 can now be challenged. Had the court in the Härjedalen case evaluated the evidence from the perspective of customary rights, the outcome of the ruling would most probably have been different. The Saami reindeer herders' organization (SSR) is therefore investigating whether such reassessment of the Härjedalen ruling is possible, given these legal developments. Meanwhile the Saami herders and the private landowners have reached an agreement in Härjedalen, where the landowners will be compensated by the herders and the state for allowing the reindeer to graze on their property.¹⁰ The Supreme Court ruling is already having an impact in a similar legal process, the so-called Råtan case, concerning Tåssåsens Saami village's herding rights in Jämtland. In the summer 2011, and in light of the Nordmaling ruling, the Court of Appeals determined that the Östersund District Court has to reassess their previous verdict on this case, where the Saami herders had lost their right to herd reindeer in some disputed territories.¹¹

In the Nordmaling case, the Court of Appeals had argued that it was a political failure which had led to these resource conflicts between reindeer herders and landowners. Thus, while the 2011 ruling by the Supreme Court in the Nordmaling case is clearly positive for Saami land rights in Sweden, the underlying conflict between the reindeer herders and landowners is by no means over. The Court ruled on the fundamental matter of entitlement, but it still remains to be determined to what extent the land 'owners' claims of damages to land can be solved through state-funded economic compensation. Similarly, the Nordmaling verdict provides no guidance for circumstances where encroaching industrial development, such as mining, logging or wind-power development, makes it impossible for Saami herders to use the pastures to which they have customary right. Does Saami customary use of land for reindeer grazing also imply an obligation, on the part of the landowner, to protect it from developments which would make such use difficult or close to impossible? It is also not yet clear to what extent the Nordmaling verdict will have an effect on the consultation right of Saami villages and the ways in which Saami input is considered in decision-making processes. By Swedish regulation, stakeholders should be consulted by any entity wishing to encroach on their rights. Hence the hydroelectric power companies should consult with the Saami villages in question if a dam is planned on their lands, and the forestry owners should consult with the Saami villages if they wish to log in areas grazed by reindeer. In the past such consultation has been rather perfunctory (more a matter of telling than asking or conferring). With stronger land claims, Saami desires should be strengthened as should be the consultation process itself.

In conclusion, the 2011 verdict by the Swedish Supreme Court on the Nordmaling case represents an important advancement on a thorny problem, but the conflict between landowners and Saami herders cannot be eliminated by a Court ruling. There is also a need to find more imaginative and constructive political solutions,

based on a sound understanding of the historical roots of the issue. The responsibility for such initiatives rests ultimately with the Swedish State, as it is the state that, historically, has shaped and to a great extent created the roots of the problem in the first instance.

Notes

1. Department of Cultural Anthropology, Uppsala University, Sweden.
2. The border of the year-round grazing areas runs roughly in a northeast-southwest direction. Swedes say 'below the border', as these year-round grazing areas are essentially in the mountainous part of the country.
3. Ongoing official investigations include: 'Samerna ett ursprungsfolk i Sverige' [The Saami, an indigenous people in Sweden], *Frågan om Sveriges anslutning till ILO-konvention nr 169* [The Question concerning Sweden's ratification of the ILO Convention 169]. SOU 1999: 25; 'En ny rennäringspolitik – öppna samebyar och samverkan med andra markanvändare. Betänkande av Rennäringpolitiska kommittén' [A new reindeer herding policy – open Saami villages and cooperation with other land users. Report of the Reindeer-Policy Committee]. SOU 2001: 101; 'Sametingets roll i det svenska folkstyret' [The Saami Parliament's role in Swedish democratic governance]. SOU 2002: 77; 'Samernas sedvanemarkar'. Betänkande av Gränsdragningskommissionen för renskötselområdet ['Saami lands of customary use'. Report of the Border Survey Commission for the reindeer herding area]. SOU 2006: 14; 'Jakt och fiske i samvetkan'. Slutbetänkande av Jakt- och Fiskerättsutredningen. ['Hunting and fishing in cooperation'. Final Report of the Hunting and Fishing Rights Investigation]. SOU 2005: 116.
4. Repeated critique has been made by UN convention committees (specifically ICCPR and CERD), in consultation with reports produced by Saami and other Human Rights organizations over the past ten years. See also recent recommendations issued by the Human Rights Council in its IPR review of Sweden and 2010 report on the Saami by James Anaya, UN Special Rapporteur on Indigenous Peoples. These recommendations and reports are all published under Sweden on the homepage of the Office of the High Commissioner for Human Rights, which can be found at www.ohchr.org
5. Swedish Supreme Court ruling in Nordmaling, case T 4028-07, Stockholm, 27 April 2011, pp. 12.
6. Ibid.
7. Ibid. pp. 26.
8. Christina Allard, 'Analys: Rätten till vinterbete baseras på sedvanerätt – nytt vägval av HD', *Karnov Nyheter*, Thomson-Reuters, 2 June 2011.
9. Interview on Swedish Radio with the Saami reindeer herders' organization (SSR) representative and juris doctor (doctor of law) Mattias Åhren concerning the Nordmaling ruling, published on 3 May 2011. The full interview (in Swedish) can be heard on <http://sverigesradio.se/sida/artikel.aspx?programid=2327&artikel=4484443>
10. Ibid.
11. 'Pressinformation ang. Rätanmålet', *Gärde Wesslau Advokatbyrå*, 5 July 2011.