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# The Nordic countries' law on Sámi territorial rights<sup>1</sup>

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Territorial rights are important for the Sámi people, as they are for all indigenous peoples. Land is the asset which supports the Sámi culture and responsible for its long-standing survival. This article compares property laws in Norway, Sweden and Finland as to how Sámi rights to land and natural resources are articulated and recognized. These rights are based on old doctrines: 'immemorial usage' in Norway and 'immemorial prescription' in Sweden and Finland. Although the doctrines are generally regarded as equivalent, the article discusses a few significant differences. Subsequently the basic principles underpinning the two doctrines are analyzed, contrasted and discussed, with particular focus on reindeer herding rights.

**Keywords:** Sámi rights, territorial rights, immemorial usage, immemorial prescription, Norwegian law, Swedish law, Finnish law, reindeer herding

## 1 Introduction

Sámi<sup>2</sup> rights to land - rights to own or to use land and natural resources - are crucial. Land represents the material and spiritual foundation of Sámi cultural identity, and provides the basic necessities for

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<sup>1</sup> Warm thanks to LL.Lic. Juha Joona, of the Northern Institute for Environmental and Minority Law (NIEM) and Heikki Hyvärinen, former lawyer at the Finnish Sámi Parliament, for excellent help and valuable comments on Finnish law. Any remaining errors are the sole responsibility of the author.

All translations in the article are by the author.

Author's note 30-04-11: After this article was completed and had passed through the usual peer review process, the Swedish Supreme Court released its verdict concerning the Nordmaling case on April 27, 2011: Case No. T 4028-07. Although previous Swedish cases on Sámi territorial rights have been articulated through immemorial prescription, the Supreme Court here based their reasoning on customary law (*sedvanerätt*) with regard to reindeer husbandry on so called winter-pasture areas. (Compare with my case review in this issue of the *Arctic Review on Law and Politics*.) This article should therefore be read with the verdict of the Nordmaling case in mind, i.e. the analysis of Swedish law concerning the recognition of reindeer herding rights for winter-pastures is no longer relevant. In Swedish reindeer husbandry legislation there is a distinction made between year-around-areas and winter-pasture areas. For year-around-areas immemorial prescription still applies.

traditional activities like reindeer husbandry. Such rights are often referred to as territorial rights.<sup>3</sup> Seen as a whole, the three Nordic States - Norway, Sweden and Finland - have until very recently recognized such Sámi territorial rights only as usufruct rights.<sup>4</sup> Developments in Norwegian law, through case law and legislation, have meant a breakthrough in this respect. Nevertheless, to various degrees and manners, the three countries still struggle with the recognition of limited Sámi rights, chiefly the recognition (and protection) of the reindeer herding right.

As to ownership, the States implicitly or explicitly claim ownership of *Sápmi*,<sup>5</sup> the vast cross-border territory that constitutes the customary Sámi home area.<sup>6</sup> For Norway this picture must be somewhat modified given a shift in attitude related to certain areas, particularly in the very north of the country.<sup>7</sup> Concerning an area called Svartskogen in northern Norway, the Norwegian Supreme Court found in 2001 that the local population (of Sámi majority), not the State, were the rightful owners.<sup>8</sup> Additionally, a new statute has transferred a majority of “state-owned” lands in the very north in Finnmark, regarded as the core Sámi area, to a new body (the Finnmark Estate) to manage these lands.<sup>9</sup> Importantly this statute also laid down processes for examining the rights of the Sámi and other locals to the Finnmark Estate lands, meaning that still existing Sámi rights, ownership or limited rights, are being investigated by a specific commission.<sup>10</sup>

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<sup>2</sup> Also spelled Saami or Sami. The Sámi were formerly known as Laps.

<sup>3</sup> See e.g. J. Anaya, *Indigenous peoples in international law* (Oxford University Press, Oxford, 2004) p. 143.

<sup>4</sup> See also the report of the UN Special Rapporteur James Anaya, *The situation of the Sami peoples in the Sápmi region of Norway, Sweden and Finland*, A/HRC/18/XX/Add.Y, 2011 at 46-52.

<sup>5</sup> See e.g. N. Bankes, *Legal Systems in Arctic Human Development Report* (Stefanson Arctic Institute, Akureyri, 2004) pp. 112-113. The issue of State ownership is in general contested among the Sámi.

<sup>6</sup> For a map, see [www.eng.samer.se/servlet/GetDoc?meta\\_id=1002](http://www.eng.samer.se/servlet/GetDoc?meta_id=1002) (accessed March 1, 2011).

<sup>7</sup> This shift must be understood broadly. For instance, the Norwegian State has nowadays in various public documents recognized that the country is founded on the territory of two peoples: the Norwegian and the Sámi, thereby recognizing the country's colonial history.

<sup>8</sup> Rt. 2001 s. 1229.

<sup>9</sup> Finnmark Act, June 17, 2005 No. 85.

<sup>10</sup> Such rights may be based upon prescription, immemorial usage or other proprietary concepts. This is a work currently in progress. A specific court will eventually resolve disputes over those rights. See the Finnmark Act s. 5. For a good analysis of certain issues related to the acknowledgement of rights adhering to Finnmark, see Ravn, 'Alders tids bruk og hevd som ervervsgrunnlag i samiske områder - særlig med vekt på kravet til aktsom god tro ved rettsidentifisering i Finnmark', *Tidsskrift for Rettsvitenskap*, 3/2010. A government commission has suggested a similar regime for Nordland and Troms Counties, the area south of Finnmark. See NOU 2007:13 pp. 31-35, 1169.

With respect to territorial rights, it is essential to recall that the Sámi were already living on the lands when the present State boundaries were established and cut across *Sápmi*.<sup>11</sup> Those borders are still somewhat problematic, in particular for reindeer husbandry. Along with many other indigenous populations residing in Western societies, the Sámi have long struggled to have their territorial rights recognized, and above all, their ownership rights.

This article focuses on the three counties' proprietary regimes and Sámi traditional land uses, and more precisely the legal doctrines of 'immemorial usage' (Norway) and 'immemorial prescription' (Sweden/Finland). It addresses and analyses the legal foundation of territorial rights of the Sámi in the three countries in a comparative manner. The aim is to contrast and discuss the general principles underpinning the recognition of such rights and to point to differences among the three countries, especially as the Sámi are one people in and among the three countries. While covering three countries' laws, the article mainly provides a condensed analysis and discussion on the matter. Naturally not all complex facets and details can be addressed. Moreover, attention focuses on reindeer husbandry since it has, to larger extent than other traditional activities, been acknowledged to establish usufruct rights to land.

It should be observed that the comparative analysis here is at a national level, since the recognition of Sámi rights is mainly rooted within the Nordic State's property laws.<sup>12</sup> Up until today a substantive review of Sámi (or other indigenous people's) land rights, challenging the domestic laws, has not seen its light at the European Court of Human Rights. Following Timo Koivurova, "indigenous peoples have not found much protection from the European Court (or Commission) of Human Rights."<sup>13</sup> For the few cases that have made their way to the European Commission or Court, it is clear that the domestic court proceedings are to determine the existence and extent of indigenous people's territorial

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<sup>11</sup> Compare with the definition in Article 1.1(b) of the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.

<sup>12</sup> Until quite recently land rights have rarely been addressed from an international human rights perspective, given that the property law regimes traditionally remain in the domain of the States' national jurisdiction. The view that States exercise territorial sovereignty is still strong, even if legislative and jurisprudential evolution occurs on different levels, in particular regarding indigenous peoples. See J. Gilbert, *Indigenous peoples' land rights under international law. From victims to actors* (Transnational Publishers, Ardsley, N.Y. 2006) pp. 87, 114-115. See also A. Xanthaki, 'Indigenous rights in international law over the last 10 years and future developments', *Melbourne Journal of International Law*, 1/2009 p. 5, where the author expresses that "land issues represent a grey area in international law, as the right to property has not acquired as strong protection as have other rights."

<sup>13</sup> T. Koivurova, 'Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects', *International Journal on Minority and Group Rights* 18/2011, p. 28.

rights.<sup>14</sup> This should be contrasted against the evolutionary case law in the Inter-American human rights system.<sup>15</sup>

In relation to the 1989 ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, only Norway is party to the Convention.<sup>16</sup> Article 14 of the Convention, the essential land rights provision, more or less presupposes that the recognition of territorial rights is to be done according to national law.<sup>17</sup>

Consequently the analysis in this article is based on national laws, chiefly the two doctrines. It is common to assume, without deeper examination, that immemorial usage and immemorial prescription are equivalent.<sup>18</sup> With close analysis differences do emerge. The article argues that despite superficial resemblance, rather indistinct differences may work in advance for the recognition of Sámi territorial rights in Norwegian law in contrast to the situation in Sweden and Finland, and may help explain the disparity in recognition of Sámi territorial rights that we see today.

## 2 Reindeer husbandry

### 2.1 Some basic information

Reindeer husbandry is a traditional Sámi industry, today carried out only by a minority of roughly ten percent of all Sámi.<sup>19</sup> Of course there are other revenue-producing traditional Sámi activities, such as

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<sup>14</sup> *Ibid.*, p. 26. The cases have either been deemed inadmissible or the protection awarded has been scanty. See e.g. *Handölsdalen Sami village and Others v. Sweden*, Appl. no. 39013/04, Judgement March 30, 2010. Here the Court only found a violation of Article 6.1 in regard to the length of the proceedings.

The cases from the UN Human Rights Committee on Article 27 (protection of culture) do not address the conditions for territorial rights. See e.g. *J. Länsman et al v. Finland* Comm. No. 1023/2001, adopted April 15, 2005. Compare with the UN Human Rights Committee, *General Comment No. 23: The rights of minorities (Art. 27)*, CCPR/C/21/Rev.1/Add.5.

<sup>15</sup> See e.g. the landmark case of *Awás Tingni: Mayagana (Sumo) Awás Tingni Community v. Nicaragua*, Inter-American Court of Human Rights, judgement of 31 August 2001 (Series C No. 79). Here the communal property of Awás Tingni was upheld by the Court despite the lack of State recognition, and hence it was a violation of the right to property. In subsequent matters the Inter-American Human Rights institutions have confirmed the ruling in the *Awás Tingni case*.

<sup>16</sup> The only binding instruments that recognize indigenous peoples' territorial rights remain the two ILO treaties, including the ILO Convention No. 107 from 1959.

<sup>17</sup> This is also the view of the Norwegian Sámi Rights Committee which recently analysed the matter. See NOU 2007:13 pp. 231, 233. Hence, national property law applies and, in addition, indigenous customs and land tenure systems should be considered. Compare with Articles 8(1), 13(1) and 34.

<sup>18</sup> See e.g. Eriksen, *op. cit.*, p. 59; SOU 2006:14 p. 464; NOU 2007:13 p. 247.

<sup>19</sup> Most Sámi live in Norway, some 50,000-65,000, while the official figure in Sweden is some 20,000. There are approximately 8,000 Sámi in Finland and estimated up to 2,000 in Russia. See *Nordisk samekonvensjon*:

fishing (in coastal areas, lakes and rivers) and handicrafts, but these have generally been overlooked by the States when it comes to acknowledgement and codification.<sup>20</sup>

In Norway, Sweden and Finland, reindeer husbandry is carried out on both state-owned and privately-owned lands, a situation that is explicitly mentioned only in Finnish legislation.<sup>21</sup> The right to herd reindeer is generally characterized as a usufruct right that burdens the title to the land. The table below provides some basic figures for the three countries.

Table 1. Comparison of reindeer husbandry in Norway, Sweden and Finland

	<b>Size of the reindeer herding area (% of State territory)</b>	<b>Organisation form</b>	<b>Basic statute and its issue date</b>	<b>Sámi monopoly of reindeer husbandry</b>
Norway <sup>22</sup>	About 40%	80 reindeer herding districts <sup>23</sup>	Reindeer Husbandry Act, 2007 <sup>24</sup>	Yes
Sweden <sup>25</sup>	About 40%	51 Sámi villages	Reindeer Husbandry Act, 1971 <sup>26</sup>	Yes
Finland <sup>27</sup>	About 35%	57 reindeer herding cooperatives	Reindeer Husbandry Act, 1990 <sup>28</sup>	No

From the data it is obvious that reindeer husbandry is carried out over vast areas in all three countries: in Norway and Sweden on some 40% of their respective territory, and in Finland somewhat less. Reindeer husbandry is concentrated in the northern and mid parts of each country, meaning that the majority of these particular areas are subject to reindeer husbandry. In these same areas other activities are also carried out, such as forestry, agriculture, mining and tourism. It is not difficult to grasp that multiple stakeholders compete to use the land and natural resources simultaneously within these areas.<sup>29</sup> Also, outdoor activities related to public access to lands (e.g. snow scooter driving, hiking,

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*utkast fra finsk-norsk-svensk-samisk ekspertgruppe* (2005) p. 106. However, the figures are approximate and no official census has been done recently.

<sup>20</sup> In Norway a government commission has investigated Sámi coastal fishing rights. See NOU 2008:5.

<sup>21</sup> Finnish Reindeer Husbandry Act, s. 3.

<sup>22</sup> See [www.reindrift.no/?id=300&subid=0](http://www.reindrift.no/?id=300&subid=0) (accessed March 1, 2011).

<sup>23</sup> The exact number may vary from year to year, but the number in recent years has been fairly constant, around 80 districts, NOU 2007:13 p. 380.

<sup>24</sup> Reindeer Husbandry Act, June 15, 2007 No. 40 (Norwegian RHA).

<sup>25</sup> *Svensk rennäring* (Statistiska centralbyrån, Stockholm, 1999) pp. 15, 123.

<sup>26</sup> Reindeer Husbandry Act (1971:437) (Swedish RHA).

<sup>27</sup> See [www.paliskunnat.fi/default2.aspx?kieli=en-US](http://www.paliskunnat.fi/default2.aspx?kieli=en-US) (accessed March 1, 2011).

<sup>28</sup> Reindeer Husbandry Act 14.9.1990/848 (Finnish RHA).

<sup>29</sup> See also the UN report, *supra* note 4, at 55-61.

hunting and fishing) sometimes interfere with reindeer husbandry.<sup>30</sup> In addition, the exact boundaries of reindeer herding areas remain largely undefined, in particular in Sweden,<sup>31</sup> which further compounds the problems outlined above.

Specific administrative organizations (the reindeer herding district, the Sámi village, and reindeer herding cooperative) are tasked to manage reindeer husbandry over a geographically-defined area.<sup>32</sup> Although the structures for reindeer husbandry are operated differently in the three countries, there are a few basic similarities. Another common denominator is that the organisations have the authority to act as representatives and have an important function for managing reindeer husbandry. Moreover, reindeer husbandry may be performed only through these prescribed bodies, and membership is mandatory.<sup>33</sup>

As indicated in table 1 above, Norway has amended its legislation relatively recently, whereas Sweden has not been able to arrive at an acceptable solution despite several government reports and drafts.<sup>34</sup> Finnish legislation differs in one major aspect from the Norwegian and Swedish situation. Reindeer husbandry is not an industry exclusive to the Sámi in Finland, where Finnish settlers and farmers began quite early to herd reindeer. As a result, anyone permanently living within the Finnish reindeer herding area, and who is a citizen of a country within the European Economic Area, has the right to own and herd reindeer.<sup>35</sup> This is an important distinction between Norway and Sweden on the one hand, and Finland on the other, and impacts legislation concerning reindeer husbandry as well as reindeer herding rights, as discussed next in relation to Finnish law.

## 2.2 The reindeer herding right

The Sámi reindeer herding right is understood as a civil right in all three countries, even if this is not stated in the Finnish statute.<sup>36</sup> In Norway and Sweden, the reindeer herding right consists of a bundle

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<sup>30</sup> Snow scooter driving is not part of the rights in ‘the public access to land’, but it is often a prerequisite for travel to remote hunting areas. This problem is more accentuated in Sweden and Finland, while Norwegian legislation is more restrictive.

<sup>31</sup> There has been a government commission investigating the matter, which concluded that most of northern Sweden is pasture areas. So far, this has not led to any government action. See SOU 2006:14.

<sup>32</sup> In the Finnish legislation, the term “reindeer herding cooperative” means only the administrative organisation and not the area as such. See RP 244/1989 p. 7. This is, however, doubtful.

<sup>33</sup> Norwegian RHA, ss. 5-6; the Swedish RHA, ss. 6 and 1 para. 3; and RP 244/1989 p. 7.

<sup>34</sup> SOU 2001:101; Ds 2009:40. However, some decision-making authority was transferred from the State to the Sámi Parliament, Prop. 2005/06:86.

<sup>35</sup> Finnish RHA, ss. 1, 2 and 4. There are some conditions for the ownership, see ss. 6 and 9-10.

<sup>36</sup> Norwegian RHA, s. 4 para. 1; Swedish RHA, s. 1 para. 2. The reference to immemorial usage and immemorial prescription respectively, means that this is the reindeer herding right’s primary legal basis - and not the statute itself. On Finnish law see section 3.4.

of different rights stated in the Acts.<sup>37</sup> The most basic is the right to use the lands for pasture. The right includes, among other things, a right to move reindeer between different pastures, a right to construct buildings and structures necessary for reindeer husbandry such as cots, storehouses and fences, and a right to take timber for such buildings and structures, as well as hunting, trapping and fishing rights. The provisions concerning reindeer herding rights are detailed and can best be understood as a codification of older rights. In fact very little has been changed since the first legislative enactments, and the present Norwegian and Swedish provisions are similar in this respect.

## 3 The recognition of territorial rights

### 3.1 Introduction

During most of the 1900s, Norway, Sweden and Finland assumed that the Sámi semi-nomadic and wide-ranging use of land did not qualify for establishing rights to land and resources. To some extent this assumption still prevails, especially concerning Sámi land ownership, where cultivation of land has since long formed the standard. Recently a major turning point came in Norway with the Selbu and Svartskogen cases in 2001.<sup>38</sup> The Swedish Nordmaling case (court of appeal) in 2007 was the first case to uphold reindeer herding rights on private lands.<sup>39</sup> Finland is so far lacking case law on these matters.

Apart from historical case law, cases on Sámi rights started to emerge, in principle, after the Second World War. Sámi territorial rights have been and are articulated chiefly in accordance with two old proprietary law doctrines: immemorial usage (*alders tids bruk*) in Norway, and immemorial prescription (*urminnes hävd*) in Sweden and Finland. To some extent occupation and/or (normal) prescription are being discussed in relation to Sámi land rights, at least in the legal literature.<sup>40</sup> Space

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<sup>37</sup> Norwegian RHA, ss. 19-26; Swedish RHA, ss. 15-25.

<sup>38</sup> Rt. 2001 s. 769; Rt. 2001 s. 1229. Two older cases which have been fundamental for the recognition of Sámi territorial rights in Norway should also be mentioned here: the Altevann case (Rt. 1968 s. 429) and the Brekken case (Rt. 1968 s. 394). The first case acknowledged a protection (compensation for infringements) of customary and long-term usage by (Swedish!) reindeer herders. The latter case concerned hunting, fishing and trapping rights for reindeer herders, and the Supreme Court upheld these rights on the basis of prolonged usage. Subsequent cases demonstrate a more wobbly path, see section 3.2.2 below.

<sup>39</sup> Hovrätten för övre Norrland, 2007-09-19, T 155-06. The case is now pending at the Supreme Court.

<sup>40</sup> See e.g. G. K. Eriksen, *Alders tids bruk* (Fagbokforlaget, Bergen, 2008) pp. 43, 186; S. F. Skogvang, *Samerett*. (2 ed., Universitetsforlaget, Oslo 2009) pp. 232-233; Bengtsson, *Samerätt* (Norstedts juridik, Stockholm, 2004) p. 82; C. Allard, *Two sides of the coin - rights and duties* (Luleå tekniska universitet, Luleå 2006) pp. 285-288. On historical rights with transnational relevance see e.g. K. Korpijaakko-Labba, *Om samernas rättsliga ställning i Sverige-Finland* (Juristförbundets förlag, Helsingfors 1994); O. Jebens, *Om eiendomsretten til grunnen i Indre Finnmark* (Cappelen akademisk forlag, Oslo 1999).

does not permit discussion of these aspects here, but the law today essentially evolves around these two doctrines. In Norway, the country leading this jurisprudential development, it has been natural to assert both prescription and immemorial usage before the courts, but for the most part and with specific reasons, the courts have articulated their reasoning under the doctrine of immemorial usage (see next section).

With immemorial usage and immemorial prescription, a certain set of conditions apply. Apart from long-term use of a certain area, as a general condition the land use must have been sufficiently *intensive, continuous* and *exclusive* to succeed into a right.<sup>41</sup> This is similar for both doctrines. A common and essential thread is that the two doctrines were developed for more stationary land uses adapted to the needs of farming society.<sup>42</sup> For this reason one must take into account specific Sámi land use traditions and views when applying conditions inherent in the two doctrines, something explicitly done only by the Supreme Court in Norway.

## 3.2 Immemorial usage in Norwegian law

### 3.2.1 *The doctrine of immemorial usage*

In this section the doctrine's main features and characteristics will be examined on the basis of legal literature. While immemorial usage shows similarities with prescriptive rules, the doctrine will be contrasted against prescription. This relationship is relevant for understanding immemorial prescription in Swedish and Finnish law. In the two following sections the application of immemorial usage is illustrated with the leading Selbu and Svartskogen cases.

Immemorial usage has been said to contain a certain patina, through its age more than distinctiveness, meaning its conditions are somewhat vague.<sup>43</sup> It is an old proprietary doctrine which provides that one can establish ownership or lesser rights based upon use over time.<sup>44</sup> In contrast to Sweden and Finland, immemorial usage has maintained a strong position in Norwegian law, and both old and new case law are proof of that. The doctrine is not only applied in relation to Sámi territorial rights, and its continued usage also explains why it has been and still is discussed in legal literature.<sup>45</sup> Gunnar Eriksen has concluded that because of the doctrine's flexibility and relative content, it has proved itself as a vigorous and practical part of Norwegian property law.<sup>46</sup>

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<sup>41</sup> Compare e.g. Skogvang, *op.cit.*, p. 234.

<sup>42</sup> Allard (2006), *op. cit.*, pp. 271-272; Eriksen, *op. cit.*, p. 348.

<sup>43</sup> S. Brækhus and A. Hærem, *Norsk tingsrett* (Universitetsforlaget, Oslo 1964) p. 604.

<sup>44</sup> T. Falkanger and A. T. Falkanger, *Tingsrett* (Universitetsforlaget, Oslo, 2007) p. 324.

<sup>45</sup> Gunnar Eriksen defended a doctoral thesis on immemorial usage in 2008: Eriksen, *op. cit.* For references to other legal literature see Falkanger and Falkanger, *op. cit.*, p. 323 and Brækhus and Hærem, *op. cit.*, p. 605.

<sup>46</sup> Eriksen, *op. cit.*, p. 369.



Rights established by immemorial usage can be explained in brief as *a certain use over a long time period* that has occurred *in good faith*.<sup>47</sup> These three main conditions were developed long ago chiefly through case law and recently reiterated by the Selbu and Svartskogen cases.<sup>48</sup> Since immemorial prescription is not codified in legislation, these conditions form a part of unwritten law. The conditions inherent in immemorial prescription are somewhat vague, both due to its unwritten character and because immemorial usage has historically been influenced by the rules on prescription. Therefore it is not possible to draw a clear line between immemorial usage and prescriptive rights.

Prescriptive rules have been part of written law since the medieval codes, and from the 19<sup>th</sup> century onwards the kinship between immemorial usage and prescription has been accentuated.<sup>49</sup> The present legislation on prescription is from 1966 and includes ‘ownership prescription’ with a prescriptive time period of 20 years and ‘usufruct prescription’ with a time-frame of 50 years.<sup>50</sup> The latter prescription allows for communal uses over a long time (50 years) as a mean for establishing limited rights, for example by local peoples in rural communities.<sup>51</sup>

The relatedness between prescriptive rights and immemorial usage is also illustrated by the fact that immemorial usage has been used as a subsidiary claim when the rules on prescription did not succeed, typically when the land use had not been sufficiently comprehensive and continuous.<sup>52</sup> So what are the main differences? Most obvious is *the time period*, which is much longer for immemorial usage. Compare here with the three main conditions for immemorial usage stated above in italics. A fixed time-frame for immemorial usage has not been set authoritatively, but must be substantively longer than 20 years.<sup>53</sup> As the concept itself suggests, the usage must be immemorial, or in other words olden. In literature and case law the time span varies from some 50 years to 150, but as a rule of thumb the time period should be about 100 years total.<sup>54</sup> A lower threshold for immemorial usage must today be set to 50 years because of the statutory ‘usufruct prescription.’

Another difference is related to *the land use*. For immemorial usage the same requirement is not imposed upon a visible land use, such as through cultivation or the need to erect structures as proof of a particular on-going land usage. But nevertheless the land use must be of such character that the

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<sup>47</sup> Brækhus and Hærem, *op. cit.*, p. 610.

<sup>48</sup> Rt. 2001 s. 769 at pp. 788-789; Rt. 2001 s. 1229 at p. 1241.

<sup>49</sup> Eriksen, *op. cit.*, pp. 96, 370-371.

<sup>50</sup> Act on Prescription, December 9, 1966 No. 1 ss. 2 and 8.

<sup>51</sup> ‘Usufruct prescription’ has not meant a decline in claims on immemorial usage, as supposed by the legislator.

<sup>52</sup> Falkanger and Falkanger, *op. cit.*, p. 324.

<sup>53</sup> Brækhus and Hærem, *op. cit.*, p. 611.

<sup>54</sup> *Ibid*; Falkanger and Falkanger, *op. cit.*, p. 325; Eriksen, *op. cit.*, pp. 186-188. It is mainly in a few old cases where the Supreme Court has accepted around 50 years, probably under influence of Danish law, see Eriksen, *op. cit.*, p. 191.

rightful owner realises the need to intervene.<sup>55</sup> This is also important for the condition of occurring in good faith (see further below).

The intensity of use is more lenient for immemorial usage, principally allowed because of the longer time span. Eriksen has concluded that the intensity of the land use is “the most dynamic element in the rules on immemorial usage.”<sup>56</sup> As a synopsis, the intensity criterion is assessed with all facts taken together, but most central is that the use as such corresponds with a “normal” use of the area in question and with the rights claimed.<sup>57</sup> For example, if ownership is claimed, the use must have been all-embracing compared to how the area could have been utilised. It should also be mentioned that if the intensity criterion is met, the same kind of use must not have been performed over the whole time period, but rather that the use for each period correspond to the best and most natural usage.<sup>58</sup> A related issue is the use of large areas, typically for reindeer herding, where the intensity of the use is satisfied in some parts of the area but not in others. This was addressed by the Supreme Court in the Selbu case (see below).

The use must also have been sufficiently continuous, which is a requirement supplementary to the intensity criterion.<sup>59</sup> Here the difference in time-frame for prescription in respect to immemorial usage again becomes relevant, because ‘ownership prescription’ lapses lasting over two years mean that the prescription is broken.<sup>60</sup> The time period for allowed interruptions in land use for immemorial usage is flexible. Discontinuity in the use due to natural causes, such a seasonal fluctuation, weather conditions, logging in an area, etc., is generally accepted. Personal causes may also be accepted where relevant, for instance a man has not been able to log due to a period of sickness. As a general rule, where land use has been less intensive, only minor disruptions in the use can be accepted.<sup>61</sup>

When it comes to the criterion on exclusive authority over the area in question, it is not equally straightforward to say that requirements are more lenient for immemorial usage than prescription. For claims on ownership or limited but exclusive rights, this criterion is essential.<sup>62</sup> This means that the user of the land must have hindered or obstructed others’ use, including any use by the rightful owner. There are examples in case law of both a more lenient application of the exclusivity criterion for immemorial usage, as well as applications along the standards for prescription.<sup>63</sup> According to Eriksen

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<sup>55</sup> Brækhus and Hærem, *op. cit.*, p. 612; Eriksen, *op. cit.*, pp. 136-137; Falkanger and Falkanger, *op. cit.*, p. 325.

<sup>56</sup> Eriksen, *op. cit.*, p. 146.

<sup>57</sup> *Ibid.*, p. 141.

<sup>58</sup> *Ibid.*, p. 149.

<sup>59</sup> *Ibid.*, p. 147.

<sup>60</sup> Act on Prescription s. 6.

<sup>61</sup> Eriksen, *op. cit.*, pp. 147-148.

<sup>62</sup> Brækhus and Hærem, *op. cit.*, pp. 581, 612.

<sup>63</sup> Eriksen, *op. cit.*, p. 153.

it seems natural to start with the presumption that the criterion is somewhat less for immemorial usage, given the duration of land use required and potential risk of competing land uses at some time during this period, and that the conditions for immemorial usage in unison are flexible and relative.<sup>64</sup>

Lastly, we have the condition of *good faith*. This condition is mainly understood as being in line with the public's sense of justice: a certain usage of a piece of land should not continue when it is known to be unlawful.<sup>65</sup> This condition applies equally for immemorial usage and for prescription, but was historically not a part of the rules.<sup>66</sup> Following Eriksen, the good faith requirement has less relevance for long-term usage which began in "dusky history" than to usage of known onset. The good faith criterion may well be illusory when information about the actual use and what past users knew or ought to have known is scarce or non-existent. He argues that in such cases more emphasis should be put on documentation of the actual and continuous land use from the earliest time.<sup>67</sup> For collective usage of land it is clear that the threshold for good faith is lower than for prescription: if a few of the users are not in good faith it lacks relevance.<sup>68</sup> This view was applied in the Selbu and Svartskogen cases, both of which concerned communal use.

Accordingly in many ways the conditions for establishing rights based on immemorial usage are more lenient than corresponding conditions for prescription. The similarity between the two sets of rules is nevertheless evident. However, there are a few aspects that are distinct to immemorial usage. First and foremost the conditions for immemorial usage are internally relative and allow a free assessment of all facts taken together.<sup>69</sup> The court has therefore a large margin of appreciation. For instance, less intense land usage may be compensated by a longer period of use, and vice versa. This cannot be seen in relation to the Norwegian rules on prescription. A court may additionally pay regard to other factors, such as how awkward the land use is for the property owner or how necessary the use is for the ones claiming immemorial usage.<sup>70</sup>

Secondly, because immemorial usage is an unwritten doctrine, the conditions are easier to adapt to given circumstances, which follows from its internally relative conditions. The point here is that this

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<sup>64</sup> *Ibid.*, pp. 152, 155.

<sup>65</sup> Falkanger and Falkanger, *op. cit.*, p. 326; Eriksen, *op. cit.*, pp. 219-220.

<sup>66</sup> Under the influence of Roman law and Danish-Norwegian theory, in a case from 1844 the Supreme Court did not uphold a claim on ownership prescription because the good faith was not there. Brækhus and Hærem, *op. cit.*, p. 584. See further on this development in Eriksen, *op. cit.*, pp. 204-219.

<sup>67</sup> Eriksen, *op. cit.*, pp. 225, 226. Øyvind Ravna has also argued for a more lenient application of the good faith criterion, or even its omission, as related to claims on the Finnmark Estate. See Ravna (2010), *supra* note 10, pp. 500-501.

<sup>68</sup> Brækhus and Hærem, *op. cit.*, p. 612; Falkanger and Falkanger, *op. cit.*, p. 326.

<sup>69</sup> Eriksen, *op. cit.*, p. 132; Brækhus and Hærem, *op. cit.*, p. 611.

<sup>70</sup> Brækhus and Hærem, *op. cit.*, p. 611.

balancing of facts and eventual adjustments do not involve the legislator, but are principally driven by judges.

### 3.2.2 *The Selbu case – the reindeer herding right*

The Selbu case,<sup>71</sup> which concerns reindeer husbandry, has become instrumental for clarifying the establishment of reindeer herding rights through immemorial usage. In fact, along with the Svartskogen case, it has been seen to represent a paradigm shift, and the two cases have revitalised the doctrine.<sup>72</sup> The importance of the Selbu case must be understood with a glimpse in the rear-view mirror. In particular, three earlier cases have proved that the threshold for establishing reindeer herding rights were high.<sup>73</sup> Herding use was not regarded as sufficiently intensive and continuous, and when the Selbu case was decided in *plenum* by a total of fifteen judges, the Supreme Court set aside these previous cases. One of the most creative aspects of the verdict was the emphasis on the particular features of reindeer husbandry and its importance, for balancing of the conditions.<sup>74</sup>

Furthermore, as evidenced by the verdict, the case was decided merely on the basis of national law, despite the fact that relevant international law provisions were invoked. The Court deemed the Norwegian provisions on immemorial usage to be sufficient for the assessment of the existence of reindeer herding rights.<sup>75</sup> Of importance in the case was also the burden of proof. Present legislation imposes the onus of proof upon the property owners as long as the claim regards pasture areas within the Norwegian reindeer herding area.<sup>76</sup> This was a principle also inherent in the former reindeer husbandry legislation - and was applied for the first time in the Selbu case.<sup>77</sup>

The case regarded reindeer herding on private lands for two reindeer herding districts within the Selbu Municipality in the south-eastern part of the herding area. The dispute regarded certain outlying

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<sup>71</sup> Rt. 2001 s. 769. The decision was rendered in a vote of 9 against 6. Hereunder I refer to the majority's reasoning. The dissenting judges agreed on the basic principles but had another opinion regarding the boundary for the right.

<sup>72</sup> Eriksen, *op. cit.*, p. 324, 363.

<sup>73</sup> Rt. 1981 s. 1215; Rt. 1988 s. 1217; Rt. 1997 s. 1608. See also Ø. Ravna, *Rettsutgreiing og bruksordning i reindriftsområder* (Gyldendal akademisk, Oslo 2008) pp. 229-233.

<sup>74</sup> See e.g. Ravna, *op. cit.*, p. 239. For a summary of earlier cases related to Sámi, see e.g. Eriksen *op. cit.*, pp. 315-324; NOU 2007:13 pp. 309-311.

<sup>75</sup> Rt. 2001 s. 769 at pp. 791, 818.

<sup>76</sup> The provision explicitly states that within the Sámi reindeer herding area "there is a right to pasture..." See the Norwegian RHA, s. 4 para. 2. See also Ot.prp. nr. 28 (1994-95) pp. 30-31, 39.

<sup>77</sup> The land owners had to prove with the degree of probability that the land use did not have the necessary scope and intensity to be regarded as a lawful reindeer pasture area, see the case at p. 788.

fields of some 400 km<sup>2</sup>. The Supreme Court held that the land use was of such character as to establish a reindeer herding right on the basis of immemorial usage.<sup>78</sup>

As a point of departure the Court stated that specific regard must be taken of reindeer husbandry as a part of a traditional culture separate from the Norwegian. The Court stated that:

Since our case regards pasture rights concerning reindeer, the specific conditions within this livelihood must be considered ... The conditions must be adjusted to the land uses of the area by the Sámi and the reindeer. Regard must also be taken of the nomadic lifestyle of the Sámi. Circumstances that have been significant for other grazing animals cannot without consideration be transferred to reindeer husbandry. These circumstances must be a part of the overall assessment.<sup>79</sup>

With this interpretive principle as a backdrop, the Court emphasized in particular the need for vast pasturage and that the use may vary from year to year in correlation with weather and wind conditions and the nature of the reindeer. Therefore, it could not be required that the reindeer have pasturage in a specific area each year. This, together with the nomadic lifestyle, meant that pauses in the land use should not cause a stop in the acquisition, even if the lapse were lengthy.<sup>80</sup>

Although the Court considered historical material, including testimonies, as far back as the 15<sup>th</sup> century, the 20<sup>th</sup> century seemed to be the most crucial in the assessment. The Court concluded that even if the land use should not be sufficient up to the late 1800s, given the conditions for immemorial usage, the Sámi had in any case established pasture rights when their land use in the 1900s was taken into account.<sup>81</sup> Regarding the character of the use, the Court accepted a lower intensity of use in the outer zone on the basis of the topography of the land and the nature of the reindeer.<sup>82</sup> Likewise a more lenient attitude was applied towards the criterion on continuous use for reindeer husbandry, following from the Court's general remarks cited above.

The Supreme Court also maintained the condition on good faith in favor of the reindeer herders. The Court reasoned that the Sámi at the time had limited knowledge of Norwegian written language vis-a-vis various documents from authorities, in particular those related to land uses in the 20<sup>th</sup> century.<sup>83</sup> Moreover all reindeer herders in the two districts were not required to have been in good faith for the entire time period.

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<sup>78</sup> Rt. 2001 s. 769 at p. 814.

<sup>79</sup> *Ibid.*, p. 789.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*, p. 814.

<sup>82</sup> *Ibid.*, pp. 815-816. The Court maintained that such areas could not be assessed in isolation.

<sup>83</sup> *Ibid.*, pp. 813-814.

### 3.2.3 *The Svartskogen case - Sámi ownership*

The matter in the Svartskogen case<sup>84</sup> concerned intensive and diversified usage, mainly through farming, hunting and fishing by a local community (with a Sámi majority) in northern Norway (Kåfjord Municipality). The dispute regarded whether the State or the local Sámi was the rightful owner of a land area of 116 km<sup>2</sup>, including an area called ‘Svartskogen.’ This case was also decided by application of national property law, although the Sámi invoked the same treaty-based articles as in the Selbu case.<sup>85</sup> In this case prescription or immemorial usage was claimed, but since the land use was lengthy the Supreme Court commenced with an assessment vis-à-vis immemorial usage.<sup>86</sup>

In contrast to the Selbu case, the land use as such was not seen as explicitly distinct for the Sámi. Instead a central assessment regarded whether the land use had been sufficiently intensive given the collective use. The Supreme Court concluded that:

... the land use has had a varied form given what has been a natural utilisation in the different periods. In a nutshell, the land use is characterised by continuity, and has been all-embracing and intensive as well as flexible. The conditions regarding the scope and length of the land use for establishment of ownership are maintained.<sup>87</sup>

When it comes to the time period the Court seems to accept some 100 years as the time criterion. The Court says that this claim concerned land uses for over a hundred years, and further that it was not necessary to assess the land use before 1879 (due to land partition).<sup>88</sup> The strongest reason seems to have been the significant increase in the population in the late 1800s, which meant that the need to use the Svartskogen area would have amplified. Given the communal use of Svartskogen, the intensity criterion was mitigated.<sup>89</sup> The Court emphasized that not all in the community had used the area regularly and intensively, but the local view still was that no person held a stronger right than any other.<sup>90</sup> In this the Court accepted that a communal use of this kind may give rise to strong rights.

Svartskogen was also clearly demarcated by its topography, and there had never been disputes over utilization with neighboring communities. This seems to have been important for the assessment of how exclusive the usage had been, which typically is a rather strict requirement. The issue of exclusiveness is not explicit in the Court’s reasoning, but along with the natural topography, the

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<sup>84</sup> Rt. 2001 s. 1229. The decision of the Court was unanimous (5 judges).

<sup>85</sup> *Ibid.*, p. 1252. The Court stated, though, that its conclusion was well in line with the protection allowed by Article 14 of the ILO Convention No. 169.

<sup>86</sup> *Ibid.*, p. 1241. The Supreme Court never assessed the land use based on the conditions of prescription.

<sup>87</sup> *Ibid.*, p. 1244.

<sup>88</sup> *Ibid.*, p. 1241.

<sup>89</sup> Compare with Eriksen, *op. cit.*, p. 332.

<sup>90</sup> Rt. 2001 s. 1229 at p. 1244.

Court's statement that the Sámi had used Svartskogen "in all possible ways" is important.<sup>91</sup> Hence, to some extent the exclusivity criterion seems to have been modified.

The criterion on exclusive use also has links to the State's ways of gaining authority over the area, which coincides with the good faith required. The particularity of the Svartskogen case must in any event be deemed to be the assessment of the condition for good faith. There was evidence that the State at times tried to regulate and seize the land, but for the most part the State did not pursue those efforts. So, after a complex overall assessment, the Court maintained the view of the community that they had rights to use the area as property owners.<sup>92</sup>

### 3.3 Immemorial prescription in Swedish law

#### 3.3.1 *The doctrine of immemorial prescription*

Immemorial prescription in Swedish law will likewise be studied with regard to legal literature. It is the doctrine as such that is examined in this section, whereas the following section briefly analyses the only precedent case on immemorial prescription, the Taxed Mountains case, which concerned both ownership and reindeer husbandry. Both sections are relevant for understanding Sámi territorial rights in Finnish law.

Lengthy possession and use can establish rights through immemorial prescription, and rights may concern either ownership or limited rights. Immemorial prescription has been codified since medieval times and continued on into the Real Property Code of 1734. In the 1970s, with the enactment of the new Real Property Code, the doctrine was brought to an end. Via transitional rules, already existing rights based upon immemorial prescription continue to be lawful.<sup>93</sup>

In Sweden, prescription has long been seen as an outdated doctrine with little practical use. As a consequence very little is written on the doctrine in recent times.<sup>94</sup> There are a few cases from the 19<sup>th</sup>

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<sup>91</sup> *Ibid.*, p. 1244. The same opinion in Eriksen, *op. cit.*, pp. 340-343. This criterion seems to have been concealed behind other issues.

<sup>92</sup> Rt. 2001 s. 1229 at pp. 1244-1252. See also Eriksen, *op. cit.*, pp. 346-347.

<sup>93</sup> Act (1970:995) on Promulgation of the New Real Property Code, s. 6. Present hunting and fishing legislation also acknowledges rights based upon immemorial prescription.

<sup>94</sup> Maria Ågren has done an important historical study of the doctrine's application in the 17<sup>th</sup> century: M. Ågren, *Att hävda sin rätt* (Institutet för rättshistorisk forskning, Stockholm, 1997). The author's doctoral thesis contains an examination of the doctrine and its application, in part with the support of Ågren's work, see Allard (2006), *op. cit.*, pp. 264-285. Bertil Bengtsson has also written on the doctrine in connection with reindeer husbandry, see Bengtsson, *op. cit.*, pp. 79-89. For older legal literature see primarily Ö. Undén, *Svensk sakrätt II. Fast egendom* (Gleerup Bokförlag, Lund, 1965); G. Hafström, *Den svenska fastighetsrättens historia* (Juridiska föreningen, Lund 1969).

century and the first half of 20<sup>th</sup> century, but none concern Sámi territorial rights.<sup>95</sup> Only in recent years has the doctrine been revived through Sámi legal matters brought to courts.

Early preparatory works to the reindeer husbandry legislation briefly acknowledge that reindeer herding rights rest in immemorial prescription. Since 1993, through an amendment, the Reindeer Husbandry Act states in section 1 paragraph 2 that the reindeer herding right “is held by the Sámi people and is founded on immemorial prescription.”<sup>96</sup> According to the preparatory work to the present Reindeer Husbandry Act, matters concerning the existence of reindeer herding rights shall be tried by the court “on the basis of such evidence that according to general legislation, is required for recognition of immemorial prescription.”<sup>97</sup> The problem is that no one seems to know what that means. The fact that the doctrine has rarely been used in modern times makes it problematic to interpret with its vague conditions. What is clear, though, is that the onus of proof rests on the Sámi claiming immemorial prescription.<sup>98</sup>

The provision in the old Real Property Code from 1734 reads:

It is immemorial prescription where someone has possessed, used and utilised real property or a right for such a long time undisputed and unhindered, that no one remembers or on good authority knows how his ancestors or acquirers came to be.<sup>99</sup>

Of importance in relation to *the land use* is the provision’s emphasis on both possession and the usage. In relation to immemorial usage in Norwegian law, only the use is stressed as a relevant condition. The provision’s wording is not a play on words, as the concept of possession is more evident in relation to prescription in general.<sup>100</sup> This suggests a stricter assessment of the character of the land use, with an emphasis also on the exercise of authority over the area, which should have relevance for the assessment of how intensive the land use has been. The concept of possession is difficult to apply and also rather unclear in Swedish law.<sup>101</sup> For instance, in unsettled and outlying areas, where reindeer

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<sup>95</sup> For reference of cases see Allard (2006), *op. cit.*, pp. 270-271.

<sup>96</sup> The main inspiration behind this amendment was the Supreme Court’s finding in the Taxed Mountains case, where the Court held that the reindeer herding right was based upon immemorial prescription and, therefore, not dependent upon a statute for its existence. See further next section. The wording of this provision is similar to language in the Norwegian Reindeer Husbandry Act, where it refers to immemorial usage as the basis for the reindeer herding right. See the Norwegian RHA s. 4 para. 1.

<sup>97</sup> Prop. 1971:51 p. 158 that refers to Prop. 1928:43 p. 71.

<sup>98</sup> Old Real Property Code, chapter 15 s. 4. See also Bengtsson, *op. cit.*, p. 81.

<sup>99</sup> Old Real Property Code, chapter 15 s. 1.

<sup>100</sup> Compare with Norwegian literature, Brækhus and Hærem, *op. cit.*, pp. 579-580.

<sup>101</sup> Bengtsson acknowledges the importance of possession in immemorial prescription, but questions its relevance for Sámi territorial rights. He suggests that emphasis be laid on the usage instead, Bengtsson, *op. cit.*, pp. 83-84. See also Allard (2006), *op. cit.*, pp. 275-277.



husbandry mainly is carried out, an efficient control is more or less impossible. For claims on ownership or exclusive limited rights, such as an exclusive hunting right, the degree of control exercised is essential, as for immemorial usage, and this is typically a strict condition.

Furthermore, to establish rights it is important that the possession and use has been continuous. How long an intermission may be acceptable without losing the prescription is unclear and has never been tried before a court.<sup>102</sup> The old provision also calls for land use and possession that has been “undisputed and unhindered” (*okvald och ohindrat*), which, in modern Swedish, means that the right should not be dubious or disputed by anyone.<sup>103</sup> What it means in a given situation is unclear, but a prescriptive use may be “broken” through the action of others, primarily the property owner or others using the area.<sup>104</sup>

Regarding *the time period*, a long established use of an area is required, roughly some 90 years total (two generations back). The time period required for establishing rights has never been fixed, and the suggestion of 90 years has its origin in legal literature, based on the idea that with a much longer time span memory is lost.<sup>105</sup>

The above-mentioned conditions are central for establishing immemorial prescription, and all conditions are problematic in some way when applied to traditional Sámi land usage, particularly with regard to reindeer husbandry.<sup>106</sup> A recent government commission concluded that, because of cultural differences in land use between the Sámi and the Swedish population, there are in principle two separate doctrines. The conditions for ‘normal’ immemorial prescription need careful consideration before they can be applied.<sup>107</sup>

### *3.3.2 The Taxed Mountains case – potential Sámi ownership and the reindeer herding right*

The Sámi have lost several cases regarding reindeer herding rights on private lands, and none of them has been tried by the Supreme Court. Thus the Taxed Mountains case<sup>108</sup> is the only preceding case in Sweden on immemorial prescription and Sámi territorial rights. The case included claims on

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<sup>102</sup> Thirty years has been discussed. See Bengtsson, *op. cit.*, pp. 85-86; SOU 2006:14, pp. 393-394.

<sup>103</sup> Allard (2010), *op. cit.*, pp. 25-26.

<sup>104</sup> SOU 2006:14, pp. 394-395; Allard (2006), *op. cit.*, pp. 278-279.

<sup>105</sup> Ö. Undén, *Svensk sakrätt II. Fast egendom* (Gleerup Bokförlag, Lund, 1965) p. 144.

<sup>106</sup> There are a few more prerequisites inherent in immemorial prescription that are not addressed here. See further Allard (2006), *op. cit.*, pp. 271-282; Bengtsson, *op. cit.*, pp. 79-87.

<sup>107</sup> SOU 2006:14 pp. 378, 386 and 388. This commission investigated the boundaries of reindeer herding rights and to some extent analysed the doctrine of immemorial prescription.

<sup>108</sup> NJA 1981 s. 1. In relevant aspects here, the decision was unanimous (6 judges).

ownership and reindeer herding rights, and its significance relates to the clarification of the legal nature of Sámi reindeer herding rights in particular.

The Taxed Mountains case is huge and complex, and it is still the largest in Swedish case history.<sup>109</sup> It commenced with a few Sámi villages suing the State in the mid-1960s claiming ownership rights, or at least stronger rights than expressed in the reindeer husbandry legislation. The Sámi also wished to have a declaration that their rights existed on the basis of civil law, irrespective of legislation. Their claims rested primarily on occupation and immemorial usage. The disputed area concerned an area known as the taxed mountains (due to administrative proceedings in the 1840s involving taxation and land partitioning) in the County of Jämtland, quite close to the Norwegian border.

After extensive examination of historical material, the Supreme Court ruled that the State was the owner of the area, ultimate due to a decree of 1683. The Sámi land use was not sufficiently intense or exclusive in character to establish ownership.<sup>110</sup> Nevertheless, the Court accepted the idea that the Sámi through reindeer herding, hunting and fishing may acquire ownership through immemorial prescription regardless of the extent to which they cultivated land or settled permanently.<sup>111</sup> As such, this is an important statement of principle compared to the prevailing view.

Despite the obvious defeat for the Sámi, the Supreme Court did make some principally important statements concerning the reindeer herding right. The Court held that the rights ultimately rested on immemorial prescription, clarifying that the legislation as such did not create the rights. In addition, the Court held that the reindeer herding right in principle was fully regulated in the first statute from 1886 and that the content of the reindeer herding right had been transferred on into the 1971 Act. Since reindeer herding rights were based upon civil law, the Court stated that they are protected by the Constitution in the same way as ownership; takings and other infringements entitle compensation. In sum, the Court maintained that the reindeer herding right, as codified into legislation, is a strong usufruct right.

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<sup>109</sup> See further in e.g. B. Bengtsson, *The legal status of rights to resources in Swedish Lapland* (in: Berge and Stenseth (eds.), *Law and the governance of renewable resources*, ICS Press, Oakland, 1998) pp. 225-227; Allard (2006), *op. cit.*, pp. 258-262. It should be noted that Bengtsson was one of the judges in the case.

<sup>110</sup> NJA 1981 s. 1 at p. 229. The burden of proof in this case was shared. The majority of the evidence was comprised of public administrative documents of various kinds, including documents and decisions by the Swedish King.

<sup>111</sup> *Ibid.*, p. 190.

### 3.4 Immemorial prescription in Finnish law

In Finnish law much is unclear when it comes to Sámi territorial rights.<sup>112</sup> One problem is the absence of cases that deal with reindeer husbandry and immemorial prescription.<sup>113</sup> Another is the scarcity of modern literature analysing the legal situation of the Sámi concerning the use of land and natural resources.<sup>114</sup>

As mentioned briefly above, Finnish reindeer husbandry legislation differs from its Swedish and Norwegian counterparts. The legislation is silent about a Sámi reindeer herding right and this activity does not constitute an exclusive livelihood for the Finnish Sámi. This complicates the picture when it comes to interpretation and application of national as well as international law.<sup>115</sup> The parliamentary constitutional committee has mentioned on several occasions the need to properly investigate the unique cultural and legal status of Sámi reindeer herders.<sup>116</sup> It should be noted that there have been attempts to settle the issue of Sámi territorial rights generally by legislative means, in particular for an administrative area called ‘the Sámi homeland’ in northernmost Finland, but the proposals never reached the parliament for decision.<sup>117</sup>

All the same, Sámi territorial rights in Finland should closely resemble the Swedish legal situation with regard to the basic principles.<sup>118</sup> An important factor in understanding the reindeer herding right in Finnish law is the close historical connection between Sweden and Finland. Since Finland once was part of the Kingdom of Sweden for over 650 years, with the same public administration, law and judiciary system, Sámi territorial rights can be expected to contain many similarities. Also, after 1809 to a large extent, Swedish law formed the basis of the legal system in Finland.<sup>119</sup>

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<sup>112</sup> H. J. Hyvärinen, *The legal status of rights to resources in Finnish Lapland* (in: Berge and Stenseth (eds.), *Law and the governance of renewable resources*, ICS Press, Oakland, 1998) p. 240.

<sup>113</sup> The few cases relating to reindeer husbandry are instead articulated through the provisions in legislation, and legal argumentation has not progressed into issues on immemorial prescription.

<sup>114</sup> For a condensed summary see Hyvärinen (1998), *op. cit.*, and on regulation of Sámi culture and livelihood see H. J. Hyvärinen, *Saamelaisten kulttuurin ja elinkeinojen sääntely* (in: K. T. Kokko (ed.) *Kysymyksiä saamelaisten oikeusasemasta*, Lapin yliopiston oikeustieteellisiä julkaisuja, Rovaniemi, 2010). For legal historical studies see J. Jona, *Entisiin Tornion ja Kemän Lapinmaihin kuuluneiden alueiden maa- ja vesioikeuksista* (NIEM, Rovaniemi, 2006); Korpijaakko-Labba (1994), *op. cit.*; K. Korpijaakko-Labba, *The history of rights to resources in Swedish and Finnish Lapland* (in: Berge and Stenseth (eds.), *Law and the governance of renewable resources*, ICS Press, Oakland, 1998).

<sup>115</sup> See also Nordisk samekonvensjon, *op. cit.*, pp. 112-113.

<sup>116</sup> See e.g. GrUU 29/2004 rd. pp. 2-4.

<sup>117</sup> Hyvärinen (1998), *op. cit.* p. 237.

<sup>118</sup> The same opinion in Jona, *op. cit.*, pp. 402-403.

<sup>119</sup> T. Modeen, *Finlands och Sveriges rätt* (Åbo akademis förlag, Åbo, 1989) pp. 1-5, 11-12; A. Aarnio *Introduction* (in: J. Pöyhönen (ed.) *An Introduction to Finnish Law*, Kauppakaari, Helsinki, 2002) pp. 2-4.

Hence Sweden and Finland have historically had the same legal structure and legislation, in particular the old Real Property Code of 1734 with the provision on immemorial prescription in chapter 15 section 1. This provision was formally applicable in Finland as late as 1996. With the enactment of the new Real Property Code in January 1, 1997 the old Swedish Code was repelled.<sup>120</sup> The transitional provisions of the new Code state that the possibility to claim immemorial prescription continues.<sup>121</sup>

The preparatory work for the present Reindeer Husbandry Act briefly mentions, in relation to the right to herd reindeer, that the reindeer herders “since olden times have had this right and the intention is that they shall have it also in the future.”<sup>122</sup> The Sámi is not mentioned specifically, but it must mean that rights since olden times apply also to reindeer herding Sámi. This understanding is supported by the preparatory works for the former reindeer husbandry legislation of 1932 and 1948, which briefly refer to the Sámi right as founded on ‘immemorial prescription.’<sup>123</sup>

Nevertheless, some question marks remain. Heikki Hyvärinen has argued that although the preparatory work from 1929, which resulted in the first reindeer herding legislation of 1932, referred to immemorial prescription as the legal basis for Sámi reindeer husbandry, the committee omitted the Sámi as rights-holders when drafting the legal text. Nor did the legal text mention anything about a reindeer herding right. The committee argued that the legislator had complete autonomy in the matter.<sup>124</sup> Up until the 1970s the reindeer herding right was still understood to be based on immemorial prescription and thus characterised as a civil right in preparatory works. Thereafter the right is seen as a public right for all reindeer owners.<sup>125</sup>

This erosion of the reindeer herding right has occurred mainly through statements in preparatory works and by omitting the right-holders and the content of the right in legislation. If ever tried in a court on the basis of immemorial prescription, it is highly doubtful the court would find the civil right non-existent due to such reasons. The origin of the reindeer herding right in immemorial prescription means *per se* that it is a right not dependent upon statutory recognition for its existence.<sup>126</sup> As long as

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<sup>120</sup> Real Property Code 12.4.1995/540.

<sup>121</sup> Act on Promulgation of the Real Property Code 12.4.1995/541, s. 18.

<sup>122</sup> RP 244/1989 p. 6.

<sup>123</sup> Komiteanmietintö 1942:8 p. 4; Komiteanmietintö 1929:8 pp. 50-51. Finnish reindeer herders may have established rights due to long-term possession and use based upon immemorial prescription as well. Compare e.g. with historical cases dealing with fishing rights based on immemorial prescription and taxation duties in faraway lakes of Finnish settlers in Joona, *op. cit.*, p. 396.

<sup>124</sup> Hyvärinen (2010), *op. cit.*, pp. 129-131.

<sup>125</sup> *Ibid.*, pp. 131-132.

<sup>126</sup> NJA 1981 s. 1. Compare Jebens, *op. cit.*, p. 26. The content of the reindeer herding right probably includes hunting and fishing rights similar to the corresponding rights in Norway and Sweden.

the State has not clearly abolished the right by parliamentary legislation, which should give a right to compensation, the right should exist.<sup>127</sup>

Sámi ownership or reindeer herding rights are to be tried on the basis of the Swedish Real Property Code of 1734 and the provision on immemorial prescription. The interpretation and understanding of immemorial prescription ought to be essentially the same as in Swedish law. In relevant aspects the Taxed Mountains case should therefore be understood as a precedent case.

## 4 Conclusion

This article analyses the general principles underpinning the recognition of Sámi territorial rights, and particular differences in law in three Scandinavian countries. As stated initially, rather indistinct differences may work in advance for the recognition of Sámi territorial rights within the Norwegian legal system, as compared to the prescription-based doctrine in Sweden and Finland. Chiefly two features associated with immemorial usage stand out. These have been highlighted already in relation to the Norwegian prescriptive rules, and are re-iterated here.

First, the different facts and criteria are not static when one is to assess whether a condition in immemorial usage is met. The conditions are internally relative. The court is therefore called to make an overall assessment of all facts taken together. Although most of the conditions inherent in immemorial usage are more lenient than prescription in Norwegian law, the situation is usually corrected by the length of land usage. This feature of immemorial usage is highly relevant for traditional Sámi land use, which typically is lengthy but is carried out over large areas with a less intensive character compared to the standard for cultivation. Consequently, if the land use through reindeer herding, hunting and fishing, etc., has been less intensive and continuous it may very well be deemed sufficient if the time involved is long-standing.

Second, immemorial usage is an unwritten doctrine, and as such its conditions may more easily be modified and adapted to specific circumstances, such as accounting for cultural differences between Sámi and Norwegians. Such adjustments must be characterized as judge-made law. This denotes a classical tension between the substantive law and legal positivism on the one hand, and a pragmatically-oriented judiciary on the other.<sup>128</sup> Norwegian law has features from both systems and has been characterized as a hybrid between Anglo-American law and the European civil law traditions.<sup>129</sup> As an observation, Norwegian property law has a relatively larger portion of unwritten law than Swedish and Finnish laws, where legal positivism also must be said to have a stronger grip.

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<sup>127</sup> Same opinion in Hyvärinen (1998), *op. cit.* p. 237.

<sup>128</sup> Compare Eriksen, *op. cit.*, p. 348.

<sup>129</sup> J. Ø. Sunde, *Speculum legale – rettspegele* (Fagbokforlaget, Bergen 2005) pp. 325-326; Eriksen, *op. cit.*, p. 349.

Of importance for my argument here is that the unwritten conditions for acquiring rights under immemorial usage, along with the strong position of the Norwegian Supreme Court as an autonomous, law-making legal institution,<sup>130</sup> has progressed into culturally significant adjustments of the doctrine. This is particularly evident in the Selbu case, where the livelihood of the reindeer herders and the nature of the reindeer were regarded as relevant, but also in the Svartskogen case, in the assessment of the condition of good faith. With a freer assessment follows improved possibilities for a court to elevate ‘societal influences’ implicitly within its reasoning, such as an emphasis on developments within the indigenous people’s law. Even though the two Norwegian cases were solved by application of domestic law, one cannot disregard the possibility that such influences may have affected the cultural adjustments made.

In contrast, the assessment of facts and conditions for immemorial prescription adheres first of all to the wording of the provision in the old Real Property Code - following the principle of the primacy of written law. The emphasis on possession, for instance, presupposes stricter requirements for the actual land use, particularly with regard to the intensity of the use. Moreover, the conditions are not internally relative in the same way, even if one may assume that there might be some room for a court to assess different aspects of the actual land use. At the same time we should remember that the conditions for immemorial prescription are indistinct, largely because of the doctrine’s long-term neglect.

To sum up this analysis, I can only conclude that these two main features of immemorial usage - the conditions’ relativeness and the doctrine’s unwritten character - even though not immediately obvious, must have relevance in individual cases where Sámi territorial rights are in dispute. They work in tandem to accommodate claims for Sámi territorial rights in Norwegian law. They may therefore, to a certain degree, facilitate recognition of Sámi rights in Norway compared to Sweden and Finland. This accommodation could well be illustrated with the expression ‘where there is a will, there is a way,’ and for immemorial usage this road is smooth. Whether Swedish and Finnish Supreme Courts take the same path remains to be seen, but there is clearly a need to follow the Norwegian lead.

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<sup>130</sup> *Ibid.*, p. 350.