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Minority Rights, to be recognised by the legislator or the Supreme Court?

Did the Swedish Supreme Court *(Högsta domstolen)* adopt an activist or restrained position, concerning the right to property of the Sami people, in the Taxed Mountain Case *(Skattefjällsmålet)* and what were the effects of the chosen approach?

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Summary

In the 1970s a group of Sami people sued the Swedish State claiming a better right to a geographic area referred to as the Taxed Mountain *(Skattefjällen).* The Sami people are recognised as an indigenous people, and a minority group, by the Swedish State. The Taxed Mountain Case *(Skattefjällsmålet),* that reached the Supreme Court *(Högsta domstolen)* in the year of 1981, resulted in a precedent that has since heavily influenced most cases concerning the rights of the Sami people.

The objective of this thesis is to analyse the reasoning of the Supreme Court in the Taxed Mountain Case with the assistance of Ronald Dworkins theory on minority rights. The basis of the theory presented by Ronald Dworkin is that a majority is unwilling to accommodate the rights of a minority group any further than to ensure peace and order. Dworkin therefore advocates an activist Supreme Court stepping in, when the majority fails to do so, to ensure the constitutional rights of minority groups.

To be able to understand the analysis of the Taxed Mountain Case much effort has been put into presenting both the theory of Ronald Dworkin but also the Swedish constitutional system and tradition. The constitutional document relevant for this thesis is the Instrument of Government *(Regeringsform).* Other material used consists mostly of legal doctrine, published papers by legal scholars, legislative history (*förarbeten)* and to some extent newspaper articles.

The conclusion of this thesis is that the Supreme Court adopted a strongly restrained position in relation to the legislator, as defined by Dworkin, when determining the Taxed Mountain Case. The effects of such an approach, according to Dworkin, is that the Supreme Court established that if a right does not prevail from the political or legislative process, with the assistance of political institutions, it is an improper claim of a right. Concerning the

rights of the Sami people this results in them completely having to rely on the good will of the political majority to ensure their rights. This thesis shows that the political majority has so far, through out history, not shown interest in assuring the rights of the Sami people.

Sammanfattning

På 1970-talet stämde en grupp samer den svenska staten då de ansåg sig ha bättre rätt till ett geografiskt område kallat Skattefjällen. Samer är av svenska staten erkända som ett ursprungsfolk, och som en minoritetsgrupp. Skattefjällsmålet togs upp av Högsta domstolen 1981 och resulterade i ett prejudikat som sedan dess haft stort inflytande på de flesta mål som berört samers rättigheter.

Syftet med denna uppsats är att, med hjälp av Ronald Dworkins teori om minoriteters rättigheter, analysera Högsta domstolens domskäl i Skattefjällsmålet. Grunden för Ronald Dworkins teori är att en majoritetsgrupp inte är villig att säkerställa att en minoritetsgrupps rättigheter tas tillvara i större utsträckning än att se till att ordning upprätthålls. Dworkin argumenterar därför för att en Högsta domstol ska, genom att vara aktivistisk, försäkra att minoritetsgruppers konstitutionella rättigheter upprätthålls även när den politiska majoriteten inte anser detta vara av intresse.

För att förstå analysen av Skattefjällsmålet så har mycket tid lagts på att både presentera Ronald Dworkins teori, men också Sveriges konstitutionella system och tradition. Den relevanta grundlagsförfattningen för denna uppsats är Regeringsformen. Annat material som använts i uppsatsen utgörs framförallt av juridisk doktrin, rättsvetenskapliga artiklar, förarbeten och i viss utsträckning tidningsartiklar.

Slutsatsen som dras i denna uppsats är att Högsta Domstolen valde en starkt återhållsam inställning i relation till lagstiftaren, så som definierat av Dworkin, när de dömde i Skattefjällsmålet. Effekten av en sådan inställning, enligt Dworkin, är att Högsta Domstolen signalerar att en rättighet bara existerar om den har uppkommit genom en politisk process som resulterar i lagstiftning och erkänns av politiska institutioner. Gällande samers

rättigheter så betyder det att samer måste lita på att den politiska majoriteten vill tillgodose deras rättigheter. Denna uppsats visar på att den politiska majoriteten historisk inte har visat något intresse av att försäkra att samers rättigheter tillvaratas.

Preface

I would like to thank Conor O'Mahony, senior lecturer in constitutional law at University College Cork, for introducing me to the discipline of constitutional theory. The module in comparative constitutional law taught by Mr O'Mahony offered me greater insight into the complexity of the idea of democracy and the balance between the legislator and the court system. Mr O'Mahony was also kind enough to give me some of his time to discuss the initial ideas I had concerning this thesis and offer me guidance concerning how to go about the task of writing it. Thank you, Mr O'Mahony.

I would also like to thank Vittorio Buffacchi, senior lecturer in philosophy at University College Cork. Mr Buffacchi introduced me to the philosophy of human rights. He managed, through excellent teaching methods, to explain and turn highly complicated philosophical ideas into something graspable. Mr Buffacchi equipped me with tolls to further understand, and question, legal ideas and systems. Thank you, Mr Buffacchi.

I would also like to thank Per Nilsén, senior lecturer of constitutional law and legal history at Lund University. Mr Nilsén is also the supervisor of this thesis. Throughout the writing of this thesis his office door has always been open, and a helping hand has never felt far away. His knowledge in Swedish constitutional law, as well as legal history, has proven invaluable. Thank you, Mr Nilsén.

If my family and friends actually make an attempt to read this thesis (I promise, I will not get mad if you do not make it past this preface), thank you for being there. You have supported me through five years of law studies, and additional blessings and struggles life has thrown my way. It is your support and love that has made this thesis, and my law degree, a reality. I am deeply grateful.

1 Introduction

1.1 Background

During two semesters I was fortunate enough to study as a visiting Erasmus student at University College Cork in Ireland. At the university I had the pleasure of studying a module touching upon the subjects of comparative constitutional law and constitutional theory. The professor teaching the module made a habit out of asking the students to try to reason and give a judgement on controversial constitutional questions that had previously been presented to the Irish Supreme Court. In class, three different nationalities, American, Irish and Swedish, were represented. It quite quickly became very clear that there was a black sheep in the family, being me.

When discussing how the Supreme Court was to handle having questions such as allowing gay marriage or abortions put in front of it, my first legal instinct was to pump the breaks. My gut strongly told me that this was not a question to be handled by the court system, this was a question that had to be answered by the legislator. The American and Irish students on the other hand often presented elaborated arguments based on different ways of interpreting the constitutional clause possibly applicable on the presented legal question. I was somehow baffled by the other students' way of arguing, but also concerning my own position.

Alongside studying constitutional law, I also partook in a module covering the fundaments of the philosophy of human rights. For the first time I was presented to philosophers such as John Rawls, Joseph Raz, Wesley Newcomb Hohfeld and Ronald Dworkin. This module also touched upon the subject of minority rights, which very much caught my attention.

The Irish High Court case D.T. v. Minister for Education blew my mind. The Irish judge presented a judgement that was so unlike anything I had

seen the Swedish Supreme Court ever present. The case concerned the Irish constitutional right to free primary education.[1] A number of cases concerning children with severe behaviour disorders were brought to court. Special facilities were needed for these children for them not to hurt themselves or others. Such facilities were however not facilitated by the Irish State. The court established that the rights of the children to free primary education had been breach and that the Irish State had an obligation of facilitating such premises. Cases concerning this issue kept coming in to court for more than four years without the State taking any measures. Justice Kelly then decided to pass a mandatory injunction against the State, giving the State six months to implementing a plan. If no such plan was enacted at the end of that time period, the Court would decide what further actions were to be taken.[2]

The combination of these two modules made me realise that I lacked knowledge concerning the legal and philosophical basis of the Swedish Supreme Court. Why did the practices of the Irish Supreme Court baffle me to such a great extent? How does the Swedish Supreme Court handle legislative inactivity effecting politically weak minorities?

Sweden is currently at a political and judicial crossroad. Historically Sweden has been known for being a social democratic welfare state. The Swedish Social Democrat party *(Socialdemokraterna)* has existed since 1889. Between the years of 1936 to 1976 the party held a majority Government without interruption.[3] In the 2018 election the social democratic party ended up receiving less than one third of the votes and a

[1] 1937 Irish Constitution, art 42.2.
[2] D. (T.) v. Minister for Education [2000] IEHC 21. Case can be found at: http://www.bailii.org/ie/cases/IEHC/2000/21.html (access 2018-10-23).
[3] Nationalencyklopedin, *Sveriges socialdemokratiska arbetareparti*. http://www.ne.se/uppslagsverk/encyklopedi/lång/sveriges-socialdemokratiska-arbetareparti (access 2018-12-12).

right-wing nationalist party, with its early roots in nazism[4], received 17%.[5] Neither the left-wing, nor the right-wing, block can form a majority which has resulted in a political situation never before seen in Swedish politics. The formation of a new Government is currently, as of the 22nd of December 2018, on-going and there are talks of the risks of having to hold a new election.[6]

The Swedish Supreme Court has as of lately been accused of judicial activism.[7] The former president of the Swedish Supreme Court has himself agreed to the Supreme Court having changed its working methods and become more active in relation to the legislator.[8]

Alongside these judicial and political changes, the indigenous people of the Northern parts of Sweden, the Sami people, are trying to raise their voices. The Sami people were recognized as indigenous people by the Swedish State in 1977.[9] In 1991 the Sami Parliament *(Sametinget)* was established.[10] The Swedish State has however for an example not signed the ILO Convention concerning the rights to indigenous people to land and water.[11]

You are current holding the results of my interest in the minority rights of the Sami people, combined with a curiosity to better understand the role of the Swedish Supreme Court as a possible rights protector, in your hands.

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[4] De Vivo (2018), *Anders Borg: SD:s ledning har inte nazistiska rötter längre*, https://www.di.se/nyheter/anders-borg-sds-ledning-har-inte-nazistiska-rotter-langre/ (access 2018-10-10).
[5] Election Authority, *Election results 2018*, https://www.val.se/servicelankar/other-languages/english-engelska/election-results-2018.html (access 2018-10-10).
[6] Horvatovic (2018), *Talmannen: Ingen ny omröstning före jul*, https://www.svt.se/nyheter/inrikes/talmannen-berattar-om-nasta-steg-i-regeringsbildningen (access 2018-12-22).
[7] See for an example: Derlen and Lindholm (2016), *"Judiciell aktivism eller prejudikatbildning?"*, p. 143–144. Fura (2014), "En offensiv Högsta domstol – en kommentar", p. 101.
[88] *Ekots lördagsintervju* (2015). Stefan Lindskog, [Podcast], https://sverigesradio.se/sida/avsnitt/632809?programid=3071 (access 2018-10-12).
[9] KrU 1976/77:43.
[10] Sametingslag (1992:1433).
[11] Sami Parliament, *The Right to Land and Water*, https://www.sametinget.se/10175 (access 2018-12-21).

1.2 Purpose and Research Question

The purpose and aim of this essay is to investigate what happens when the Swedish Supreme Court is forced into determining a politically sensitive case concerning the constitutional rights of a minority group. To be able to present a thorough analysis I had to narrow the scope of this thesis. I decided to focus on one specific minority group, the Sami people, and on one specific case, the Taxed Mountain Case *(Skattefjällsmålet).*

The research question of this thesis is therefore: Did the Swedish Supreme Court adopt an activist or restrained position, concerning the right to property of the Sami people, in the Taxed Mountain Case and what were the effects of its chosen approach?

1.3 Current state of research

One of the most recent and comprehensive investigations into what the relationship between the Swedish Supreme Court and the legislator has looked like during the last two centuries has been carried out by Martin Sunnqvist in his book *"*Konstitutionellt kritiskt dömande: förändringen av nordiska domares attityder under två sekel". I have also found guidance from the legislative comments *(lagkommentarer)* on the Instrument of Government written by Anders Eka et al. Not a lot of research has been carried out concerning the subject by foreign scholars but Ran Hrischl has written an enlightening article on the matter called *"*The Nordic Counter-Narrative: Democracy, Human Development, and Judicial Review.".

One of the most comprehensive investigations into the legal history of the Sami people was presented in a doctoral thesis by Kaisa Korpijaakko-Labba, *"*Om samernas rättsliga ställning i Sverige-Finland: en rättshistorisk utredning av markanvändningsförhållanden och -rättigheter i Västerbottens lappmark före mitten av 1700-talet." Bertil Bengtsson has written the only

existent book, "Samerätt: en översikt", with a general outline of all law touching on the legal rights of the Sami people. Concerning the role of the Swedish Supreme Court in relation to Sami rights Christina Allard has produced books and articles worth mentioning, for an example "Indigenous rights in Scandinavia: autonomous Sami law".

1.4 Disposition, Method of Research and Material

The thesis is divided into four main parts.

The first section is intended to present the Swedish constitutional tradition and the working method of the Swedish Supreme Court. The material presented in this section mostly consists of published papers written by legal scholars. There are also a number of newspaper articles, to present the reader to the current debate. The articles have been chosen based on them being published by established and independent newspapers.

The second section is a presentation of the legal philosophy on minority rights created by Ronald Dworkin. The theory of Dworkin was chosen due to its narrow focus on minority rights and the task of the Supreme Court. I am not to present a comparison of the American legal system with the its Swedish counterpart, which is considerably different. Dworkin developed the theory by analysing the legal system of the United States of America. I intend to, by applying those philosophical ideas developed by Dworkin, analyse the Swedish legal system in a similar way that Dworkin did with the American system. I do find the ideas and the philosophical discussion presented by Dworkin applicable on a judgement presented by the Swedish Supreme Court.

The third section consists of an analysis of the Taxed Mountain Case by application of the philosophical theory of Dworkin. The main material in this section is the Supreme Court judgement itself.

The final and last section concerns a discussion of the material presented in the earlier sections and comes to an end with the answering of the research question.

1.5 Translations

Some of the material in this thesis has had to be translated from Swedish to English. Concerning the translation of specific legal words or phrases I have relied on the "Glossary for the Courts of Sweden" published by the Swedish National Courts Administration *(Domstolsverket).*[12] Regarding the translation of the Swedish constitutional document the Instrument of Government *(Regeringsformen)* I have used the official translation supplied by the Swedish Parliament (*Riksdagen)*[13]. Concerning the translation of historical legal terms of importance in the Taxed Mountain Case *(Skattefjällsmålet)* I have used the translations presented and used by Johan Strömgren.[14] Some material has had to be freely translated by me, the author. Information concerning translation can be found in the footnotes.

1.6 Delimitations

There are several interesting Swedish Supreme Court judgements concerning Sami rights. Due to the limited amount of time given to compose this thesis I had to limit its scope. The only case to be analysed is therefore the Taxed Mountain Case.

[12] Domstolsverket (2016). *Glossary for the Courts of Sweden*.
[13] Swedish Parliament (2016), *The constitution of Sweden: the fundamental laws and the Riksdag Act*.
[14] Allard and Skogvang (2015), p. 95–110.

In relation to the Taxed Mountain Case there are a number of constitutional clauses, EU-law and international conventions that could had been discussed. The focus in this thesis is however only on the constitutional document the Instrument of Government.

Fourteen different claims were presented by the plaintiff in the Taxed Mountain Case. This thesis is to solely focus on the first claim, the right to property.

The legality of the legal standpoint adopted by the Swedish Supreme Court concerning the right to property, and whether that standpoint was in accordance with the Instrument of Government, is not analysed in this thesis. It is the approach and reasoning of the Supreme Court that is to be analysed.

Concerning the separation of power, or the lack of such a concept, between the Swedish courts and the legislator there is a lot to be said. Due to the limitations of this thesis this is only cursory touched upon[15].

This thesis is focusing on the Swedish Supreme Court within the general courts system, not to be confused with the Swedish Supreme Administrative Court. The two courts possess different functions.

The intention of this thesis is not to present a comparative study between the approaches of the Swedish and American Supreme Court. The focus is solely on the Swedish Supreme Court. Due to the legal theory of Ronald Dworkin being created in an American context some references are however made to American legal ideas.

[15] For further reading on the topic I highly recommend: Allard (2015), chapter 8 and Sunnqivst (2014).

2 Section 1 - The Swedish Constitutional Tradition

This part of the thesis has the purpose of introducing you to the role, and the historical development, of the Swedish Supreme Court within the Swedish democracy. I intend to begin with presenting the Swedish court system as a whole and how it is carrying out its task. I shall then move on to explaining the political forces and decisions having shaped the court system during the 20th and 21st century. The first part of this thesis is to be ended with my intention of trying to explain why judicial activism, in the Swedish context, has become a hot and debated issue within the legal and political branches, starting in the beginning of the 21st century.

2.1 The Swedish legal system as a part of the Nordic legal family

The Swedish legal system is part of what is often, in doctrine, referred to as the Nordic[16] legal family. Roman, German and French law has had a much bigger impact on Nordic private law than English or American law. Nordic law does however not classify as neither a pure common or civil law system, since it does not push on extensive codification nor rely strongly on case law or precedents.[17] Nordic private law simply constitutes its own legal family.[18] To be noted, there are sometimes substantial differences within the Nordic legal tradition, therefore the phrasing "Nordic law" should be used with great care[19].

[16] Referring to Denmark, Finland, Iceland, Norway and Sweden. Not to be confused with Scandinavia.
[17] Hrischl (2011), page 450.
[18] Lindblom (2000), page 326.
[19] Lindblom (2000), page 327.

2.2 Nordic legal tradition concerning judicial review in the 20th century

If you were to ask a student, anyone in Sweden, or perhaps in the rest of Scandinavia, what is meant by the concept "the third branch of power", she or he would likely answer "the press, the media." No one would think of the courts.[20]

Historically the Nordic countries have maintained a highly sceptical approach towards the American way of approaching rights and judicial review. The Nordic tradition is instead characterised by deference to the legislator and administrative review on procedural grounds.[21] The Swedish Supreme Court has been especially distinguished for adapting a very constrained position towards judicial review and non-technical judicial review is seldom carried out.[22]

So, how can this be?

The Nordic constitutional tradition […] has featured a well-balanced system of government based on embedded common sense and overall good governance, political and judicial restraint, relative social cohesiveness, a traditional commitment to social democracy, a well-developed welfare state combined with vibrant market economy, and celebrated national pride alongside global good deeds. […] as the data indicates, all Nordic countries continuously sport top rankings in comparative global indicators of democracy, human development, educational attainments, access to health care, gender equality, freedom of expression, political stability, economic prosperity, and contribution to international peacemaking.[23]

[20] Lindblom (2000), p. 330.
[21] Hirschl (2011), p. 450 and 454.
[22] Lindblom (2000), p. 330 and Hirschl (2011), p. 450.
[23] Hirschl (2011), p. 458.

In other words, the Nordic countries have a long tradition of using ways of ensuring and protecting rights not involving judges or courts. This has been carried out through ex-ante parliamentary preview and very restrained courts.[24] There is a strong belief in the Nordic countries that the Governmental apparatus is the supervisor of state actions, not the courts.[25] State agencies, different kinds of ombudsmen and a variety of governmental organisations are responsible for making sure that the development of society is in the best interest of the public.[26]

2.3 Swedish Constitutional Law

The Swedish Constitution consists of four different documents, all considered to enjoy the same constitutional status.[27] The most prominent on, concerning the governance of the Swedish democracy, is the document called the Instrument of Government *(Regeringsform).* The first Instrument of Government goes back to the year of 1634, originally created as a kind of provision for the chief guardian of Queen Christina until she came of age.[28]

The concept of a living constitution[29] has been adopted in Sweden, in combination with a relatively easy political process to make actual changes in the constitutional documents[30]. The parliament needs to vote yes twice to a constitutional change, with a national election in between those two votes[31].

Changes to the constitution accurse either through legislative change, carried out by the parliament, or through case-law, carried out by the

[24] Hirschl (2011), p. 451.
[25] Lindblom (2000), p. 330.
[26] Ibid, p. 336.
[27] 1 Chapter 3§ Instrument of Government (1974:152).
[28] Hirschfeldt and Eka (2012), p. 1.
[29] ”A living Constitution is one that evolves, changes over time, and adapts to new circumstances, without being formally amended.” Strauss (2010).
[30] Bull and Sterzel (2013), p. 9.
[31] 8 Chapter 14§ Instrument of Government.

courts.[32] Legislative changes are carried out every few years. The last major one was adopted in 1974, resulting in a completely new version that it is now referred to as the new Instrument of Government of 1974.[33]

2.4 Swedish Court System

The Swedish court system consists of three groups of courts:

- The General Courts.
    - District Courts (first instance).
    - Courts of Appeal (second instance, for most cases final instance).
    - The Supreme Court (highest instance, leave for appeal required).

- The Administrative Courts.
    - Administrative Courts (first instance).
    - Administrative Courts of Appeal (second instance, for most cases final instance).
    - The Supreme Administrative Court (highest instance, leave for appeal required)

- Special Courts.[34]

[32] Bull and Sterzel (2013), p. 9.
[33] Hirschfeldt and Eka (2012), p. 2.
[34] Regeringskansliet, *The Swedish Judicial System*, https://www.government.se/49ec0b/contentassets/9ebb0750780245aeb6d5c13c1ff5cf64/the-swedish-judicial-system.pdf (access 2018-07-24).

2.5 Judicial Review in the Swedish Court System

There is no constitutional court within the Swedish court system.[35] Instead, all instances in the three different court systems are responsible to carry out the task of judicial review. If a court finds a rule to be opposed to constitutional law, or a superior rule, it is not to apply the rule. The rule of non-application also applies if a rule has been created in a way substantially divergent from how it is laid down in law.[36] Up until the year of 2010 the court had to find the rule not only opposed to constitutional law but in *obvious* violation of the constitutional rule.[37]

The Swedish legal system, along with the Danish, are to a greater extent than the remaining Nordic countries influenced by the so-called idea of Scandinavian legal realism.[38] The philosophy of Scandinavian legal realism questions, and disassociates itself, from the idea of natural law.[39] The Swedish philosopher Axel Hägerström developed his theory on moral scepticism *(värdenihilism)* in the beginning of the 20th century, excommunicating the idea of natural law. He believed values to be subjective and simply an expression of emotions. The sciences should in no way associate itself with moral ideas but remain strictly objective. His ideas heavily influenced jurisprudence, political science, economics, theology and the overall outlook on the philosophy of life in Sweden until the 1950s. Hägerströms moral scepticism is also believed to have had an overall impact on the development of Swedish society.[40]

[35] Bull and Sterzel (2013), p. 252.
[36] 11 Chapter 14§ 1 section, Instrument of Government.
[37] 11 Chapter 14§ 1 section, Lag om ändring i regeringsformen (2010:1408).
[38] Schaffer (2017), p. 15.
[39] Leiter and Etchemendy, *Naturalism in Legal Philosophy.* https://plato.stanford.edu/entries/lawphil-naturalism/#ScanLegaReal (access 2018-08-03).
[40] Nationalencyklopedin, *Värdenihilism.* https://www.ne.se/uppslagsverk/encyklopedi/l%C3%A5ng/v%C3%A4rdenihilism (access 2018-08-03).

Historically, and still today in 2018, Swedish courts seldom carries out judicial review.[41] When a court does, it usually results in great debate and reactions from academics and politicians. The latest example being the Malmö and Stockholm Migration courts not applying one article in a law concerning unaccompanied minors being allowed to remain in Sweden, without having been granted asylum, to finish their upper secondary school studies.[42] To be noted, the Swedish courts only have the power not to apply a rule, unlike for an example the US Supreme Court having the right to allow one piece of legislation to replace another piece.[43] In the weeks after the two judgements articles with headlines such as "This is how the Migration courts slapped the Establishment in the face"[44] and "Open battle between law and politics" – expert is warning for a constitutional crisis after judgement on migration"[45] surfaced.

2.6 Leave for appeal by the Swedish Supreme Court

There are two different ways to be granted a leave for appeal from the Swedish Supreme Court. Either the legal question in the case must be of importance for the uniformity of law, as in the Supreme Court offering guidance, or there has to be extraordinary reasons such as the Court of appeal having made a grave procedural error, possibly resulting in a new trial.[46] The Supreme Court also has the possibility of limiting the leave of appeal to a specific legal question within the case enabling the court to focus on the precedential issue and not the facts.[47]

[41] Bull and Sterzel (2013), p. 254.
[42] Cases UM 14195-17 and UM 187-18.
[43] Follesdal and Wind (2009), p.136.
[44] Pålsson (2018), " Så örfilade migrationsdomstolarna upp det politiska etablissemanget".
[45] Wetterqvist (2018),"Öppen strid mellan juridik och politik" – expert varnar för konstitutionell kris efter migrationsdom".
[46] 54 chapter 10§ Code of Judicial Procedure (1942:740).
[47] 54 chapter 11§ Code of Judicial Procedure. Lindblom (2000), p. 345.

This has resulted in the Supreme Court not being a court correcting errors of facts but errors of law.[48] About 5 000 cases are appealed to the Supreme Court each year, about 100 are granted a leave for appeal.[49] The larger part of cases run through the Supreme Court are concerning procedural issues, such as res judicata, the competence of the court and so on. The Swedish Supreme Court can be seen as acting as the teacher for lower instances, teaching them how to apply the Code of Judicial Procedure, to create a uniform legal application.[50]

2.7 A changing Swedish Supreme Court

The Nordic states has historically been described as characterised by a:

> *suspicion of individual rights, a privileging of the interests of 'the' (monolithic) community together with an overwhelming trust in the state. – All of which may account for the resistance to judicial review.*[51]

Scholars are however agreeing upon the fact that the Nordic approach to judicial review has as of lately changed[52].

> *No other region [the Nordic countries] in the world, perhaps with the exception of the former Eastern bloc, has undergone such a transformative constitutional change in such a short period of time."*[53]

The Swedish Supreme Court has, as of lately, been accused of judicial activism and for interfering with the power balance between the judicial,

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[48] Lindblom (2000), p. 345.
[49] The Supreme Court, *Allmän information om överklagande och prövningstillstånd.* http://www.hogstadomstolen.se/Om-handlaggningen/Overklagande-och-provningstillstand/ (access 2018-08-04).
[50] Lindblom (2000), p. 346.
[51] Follesdal and Wind (2007), p. 138.
[52] Ibid, p. 141.
[53] Hirschl (2011), p. 460.

legislative and executive branches of government[54]. Scholars are mostly agreeing that the Swedish Supreme Court has, as of lately, changed its way of going about its task, acting in a more independent fashion in relation to the legislator.[55]

Martin Sunnqvist, a jurist and legal scholar[56], wrote his thesis on the change in attitude of Nordic judges during the last two centuries.[57] When discussing the extent of a judges´ activity within the creation of new legal norms he uses the words "constitutional critical judging" *(konstitutionellt kritiskt dömande)* and "loyalty of judges to the legislator" *(lojalitet med lagstiftaren).*[58] In the thesis Sunnqvist has shown that Swedish courts were barely carrying out judicial review, even though having the possibility, between the years of 1945 and 1990. The conclusion of Sunngqvist is that since the beginning of the 1990s the court system has become more active in assuring norms being in accordance with the constitution.[59]

The former president of the Supreme Court, resigned as of august 2018, Stefan Lindskog participated in an interview commenting on his views on judicial activism in the Supreme Court as of 2015.[60] He found the Supreme Court to be more activist in regard to no longer referring as many cases to the legislator when encountering unclear areas of law. The Supreme Court is today less hesitant to create new norms, partly due to the court having experience that gaps, or the lack of norms, often remained even after the question had been referred to the legislator, due to legislative inactivity.[61]

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[54] 11 chapter 3§ and 12 chapter 2§, Instrument of Government.
[55] See for an example: Derlen and Lindholm (2016), p. 143-144. Fura (2014), p. 101.
[56] Lund University Research Portal, *Marin Sunnqvist,* http://portal.research.lu.se/portal/en/persons/martin-sunnqvist(e08b5bc8-04e0-43f4-87a2-6e67e86ab25d).html (access 2018-12-20).
[57] Sunnqvist (2014).
[58] Ibid, p. 1075.
[59] Ibid, p. 1024.
[60] Johansson (2018), http://www.dagensjuridik.se/2018/06/nagon-ar-forbaskad-pa-mig-och-har-sjosatt-detta-stefan-lindskog-om-forundersokningen (access 2018-10-12).
[61] *Ekots lördagsintervju* (2015). Stefan Lindskog, [Podcast], https://sverigesradio.se/sida/avsnitt/632809?programid=3071 (access 2018-10-12).

Stefan Lindskog also argues that the Supreme Court has changed its method of working due to the legislator being busier today, compared to earlier. The legislator needs to implement EU-law and so on. Due to the legislator not keeping up it creates a "power vacuum" which the Supreme Court is to fill. Lindskog does not find judicial activism to necessarily be opposed to democracy. He argues that in case the legislator does not approve of a precedent created by the Supreme Court the legislator can always draft a law altering, or invalidating, that precedent. "In that sense, we (the Supreme Court) do not have the last word."[62]

[62] *Ekots lördagsintervju* (2015). Stefan Lindskog, [Podcast], https://sverigesradio.se/sida/avsnitt/632809?programid=3071 (access 2018-10-12).

3 Section II – The theory on minority rights by Ronald Dworkin

This part of the thesis aims to present a legal philosophical theory on judicial activism. The theory I have decided on presenting is the theory of legal philosopher Ronald Dworkin. Ronald Dworkin was at the time of his death, in 2013, a professor of law at New York University and emeritus professor at University College, London.

Professor Dworkins ideas has had a big impact on legal philosophical theory[63], with published books such as "Law´s empire" and "Taking Rights Seriously".[64] He developed a legal theory critical to legal positivism, instead advocating judicial activism, focusing on moral and its part in determining the law.[65]

I am to specifically focus on Professor Dworkins views on how a court is to ensure the rights of a minority, when those rights are opposed by the majority, within a democracy. His views on the matter I find well presented in an article from 1972 called "A Special Supplement: The Jurisprudence of Richard Nixon" published in the New York Review of Books. The same article was later, in a revised version, published in "Taking Rights Seriously".[66]

[63] Liptak (2013). https://www.nytimes.com/2013/02/15/us/ronald-dworkin-legal-philosopher-dies-at-81.html (access 2018-08-11).
[64] Dworkin (1986) and Dworkin (1978).
[65] Leiter et al. (2017), https://plato.stanford.edu/entries/lawphil-nature/ (access 2018-08-11).
[66] Dworkin (1978).

In the article "A Special Supplement: The Jurisprudence of Richard Nixon" Dworkin presents a theory on the importance of courts to protect the moral rights of minorities. Dworkin believes in majority rule as a part of a democratic concept, but he does not trust the majority in assuring minority rights when those rights are in conflict with the interests of the majority.[67]

3.1 Definition of judicial restraint and judicial activism

There are two extremes when it comes to describing what attitude a court can adapt, concerning what part it is to play in the interpretation of the constitution, in relation to the legislator. Depending on what attitude is adopted this has the potential of affecting the power balance between the two actors and is therefore of interest to discuss in every democracy. These two different attitudes are referred to as judicial restraint or judicial activism.[68]

3.1.1 Judicial restraint

Dworkin defines judicial restraint, at its most extreme, as arguing that "courts should allow the decisions of other branches of government to stand, even when they offend the judges' own sense of the principles required by the broad constitutional doctrines, except when these decisions are so offensive to political morality that they violate the provisions on any plausible interpretation, or, perhaps, when a contrary decision is required by clear precedent."[69]

[67] Dworkin (1972).
[68] Ibid.
[69] Ibid, 3rd section and 3rd paragraph.

3.1.2 Judicial activism

Judicial activism, in its most extreme form, is by Dworkin defined as the court accepting the directions of vague constitutional provisions, as in vague constitutional provisions being appeals to moral concepts rather than moral conceptions. “They [the court] should work out principles of legality, equality, and the rest, revise these principles from time to time in the light of what seems to the Court fresh moral insight, and judge the acts of Congress, the states, and the President [referring to the American system] accordingly”.[70]

He uses the example of fairness. If he asks his children to be guided by fairness Dworkin refers to fairness as a concept without a clear definition, that might change over time, and the children are to independently apply their definition of fairness in different situations. He does not intend for the children to rely on, by him, a defined exhaustive conception of fairness. A court is to apply vague constitutional provisions in the same way as children are to apply the concept of fairness.[71]

3.2 Moral and legal rights

Dworkin argues there to be existing individual moral rights against the state. He differs between moral and legal rights. A legal right only exists if it is a part of legislation, Dworkin using the example of having a legal right to drive with a car in both directions on a road, due to the government having legally decided so. A moral right exists no matter its existence in law, Dworkin using the example of freedom of speech. If the government decided on only allowing drivers to drive in one direction on a road, that would not be a violation of a moral right. The contrary would however be

[70] Dworkin (1972), 3rd section and 2nd paragraph.
[71] Ibid, 2nd section and 7th paragraph.

the case if the government decided to remove the right to free speech, that would be morally wrong, and a violation of a moral right, even if legally possible.[72]

As earlier mentioned, Dworkin focuses on vague constitutional clauses as being an expression of concepts. A concept as in a general idea that might change over time. When a judge is confronted with a concept she/he is to determine the exact conception of a certain concept in the specific case. Dworkin sees vague constitutional clauses as an appeal to moral concepts which forces the court to make a decision between different political conceptions of morality.[73]

Dworkin uses the example of the term "cruel", within the context of "cruel and unusual punishment". At the time of the framing of the American constitution capital punishment was standard. "Cruel" is however, according to Dworkin, not a conception, it is a concept, changeable over time. There are different political moral opinions on how the term "cruel" should be interpreted but often it is a court that ends up judging whether a case involves "cruel and unusual punishment".[74]

If the legislator, or the framer of a constitution intended terms such as cruel, legality, equality and so on to have a specific comprehensive meaning, Dworkin argues that they would had made that clear. They would had done so by presenting theories presenting the conception, rather than concepts, to be adapted by the court when approaching certain legal issues.[75]

[72] Dworkin (1978), p. 191.
[73] Dworkin (1972), 2nd section and 11th paragraph.
[74] Ibid, 2nd section and 11th paragraph.
[75] Ibid, 2nd section and 12th paragraph.

3.3 Political scepticism

The opposite to judicial activism is judicial restraint. In Dworkins article he moves on to presenting, and commenting on, two versions of judicial restraint, called political scepticism and judicial deference.[76]

The theory of political scepticism is based on the belief that individuals do not posses any moral rights against the state, there are only legal rights. Judicial activism is, according to the theory of political scepticism, never justifiable. Since there are only legal rights, created in law by the legislator, judicial activism can only ever be the result of judges applying their own personal preferences.[77]

Dworkin believes a political sceptic to have to present either one of three options to justify the theory of political scepticism. Either the sceptic simply believes that moral belief does not exist, and no act can ever be morally right or wrong. The second option is for the sceptic to believe in utilitarianism, the belief that an act can only be right or wrong depending on its effects on the general interest. The third option would constitute a belief in a totalitarian theory, were no individual interest are of importance and therefore right or wrong can never come into conflict.[78]

If moral rights do not exist and you except the premises of political scepticism, Dworkin does believe that the idea of allowing the legislator, and other democratic institutions, to make all decisions makes sense. In a democracy the legislative organ is elected by the people and are hence representing the majority will of the people. However, if you are to agree with this idea you need to be comfortable with the view that political decisions are "simply a matter of whose preferences shall prevail", which equals majority rule. In a state governed by the idea of political scepticism

[76] Dworkin (1972), 3rd section and 5th paragraph.
[77] Ibid, 3rd section 14th paragraph.
[78] Ibid, 3rd section 12th paragraph.

an individual does not have any individual moral rights against the state and the state can never be wrong in removing an individual legal right if doing it in a correct legal manner.[79]

3.4 Judicial deference

Dworkins continues in his paper with this idea of democracy as a justification to limit the actions, and involvement, of courts. He argues that the argument of democracy becomes less sturdy if you, instead of political scepticism, relay on the theory of judicial deference.[80]

The theory of judicial deference presents the idea that individuals do have individual moral rights against the state, beyond what is expressively presented in legislation. However, the character and strength of those moral rights are debatable and should be defined and recognised by democratic institutions, not courts.[81]

Dworkin begins with criticising the argument of democracy for assuming that the legislator should be more apt to assure moral rights due to it being responsible for its actions. He argues that this might be true in democratic theory but that democratic institutions seldom are effectively held responsible by the people in practice. This is, according to Dworkin, however more illuminating a greater call for more democracy, rather than undermining the idea of democracy.[82]

The theory of judicial deference assumes that all unsettled issues, in a democracy, have to be solved by institutions that are politically responsible in a manner that courts are not. Dworkin argues that the idea of democracy

[79] Dworkin (1972), 3rd section 15th paragraph.
[80] Ibid, 3rd section 15th paragraph.
[81] Ibid, 3rd section 7th paragraph.
[82] Ibid, 4th section 3rd paragraph.

is not defined and that "it is wrong to suppose that the word [democracy], as a word, has anything like so precise a meaning."[83]

3.4.1 Argument of fairness

Dworkin continues on to split the argument of democracy into two different paths, one being the path of fairness and one the path of soundness.[84]

The path of fairness[85] constitutes the idea that "it is for some reason fairer that a democratic institution rather than a court should decide such issues, even though there is no reason to believe that the institution will reach a sounder decision".[86]

The path of soundness argues "that judicial deference is required because democratic institutions, like legislatures, are in fact likely to make sounder decision than courts about the underlying issues that constitutional cases raises, that is, about the nature of an individual´s moral rights against the state."[87]

Dworkin argues that the principle of fairness actually offers an argument against democracy, rather than for. He settles that "it is always fairer to allow a majority to decide any issue than a minority." However, "decisions about rights against the majority are not issues that in fairness ought to be left to the majority."[88]

[83] Dworkin (1972), 4th section 4th paragraph.
[84] Ibid, 4th section 5th – 6th paragraph.
[85] Dworkin makes a point out of not defining the terms fairness and soundness. These terms are supposed to be fluent and interpretable. For further understanding see part 3.1.2 Judicial Activism in this thesis.
[86] Dworkin (1972), 4th section 6th paragraph.
[87] Ibid, 4th section 5th paragraph.
[88] Ibid, 4th section 7th paragraph.

Dworkin also points out that the United States of America has decided to adopt the theory of Constitutionalism, a theory believing in the idea of restraining the majority to protect individual rights. Constitutionalism requires some kind of organ to protect minorities from the majority, and to assign the majority, in other words the legislator, this task would make the majority its own judge. The principle of no man being the judge of his own case is a fundamental and deeply rooted legal principle.[89]

Responding to the counter-argument of it being a simplified reality saying that democratic decisions are always made by the majority Dworkin answers this. Political decisions, in the United States of America, are made by a variety of different political institutions consisting of a variety of people, also varying over time. Them all having the same goal, and opinions, would constitute a naïve view. After all, when it comes to views on for an example labour or welfare issues, a nation is normally divided on how to deal with the matter. Dworkin however argues that through out history it has been proven that politicians have a tendency, when it comes to individual rights of a minority, to quickly adapt a uniform and hostile approach. Dworkin uses the example of segregation in the USA stating, "the white majority mindful of its own interest has proved to be both national and powerful". Political institutions did not act on segregation and political process showed ineffective, even on local violations on individual rights of "politically ineffective minorities".[90]

Dworkins conclusion, concerning fairness, is that "the argument from democracy asks that those in political power be invited to be the sole judge of their own decisions, to see whether they have the right to do what they have decided they want to do."[91] In this part of his paper Dworkin however acknowledges the biggest risk of judicial activism, according to his opinion, tyranny. Tyranny in the sense that judges get out of control, gaining to much

[89] Dworkin (1972), 4th section 7th and 8th paragraph.
[90] Ibid, 4th section 10th paragraph.
[91] Ibid, 4th section 11th and 12th paragraph.

power. Dworkin is willing to argue that the risk of tyranny "override the unfairness of asking the majority to be judge in its own cause."[92]

3.4.2 Argument of soundness

The argument of soundness presents the idea "that democratic institutions, like legislatures, are likely to reach sounder results about the moral rights of the individuals than would courts."[93]

Dworkin presents two different versions of the argument of soundness, one weak and one strong version. The weak version is based on societal acceptance of individual rights, meaning that the Supreme Court can never be right in the views on rights presented in judgements, if the community does not recognize and accept those rights. Dworkin uses the example of the rights of black children or criminals. If the Supreme Court present a judgement with a specific individual right for a black child, but the community as a whole does not embrace that right, the Supreme Court is to be considered to having made a bad call.[94]

However, according to Dworkin, this is opposed to the idea of judicial restraint, since it requires active judges defending their judicial views on individual rights.[95] The weak version of soundness requires the Supreme Court to present its judgements and defend the view on rights presented in that judgement. There has to be a dialogue between the court and the citizens. This idea presupposes a belief in judicial facts as well as in the everyday man possessing moral beliefs. According to Dworkin the weak version of soundness is closer to judicial activism than judicial restraint, he therefore moves on to the strong version of soundness.[96]

[92] Dworkin (1972), 4th section 11th and 12th paragraph.
[93] Ibid, 4th section 13th paragraph.
[94] Ibid, 4th section 21th paragraph.
[95] Ibid, 4th section 21th and 22nd paragraph.
[96] Ibid, 4th section 22nd paragraph.

The strong version of soundness presents the idea that "the organic political process will secure the genuine rights of men more certainly if it is not hindered by the artificial and rationalistic intrusion of the courts."[97] Individual rights are to emerge through the political process, with the assistance of political institutions, when political pressure is applied. If a claim of a right is not emerging through the political process, for whatever reason, it is an improper claim. Dworkin disregards the strong version of soundness as a bizarre form of political scepticism, the theory of their existing no rights against the state.[98]

To claim an individual moral right against the state is often uncomfortable for the majority. It requires the state, and society, to create political institutions that are not necessarily at their advantage. "The nerve of a claim of right, […] is that an individual is entitled to protection against the majority even at the cost of the general interest. […] the comfort of the majority will require some accommodation for minorities but only to the extent necessary to preserve order; and that is usually an accommodation that falls short of recognizing their rights."[99]

3.5 The issue of Moral

The argument of moral has been criticized for appealing to "the silly faith of ethics"[100] and for naively trying to create a frictionless utopia. Dworkin however argues that his theory is based on principles as principles, no matter it being off-putting to the majority. Again, he uses the example of a black child saying that "it is unjust to force black children to take their public education in black schools, even if a great many people will be worse

[97] Dworkin (1972), 4th section 23rd paragraph.
[98] Ibid, 4th section 23rd paragraph.
[99] Ibid, 4th section 24th paragraph.
[100] Ibid, 4th section 26th and 27th paragraph.

off if the states adopt the measures needed to prevent this."[101] Dworkin concludes that moral, and moral progress, is a difficult and changing concept and historically it has been hard to define moral concepts at different times.[102]

3.6 Dworkins concluding argument

Vague constitutional clauses have to be understood as moral concepts, rather than a specific moral conception. This perception results in courts, if they are fully to apply the law, having to be activist in the sense that they must "be prepared to frame and answer questions of political morality."[103] Dworkin believes it to be incorrect to present the choice between judicial activism and judicial restraint as a choice between a "policy of moral crusade" or a "policy of legality". By phrasing it as such a choice it simplifies the complexity of the question and it is misguiding.[104]

Dworkin acknowledges that there is a risk of judges making the wrong decision. He however does not think this danger should be exaggerated. Court decisions that are truly unpopular will not be complied with by the public. Dworkin also brings up the fact that in the American system old judges will die and be replaced with a new judge, with possible other views on moral. We should however, try to shape and design our institutions in a way limiting the possibility of error, to the extent it is possible[105].

Dworkin argues that the issue of individual moral rights against the state has to become a part of the agenda of constitutional law. To make that possible, constitutional law and moral theory has to fuse, which according to Dworkin has still not happened. He adds that it is "perfectly understandable

[101] Dworkin (1972), 4th section 26th and 27th paragraph.
[102] Ibid, 4th section 26th and 27th paragraph.
[103] Ibid, 5th section 1st paragraph.
[104] Ibid, 5th section 4th paragraph.
[105] Ibid, 5th section 6th and 7th paragraph.

that lawyers dread contamination with moral philosophy, and particularly with those philosophers who talk about rights, because spooky overtones of that concept threaten the graveyard of reason."[106] According to Dworkin lawyers have been prominent in the development of legal sociology and legal economics. Lawyers need to play an active role in "the development of theory of moral rights against the state." It is time for lawyers to understand "that law is no more independent from philosophy than it is from these other disciplines."[107]

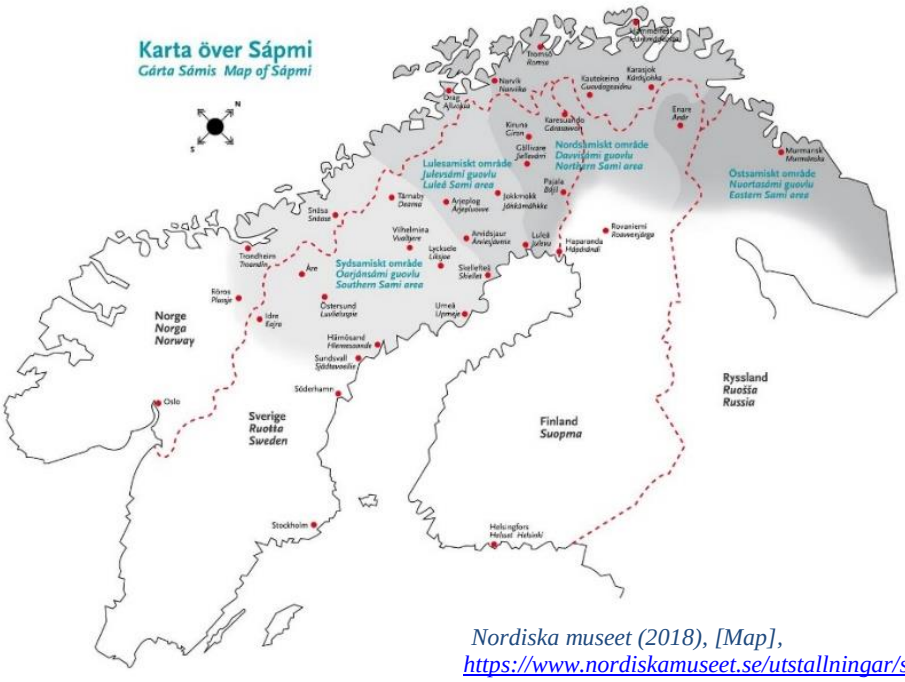
[106] Dworkin (1972), 5th section 9th paragraph.
[107] Ibid, 5th section 9th paragraph.

4 Section III – Analysis of the Taxed Mountain Case

The third section of this thesis begins with a cursory introduction of the indigenous group, the Sami people. It is to be followed by an explanation of the legal weight of the Taxed Mountain Case. The reminder of the third section constitutes an application of Dworkins theory on the Taxed Mountain Case.

4.1 The Sami people

The indigenous people of the territory today referred to as the northern parts of Sweden are the Sami people. The Sami people refers to their land as Sapmi. The area of Sapmi, historically belonging to the Sami but colonialised by Sweden, constitutes about 35 percent of the northern part of Sweden and continues on stretching over Norway, Finland and Russia.



Nordiska museet (2018), [Map], https://www.nordiskamuseet.se/utstallningar/sapmi (access 2018-12-20).

The Sami people have their own religions, languages and cultures. As of 2004 the approximated number of Sami people, living within the geographic area referred to as Sweden, was 20 000 people.[108]

The ancestors of the Sami people started inhabiting Finland as soon as the ice age ended, about 7 000 years before Christ. As to what has so far been possible to establish the Sami has always mainly lived off of hunting, fishing and reindeer herding.[109]

4.2 The Taxed Mountain Case

The Taxed Mountain Case is still, in 2018, the most complex and extensive case ever presented in a Swedish court.[110] Fourteen different claims were presented by the plaintiffs of the case, but the continuous focus of this thesis is solely on the first claim, the right to property.[111]

The name of the case, the Taxed Mountain, refers to a specific geographic area, consisting of mountains, in the Swedish county of Jämtland[112]. The complexity and the extensiveness of the case is due to a number of reasons. The evidence in the case forced the Supreme Court into trying to determine the legal history concerning the specific mountains starting in the 14th century.[113] The two parties of the case, one being the Swedish State and one being representatives from the Sami population, made the case politically delicate.

It has been almost 40 years since the Supreme Court delivered its judgement in the Taxed Mountain Case. The case is however still of immediate interest due to it having evolved into one of the most important precedents

[108] Government Offices and the Sami Parliament (2004), p. 5.
[109] Korpijaakko-Labba (1994), p. 17.
[110] NJA 1981:1 and Allard (2015), p. 244.
[111] NJA 1981:1, p. 167–168.
[112] Ibid, p. 166.
[113] Ibid, p. 193.

concerning Sami rights and law. The conclusions drawn and established by the Supreme court in the Taxed Mountain Case has been referred to in most major cases concerning Sami rights and law since.[114]

There is currently an on-going case referred to as The Girjas Case *(Girjasmålet)*, concerning the right of the Sami village Girjas to hunt small game and fish within the area of the village. The question of the possibility of granting such rights is also to be heard. The case was granted a leave for appeal by the Supreme Court as of the 4th of September 2018.[115] The District Court of Gällivare, as well as the Övre Norrland Court of Appeal, has both relied heavily on The Taxed Mountain Case as a precedent.[116] The Supreme Court, when handling the Girjas case, is therefore going to have to relate to its own precedent.

Christina Allard, associate professor of law at Luleå University[117], has published a number of books on Sami rights.[118] She believes it possible for the Supreme Court to become the guarantor for the insurance of Sami rights. Allard believes the likelihood of a successful outcome if bringing a case concerning Sami Rights in front of the Swedish Supreme Court to be greater today than it has been historically.[119] Therefor I find it interesting to analyse in what spirit The Taxed Mountain Case was determined.

[114] See for an example: NJA 1984:148, NJA 1988:684, and NJA 2011:109.
[115] The Supreme Court, T 853-18.
[116] The District Court of Gällivare, T 323-09 and the Övre Norrland Court of Appeal, T 214-16.
[117] Luleå University of Technology Staff, *Christina Allard.* https://www.ltu.se/staff/c/chrisa-1.80982?l=en (access 2018-10-12).
[118] See for an example: Allard (2015) and Allard and Skogvang (2015.
[119] Allard (2015), p. 341.

4.3 Concluding reasoning of the Supreme Court

The Supreme Courts final decision, concerning if the Sami parties has a better right to the property in question, is in favour of the Swedish State. The right to the geographic area in question is decided to belong to the State.[120]

The Supreme Court acknowledges that the Sami people lived in the northern parts of Scandinavia long before any other ethnicity. The Swedish State has, with the intention of expanding its territory, pushed the Sami people away from areas they have earlier had access to. Gradually the Sami people had to succumb to Governmental control.[121]

Throughout the case the Sami parties has raised the issue of racism and discrimination. The Sami parties, for an example, raised the issue of State representatives, being in charge of conducting State reports, having harboured racist opinions.[122] The Supreme Court however wants to make it clear that the Taxed Mountain Case is not concerning the legality of infringements having been made on the rights of the Sami people as an ethnic group. The question of racism and discrimination against the Sami people having been suggested by the Sami parties in the case are of importance in the context but the case is about private law and the right to property.[123]

Concerning the years reaching up to 1789 the Supreme Court considers the Sami party to not having managed to show that the State, at any given time, declared the Sami people to be the owner of the Taxed Mountain. The Sami people are not considered to having had the rights of a taxed man

[120] NJA 1981:1, p. 230.
[121] Ibid, p. 175.
[122] Ibid, p. 172, 219.
[123] Ibid, p. 175.

(skattemannarätt) in the same way as a farmer, and that right could therefore not have had developed into a right to property.[124]

As of 1789 the Governmental exercising of power, concerning the Taxed Mountain, increased. The Court continues on in establishing that, within the Swedish legal system, it is a widely known legal principle, established by the King Gustavus Vasa in the 16th century, that all land not demonstrably proven to be owned by someone belongs to the Swedish State.[125]

During the 1840s and the 1850s the State, according to the Supreme Court, was set on safeguarding the rights of the Sami people. The State maintained the approach that it was the owner of the land. Administrative authority increasingly considered every individual Sami person as having a permanent protected tenancy, rather than a right to property. In the years ahead of the Reindeer Herding Act of 1886 the Supreme Court states that the understanding "from all sides" was the State being the owner of the Taxed Mountain, and not the Sami people.[126]

The Supreme Court acknowledges that State issued evidence are to be approached by the Court with great caution when the State is a case party in a litigation.[127] It is also established that there is a lack of material drafted by representatives from the Sami population. This is partly due to most Sami people being illiterate up until the 18th century. Therefore, the material presented in court manifests the views on Sami people held by alien agents. The views of the ethnic group itself, the Sami people, are generally not disclosed.[128]

The administrative authority practice from the 19th century is by the Supreme Court deemed to be "solid and largely consistent". The arguments

[124] NJA 1981:1, p. 227.
[125] Ibid, p. 228.
[126] Ibid, p. 228.
[127] Ibid, p. 228.
[128] Ibid, p. 180.

supporting the reasoning of the administrative authorities are considered "reasonable" and therefore of "substantial importance" when determining the right to property in the case. The Supreme Court dismisses any claim, from the Sami parties, of the State having exercised governmental power in such an illegitimate manner that the administrative authority practice should be left without notice.[129]

According to the Supreme Court the issue raised by the Sami party, concerning racist and colonialist currents increasing after the year of 1858, should be dismissed. The Supreme Court considers the Reindeer Herding Act of 1886 to be an attempt by the legislator to actually save the right to trade, a right having been gained by the Sami people through history.[130] The Court acknowledges that "seemingly Sami hostile currents appeared in connection with the drafting of the legislation". That is however not of importance concerning establishing the right to property in the case.[131]

4.4 Applying the theory of Dworkin on the Taxed Mountain Case

4.4.1 Conflict of interest between a majority and a minority

The plaintiffs in the case is the Sami villages in the county of Jämtland, some other Sami villages and some individual Sami people. The respondent is the Swedish State.[132]

The Sami people are acknowledged as an indigenous people by the Swedish Parliament as of 1977, even though not in the constitution.[133] The

[129] NJA 1981:1, p. 228.
[130] Ibid, p. 229.
[131] Ibid, p. 229.
[132] Ibid, p. 166.
[133] KrU 1976/77:43.

constitution did however acknowledge the Sami people as an ethnic, linguistic and religious minority at the time of the judgement.[134] The Supreme Court confirms the minority status of the Sami in the judgement by referring to them as a minority.[135] It can therefore be established that the Taxed Mountain Case is constituting a conflict of interests between a majority, the Swedish state, and a minority, the Sami people.

4.4.2 Defining the right as moral or legal

The conflict of interests consists of a difference of opinion on the ownership and the right to property. The Sami party wanted the Supreme Court to establish them having more of a right, and the state having less of a right, to the geographic areas in question in the case. The State considers itself to be the owner of the property in question.[136] The right to property was at the time of the judgement protected in the 2 chapter of the 18§ of the Instrument of Government:

> *Each citizen whose property is claimed by way of expropriation or other such disposition shall be guaranteed compensation for his or her loss according to principles laid down in law.*[137]

The article is to be understood as covering the right to property and other special rights connected to financial value.[138]. The 2 chapter 18§ Instrument of Government presents one of the most controversial articles in the second chapter of the document, regulating fundamental rights and freedoms. It exists a political disunity concerning whether or not the right to property should, at all, be awarded constitutional protection and if so, how it is to be designed. The political parties are divided into those finding, on the one

[134] 1 chapter 2§ Instrument of Government.
[135] NJA 1981:1, p. 182.
[136] Ibid, p. 167-169.
[137] 2 chapter 18§ Instrument of Government (1980). Translated by the author of this thesis with the assistance of Swedish Parliament (2016), *The Constitution of Sweden: the fundamental laws and the Riksdag Act*, p. 69.
[138] Prop 1971 p. 237.

hand, the right to property a central part of the Swedish social and economic system. The other side finds a right to property as creating an obstacle for realising legislation drafted to equalise economic or social inequality or protecting the environment.[139]

Dworkin defines a moral right as a right that the legislator would do wrong morally in removing or limiting no matter the legal possibility of doing so. Freedom of speech is used by Dworkin as an example.[140]

Even though the political disunity on the right to property, in Sweden, is profound I do find it hard to believe that it would not be considered morally wrong for the Swedish parliament to remove the right to property from the Swedish constitution. It could be argued that removing the right to property would cause a state of anarchy, destroying the lives and achievements made by hard working people. I do believe the Swedish constitutional right to property is to be classified as a moral, and not purely, a legal right.

4.4.3 A vague constitutional clause

Each citizen whose property is claimed by way of expropriation or other such disposition shall be guaranteed compensation for his or her loss according to principles laid down in law.[141]

The wording of the article itself does not offer any guidance regarding things such as how to determine ownership, the definition of property or what it means to having had to surrender property to a public institution. The constitutional clause expresses the concept, not a conception, of a right to property. I consider the conflict of interest to steam from a vague constitutional clause expressing a concept.

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[139] Bull and Sterzel (2013), p. 82–85.
[140] See part "3.2 Moral and legal rights" in this thesis.
[141] 2 chapter 18§ Instrument of Government (1980). Translated by the author of this thesis with the assistance of Swedish Parliament (2016), *The Constitution of Sweden: the fundamental laws and the Riksdag Act*, p. 69.

4.4.4 Defining the vague constitutional clause

The Swedish legislative process

The Swedish legislative process begins with a proposal to new legislation *(motion)*, most often the initiative originates from the Government. The second step consist of a person, or a group of people, drafting an inquiry (*betänkande)* into the possible new legislation. The conclusions of the inquiry are presented in the Swedish Government Official Reports series *(Statens officiella utredningar, SOU)*. The report is thereinafter referred to different bodies whom might offer valuable opinions on the report *(remissinstanser)*. When the referral process is finished the ministry responsible presents the final government bill *(proposition)* to the Parliament where the final vote of acceptance, or rejection, is to take place.[142]

The reason why it is important to understand the basics of the legislative process has to do with the fact that Swedish courts refers to Swedish Government Official Reports as well as government bills in its judgements. The reports and the bills offer guidance in the motive of the legislation and they can, for an example, also specify if the legislator did not intend a certain scenario to be regulated by the legislation. Sometimes even the meaning of specific words is defined by the legislator in a report or a bill.[143]

The Reindeer Herding Act of 1886

In the Taxed Mountain Case the State argues that the rights of the Sami people are exhaustively codified in the Reindeer Herding Act[144], including the right to property.[145] The Sami parties objects, citing greater, and more exhaustive rights, then those specified in the act.[146] The Supreme Court

[142] Government Office (2018). (https://www.government.se/how-sweden-is-governed/swedish-legislation---how-laws-are-made/ (access 2018-09-15).
[143] Hirschfeldt and Eka (2012), p. 2-8.
[144] Rennäringslag 1971: 437.
[145] NJA 1981:1, p. 174.
[146] Ibid, p. 176.

establishes that the legislator has not, in the act, specified the owner of the land where reindeer herding, according to the act, is allowed to be practiced. The legislator has left the question of ownership open, the court stating that "the owner can apparently not only be the state or the Sami people, but also other legal entities."[147]

The Court however comments on the fact that the Act of Reindeer Herding is phrased in such a way that it is clear that the Sami people are not considered the owners of the land where they practice herding. The right of the Sami people is, in the act, formulated as a right of usage to the land, rather than an actual right to property.[148]

The original Act of Reindeer Herding was passed in the year of 1886 and was intended to codify the legal position, according to the State, of the Sami rights at the time. The act has been slightly changed since, but the main characteristics are maintained. The Sami parties argues against the Act of Reindeer Herding of 1886 being a codification of the rights of the Sami people, stating that the legislation has never been accepted by the ethnic group. The Supreme Court therefore decides to try to establish the right to the property in question before the coming into effect of the Act.[149]

The right to property evolving from the concept of the rights of a taxed man

During the 17th and 18th century a right to property, like the one existing today, was non-existent. What is today referred to as a right to property, in accordance with the Swedish constitution, has evolved from a legal concept historically called the rights of a taxed man *(skattemannarätt).* The rights of a taxed man consisted in farmers having, for an example, the right to cultivate his own land, keep the majority of the yield and transfer the right

[147] NJA 1981:1, p. 178.
[148] Ibid, p. 178.
[149] Ibid, p. 178-179.

of ownership to another person. However, in case the farmer failed, three years in a row, to pay taxes to the Swedish Crown the land would be seized by the Crown and the farmer would lose his protected tenancy.[150]

The Supreme Court decides to establish if the Sami people had a similar right to the geographic area in question in the case as a farmer could have in accordance with the rights of a taxed man. The question to be answered by the Supreme Court is: Did the Sami people practicing reindeer herding in the geographic area of the case have the rights of a taxed man to the land in question? If they did, that right could later evolved into a right to property.[151]

The evidence presented by the two parties are complex and old, the oldest document presented issued by the Swedish King Gustavus Vasa in 1542.[152] Most evidence presented, by both parties, are State issued documents or court judgments. Some references to academics are made but their statements and research are often considered to be to vague and not relevant for the specific geographic area.[153]

The legislator has through lower standing non-constitutional legislation, legislative history and State documents tried, to a certain extent, to define the right to property for Sami people. In other words, the legislator made attempts to turn the concept of the right to property into a conception. Both parties in the case have presented a number of State documents, including legislative history, advocating a certain standpoint concerning what right the Sami people, or the State, should have to the Taxed Mountain. The Supreme Court establishes that there is no law or document currently in place clearly specifying the owner of the Taxed Mountain and therefore the Court has to investigate the possible establishment of ownership historically.

[150] NJA 1981:1, p. 184.
[151] Ibid, p. 184.
[152] Ibid, p. 190.
[153] See for an example: NJA 1981:1, p. 203 and NJA 1981:1, p. 189.

4.4.5 Political scepticism

Dworkin defines political scepticism as the belief of there existing no moral rights, and no act can ever be morally right or wrong. Democracy is simply a way of determining whose preference is to prevail and the majority will is the only matter of interest.[154]

The Supreme Court decision consists of 87 pages. Nowhere on those 87 pages can the words moral, natural law or philosophy be found. The only reference to legal philosophy is brought up by the Sami parties in the case. They make a reference to the teachings of Hugo Grotius and Samuel Pufendorf concerning the right to property and how that right can be acquired by occupying barren land[155]. Grotius and Pufendorf have in common that their theories were based on ideas connected to natural law, moral and ethics.[156]

The work of Grotius and Pufendorf is, by the Supreme Court, referred to as "older legal doctrine".[157] The theories are, by the Supreme Court, considered to primarily be applicable concerning occupation as regulated in international law. The Court concludes that it is unclear if such a right, merging from international law, has any effect in Swedish civil law and if so, what the criteria for that would be. The material is left without regard.[158]

4.4.6 Judicial deference

The theory of judicial deference presents the idea that individuals do have individual moral rights against the state, beyond what is expressively presented in legislation. However, the character and strength of those moral

[154] See part "3.3 Political scepticism" in this thesis.
[155] NJA 1981:1, p. 171.
[156] Miller (2014), https://plato.stanford.edu/entries/grotius/ (access 2018-09-23). Seidler (2018), https://plato.stanford.edu/entries/pufendorf-moral/ (access 2018-09-23).
[157] NJA 1981:1, p. 189.
[158] Ibid, p. 189.

rights are debatable and should be defined and recognised by democratic institutions, not courts.[159]

4.4.6.1 Jurisdiction

The respondent in the case, the State party, brings up the matter of jurisdiction in the case. In District Court, the State party argues that the claims presented by the plaintiff should be dismissed since "a task like this is not within the jurisdiction of the court. The claims presented in the case have been presented in the wrong forum: to the courts instead of to the legislator."[160]

The same objection is raised by the State party in the Supreme Court. The party arguing that "the alternative claim of a special kind of right to property presented by the Sami parties cannot be realised by a court decision, in this case it should require legislation."[161]

The second chapter of the Supreme Court judgement handles the right to litigation and procedural impediment.[162] The right to litigation and procedural impediment are regulated in the Code of Judicial Procedure *(Rättegångsbalken)* and in the Code there are rules regulating when a court has to dismiss a case.[163] The Supreme Court does however not respond, or at all acknowledge, the objection made by the State party of the Court being the incorrect forum. There is no part in the judgement showing that the Supreme Court has acknowledge or tried to define what part the court itself considers to be the correct one to play, in relation to the legislator, concerning this kind of issue.

[159] Dworkin (1972), 3rd section 7th paragraph.
[160] NJA 1981:1, p. 101. Translated by the author of this thesis.
[161] Ibid, p. 173. Translated by the author of this thesis.
[162] Ibid, p. 169–170.
[163] Code of Judicial Procedure (1942:740).

4.4.6.2 Compliance with the interpretations and intentions of the legislator

1 Chapter 9§ Instrument of Government

Courts of law, administrative authorities and others performing functions within the public administration shall pay regard in their work to the equality of all before the law and shall observe objectivity and impartiality.[164]

The burden of evidence

The Supreme Court decides to place the burden of evidence on both parties in the case. Each party is responsible for proving whatever facts they refer to.[165] The Court established that the Sami people has been, "up until 1886, a minority without political power".[166] The ethnic group has had particular difficulties in understanding legal reasoning and affecting the course of events. The fact that the Sami people´s reactions to encroachments, by governmental agencies, in their industrial acquisition has sometimes been delayed and hesitant should not be given any significance in the case.[167]

The Court acknowledges the sensitivity of the case, due to one party consisting of the State and the other party being a minority, but the reasoning is phrased in such a way that it might give the impression that the burden of proof was indeed placed on the Sami parties. Wordings such as "Neither can any other circumstance referred to by the Sami parties from this time /---/ be understood as a recognition by the State that the Sami people owned the mountain in question."[168] or "The measures taken by

[164] 1 chapter 9§ Instrument of Government (1980). Translated by the author of this thesis with the assistance of Swedish Parliament (2016), *The Constitution of Sweden: the fundamental laws and the Riksdag Act*, p. 69.
[165] NJA 1981:1, p. 182.
[166] Ibid, p. 182.
[167] Ibid, p. 182.
[168] Ibid, p. 227.

Government agencies concerning the Taxed Mountain clearly shows, that from the point of view of the Crown, no right to property belonging to the Sami people was agreed to."[169]

Feeling of oppression

The Supreme Court also shows a tendency to dismiss or disregard the feeling of oppression expressed by the Sami people. Examples of this are wordings such as "The Sami parties furthermore presented the hypothesis that the benevolent statements made about the rights of the Sami people to winter pasturage in reality was meant to bring the question of the right to the Taxed Mountain out of the field of vision and in such a way deprive the Sami people of their right to property. The hypothesis appears ill-founded."[170] Another example would be "What primarily happened at the legislative drafting of 1886 was an attempt to save the industry acquisition of the Sami people by, in law, establishing their, by time, established rights.[171] The wording of the Supreme Court could be argued to have an air of the Sami people acting in a ungrateful way when the legislator has simply tried to assist them in their struggle.[172]

Concerning the Reindeer Herding Act the State Party argues that the act was intended, by the legislator, to be a complete codification of the legal position of the Sami people as of 1886. When the act was revised in 1971 it was made clear by the National association of Swedish Sami that they considered the right to reindeer herding areas to be greater than what had been established in the act.[173] The Council of Legislation raised the issue of the Sami people not approving of the basic foundations of the legislation, which the Council considered not to be satisfying. The Council did however find it acceptable, due to the Taxed Mountain Case currently being ongoing,

[169] NJA 1981:1, p. 218.
[170] Ibid, p. 227.
[171] Ibid, p. 229.
[172] This view is also supported by Bengtsson (2004), p. 102.
[173] Prop 1971:51, p. 121 and NJA 1981:1, p. 178.

that the Reindeer Herding Act of 1971 was to be based on the same premises as the Act of 1886.[174]

The Court also states that the investigation made ahead of the Reindeer Herding Act of 1886 was summary and based on a modest amount of material, especially in comparison to this case. The Court believes the reason for this to be because the general opinion of the governmental agencies handling questions of the right to property at the time was considered reliable.[175] The Supreme Court seems to accept the view of the legislator, that the Reindeer Herding Act of 1886 was an attempt to codify the current legal position.[176] The fact that the Supreme Court, concerning the burden of proof, stated that the Sami people has had limit possibilities in affecting the course of events and understanding legal reasoning[177] does not seem to have been discussed concerning the final outcome of the case.

4.4.6.3 Accountaibility of Swedish democratic institutions for wrongdoings against the Sami people

The idea that the popularly elected representatives are to be held responsible for their decisions, when having been elected by the Swedish people, is established in the Swedish constitution. The article in question is the opening article of the Instrument of Government and the foundation stone of the entire document, and by that the foundation of the Swedish democracy.[178]

All public power in Sweden proceeds from the people. Swedish democracy is founded on the free formation of opinion and on universal and equal

[174] Prop 1971:51, p. 261.
[175] NJA 1981:1, p. 226.
[176] Ibid, p. 228–229.
[177] Ibid, p. 182.
[178] Holmberg and Stjernquist (1980), p. 30.

suffrage. It is realised through representative and parliamentary form of government and through local self-government. Public power is exercised under the law.[179]

In the Swedish Government Official Reports accompanying the paragraph it is stated that the paragraph should be understood as follows: "The chosen representatives are politically responsible for the effects of the decisions they make. They act in an official capacity, and their actions can be scrutinised."[180]

During the end of the 19th century ideas of racial biology started winning ground in Sweden. Ideas of the Sami people being born with specific racial characteristics making them inferior to the remaining population was introduced. In 1922 a unanimous Parliament passed a bill to establish the first institute of racial biology in Sweden, and in the world. One of the most prominent actors of the institute of racial biology, Herman Lundborg, developed a special fixation concerning the Sami people. He spent years researching the appearance of persons from the Sami population, mostly by measuring skulls. Lundborg had the hypothesis that interracial reproduction was harmful. As of 1941 the Swedish governmental agency the Board of Agriculture proclaimed that Sami people were not suitable for agricultural work due to reasons of racial biology. The Second World War put the idea of racial biology out of fashion, but the Swedish Institute of Racial Biology remained until the year of 1958.[181]

The Sami people has also been compulsory transferred by the Swedish State. When the Union between Norway and Sweden failed in the year of 1905 the Sami population living and working in the borderland between the

[179] 1 chapter 1§ Instrument of Government (1980). Translated by the author with the assistance of Swedish Parliament (2016), *The Constitution of Sweden: the fundamental laws and the Riksdag Act*, p. 69.
Holmberg and Stjernquist (1980). The wording was the same in the Instrument of Government as of 1980.
[180] SOU 1972:15, p. 76. Translated by the author.
[181] Government Offices and the Sami Parliament (2004), p. 15.

two countries experienced great difficulties. The Sami had the custom of moving their reindeer herds between the two countries depending on the season. As of 1919 a Swedish/Norwegian convention regulating the right of the Sami to use different areas of land heavily limited the access to pasture. Some areas were completely shut off for access and the allowed number of reindeers was considerably decreased in a number of areas.[182]

The consequence of the convention was that a number of Sami groups had no access to any land for summer pasture. The solution chosen by the Swedish authorities was to compulsorily transfer a great number of Sami families further south. The families were transferred to areas already occupied by other Sami families creating social, as well as reindeer herding issues.[183]

In 1913 a new law was passed concerning a special school for nomad children. Sami children were not allowed to attend regular Swedish schools. The Sami children were to be taught by a Swedish teacher for a few weeks during the summer, the teaching taking place in the cot of the Sami family. During the winter the Sami children had to attend a stationary school for three months for three years. If they did not attend, the police forceable collected them. The education was to consist of fewer subjects than a regular school and with a lower level of difficulty. The Sami children were not to be "civilised".[184]

In 1928 it was decided by the Swedish Government that special rights were only given to that part of the Sami population working with reindeer herding. Rights such as hunting and fishing were made to be connected to reindeer herding in such a way that all Sami not owning reindeers lost all special rights to the land of their ancestors.[185]

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[182] Samiskt informationscentrum, *Stängda gränser och okända marker*, http://www.samer.se/1281 (access 2018-09-28).
[183] Ibid.
[184] Government Offices and the Sami Parliament (2004), p. 15.
[185] Ibid, p. 14.

Individual attempts, by members of the Swedish parliament, has been made to raise the issue of the historical treatment of the Sami population. For an example, in 2015 a parliament committee presented a proposal for the state to create so called white books to map out the racism and discrimination having taken place against the Sami population by the Swedish State.[186] The proposal was dismissed motivated by the argument that other investigations were already ongoing into those kinds of questions.[187]

The only apology ever issued to the Sami people by a Swedish State representative was delivered on the 8th of August 1998 by Annika Åhnberg, the then minister of agriculture and Sami, during a town hall meeting. The apology was never approved by the government and the official apology promised by the minister was never delivered. Annika Åhnberg was realised from her position as minister in September the same year, in connection to an election. It is unclear if her realise had anything to do with her decision to give the apology.[188]

4.4.7 Argument of fairness

Concerning the argument of fairness Dworkin states that "It is always fairer to allow a majority to decide any issue than a minority". However, "Decisions about rights against the majority are not issues that in fairness ought to be left to the majority."[189] So, the question in this case is, was the majority allowed to make a decision concerning its majority rights in the Taxed Mountain Case and can that be considered to be fair?

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[186] Bill from the Committee on the Constitution to the Parliament *(Motion från Konstitutionsutskottet till riksdagen)* 2015/16:2499, *Vitbok om behandlingen av samer och tornedalingar*.
[187] Record *(Protokoll)* 2016/17:104 Wednesday the 3rd of May, p. 116.
[188] Fröberg and Dahlberg (2018), *Bad om ursäkt till samerna – "fick skäll av regeringen"*, https://www.svd.se/samer-kallades-lappjavlar-fran-regeringshall (access 2018-09-27).
[189] See part "3.4.1 Argument of fairness" in this thesis.

By the Supreme Court accepting the case, even though not addressing on what premise, this has to be interpreted as the Court considering itself, and the general court system, to be the correct forum.[190] In its proceedings the Court acknowledges the Sami people as a minority, politically and judicially exposed.[191] However, in the way that I have understood the reasoning the right to property for the Sami people is entirely based on historical legislation and legal principles which has been created and shaped by the Swedish governmental apparatus.[192] That historical legislation and those legal principles are therefore created by the majority. The Supreme Court establishes that the minority, the Sami people, has had no political power during the time when that legislation and those principles were created. They also had limited abilities to assimilate the information and they were inferior in relation to the Swedish State.[193] By the Supreme Court adopting the position it did, it can be argued that the Court allowed the majority to decide its own rights as a majority, in relation to a minority.

4.4.7.1 Constitutionalism

The theory of Constitutionalism, the idea of restraining the majority to protect individual rights, can be found in constitutional law in the United States of America[194] but the theory itself is not present in Swedish constitutional law.[195] There are however articles expressing a similar idea, of individuals being protected against State infringements. Most of these constitutional individual rights can be found in the second chapter of the Instrument of Government. In the opening article of the chapter the rights and freedoms that each citizen should be guaranteed in relation with the

[190] See part "4.4.6.1 Jurisdiction" in this thesis.
[191] See part "4.4.1 Conflict of interest between a majority and a minority" in this thesis.
[192] See part "4.3 Concluding reasoning of the Supreme Court" in this thesis.
[193] See part "4.4.6.2 Compliance with the interpretations and intentions of the legislator" in this thesis.
[194] See part "3.4.1 Argument of fairness" in this thesis.
[195] Bull and Sterzel (2013), p. 18-20.

public institutions are listed. Freedom of expression, information, assembly, association, worship and the freedom to demonstrate are all listed.[196]

The foundation of the Swedish democratic system is that all public power is to be proceeding from the people, supremacy of the people *(folksuveränitet).*[197] The Swedish governing is based on negative parliamentarianism.[198] This means that the power is to be held by the majority of the organ elected by the people. The government has to be tolerated by the majority of the parliament and if not, the government has to resign. In practice this results in it being possible to pass decisions with the support of a parliamentarian minority, as long as the majority of the parliament does not actively oppose the decision and votes no.[199] No person with Sami origin is a part of the Swedish Parliament.[200]

4.4.7.2 Uniform and hostile approach to Sami rights

This brings us to the question concerning the political approach to Sami rights adopted by Swedish politicians. According to Dworkin history shows that politicians have a tendency to adopt a uniform and hostile approach towards individual rights of a minority. He argues that majorities that are mindful of its own interests are often powerful and national. This results in minorities not being able to relay on the political system and should therefore be able to put their trust in the Court system.[201] Has this historically also been the case in Sweden concerning Sami rights?

The approach adopted by the Swedish State towards Sami rights has historically fluctuated, being more or less oppressive. At times there has

[196] 2 chapter 1§ Instrument of Government (1980). Translation: Swedish Parliament (2016), *The Constitution of Sweden: the fundamental laws and the Riksdag Act,* p. 66.
[197] 1 chapter 1§ Instrument of Government (1980). Translation: Swedish Parliament (2016), *The Constitution of Sweden: the fundamental laws and the Riksdag Act,* p. 65.
[198] 1 chapter 1§ Instrument of Government (1980).
[199] Holmberg and Stjernquist (1980), p. 30-31.
[200] Samiskt informationscentrum, *Samerna och staten*, http://www.samer.se/1098 (access 2018-10-21).
[201] See part " 3.4.2 Argument of soundness" in this thesis.

been some Swedish Government Official Reports drafted in such a way that it can be understood as being more forthcoming towards acknowledging Sami rights. However, according to Bengtsson it is clear that the legislator has shown a habit of interpreting historical circumstances to its own benefit and to the disadvantage of the Sami people, unless the circumstances are clearly refuting such an interpretation.[202] To support Sami rights is not politically benefitable and Swedish politicians are hesitant to bring up these questions.[203] Research has also shown that politicians, as well as the general Swedish population, reacts more moderate on discrimination of the Sami population than discrimination of other minority groups.[204]

I do not find myself to have the material to draw such a conclusion as classifying the approach adopted by the Swedish State and the legislator as uniformly hostile, throughout history, towards Sami rights. I do however neither find material to support the opposite. It is clear that the question of Sami rights is politically controversial for the majority and a debate concerning the topic undesired due to it not being beneficial to the majority.

The determination of the right to property of the Sami people has, by one of the most prominent researchers on the topic, been criticised for hasty decisions based on deficient material.[205]

4.4.7.3 The legislator being its own judge

The Supreme Court makes a point out of defining the imbalance between the two parties in the Taxed Mountain Case. The Court also comments on the complexity of the evidence in the case, and the historical uncertainty surrounding those evidence.[206] The Supreme Court does however not seem to adopt a critical approach in relation to these circumstances and the

[202] Bengtsson (2004), p. 102.
[203] Ibid, p. 13.
[204] Lange (1998), *Samer om diskriminering*.
[205] Korpijaakko-Labba (1994), p. 473.
[206] See part "4.4.6.2 Compliance with the interpretations and intentions of the legislator" in this thesis.

aggravating circumstances are disregarded when the Court reaches its final decision concerning the right to property of the Taxed Mountain.[207] My conclusion is therefore that the Supreme Court enables the State and the legislator to be its own judge in the Taxed Mountain Case.

1 Chapter 2§ Instrument of Government

> *Public power shall be exercised with respect for the equal worth of all and the liberty and dignity of the individual.*
>
> *[…]*
>
> *The public institutions shall promote the ideals of democracy as guidelines in all sectors of society.*
>
> *[…]*
>
> *The opportunities of ethnic, linguistic and religious minorities to preserve and develop a cultural and social life of their own should be promoted.*[208]

The provision presented in 1 Chapter 2§ Instrument of Government is not legally binding. It is however expressing what fundamental values and ideas that are to be guiding the governing of Sweden. The provision is a result of political compromise and different sections has been added consecutively after consensus has been reached among the different parties in parliament.[209]

4.4.8 Argument of soundness

4.4.8.1 Weak version of soundness

Dworkin presents two versions of the argument of soundness, one referred to as weak and one as strong. The weak version consists of the idea that a

[207] This view is also supported by Allard (2015), p. 247.
[208] 1 chapter 2§ Instrument of Government (1980). Translated by the author with the assistance of Swedish Parliament (2016), *The Constitution of Sweden: the fundamental laws and the Riksdag Act*, p. 65.
[209] Holmberg and Stjernquist (1980), p. 45–48.

court judgement on individual rights needs to be accepted by society and if not, the Supreme Court has created an incorrect precedent. This presupposes a dialogue between the Court system and the general public.[210]

The idea of the Swedish Supreme Court having a dialogue with the general public is very foreign to the Swedish legal system. The Swedish Supreme Court present itself as one entity, not a formation of a number of judges, and writes its judgement as such.[211] The only mean of communication used by the Swedish Supreme Court is its judgements and individual judges never comment on them, except if they present a dissenting opinion in the end of the judgement itself. I am therefore no further to comment on the idea of a weak version of soundness within the Swedish legal system.

4.4.8.2 Strong version of soundness

The strong version of soundness is based on the idea that the political process will ensure genuine individual rights, if not hindered by the court system. If the claim of an individual right is proper, the political process, with the assistance of political institution, will realise the right when political pressure is applied. Dworkin argues that the strong version of soundness is deemed to be unsuccessful for minority rights. This due to the fact that it would require the majority to surrender its comfort, and political power, and make decision that might be at the cost of the general interest of the majority.[212]

The strong version of soundness forces a political minority to completely relay on the good will of the political majority. In the year of 1980 Sweden had a population of roughly eight million people (8 000 000).[213] The Sami population constituted roughly twenty-thousand (20 000) of those eight

[210] See part "3.4.2 Argument of soundness" in this thesis.
[211] Allard (2015), p. 314.
[212] See part "3.4.2 Argument of soundness" in this thesis.
[213] Nationalencyklopedin, *Sverige*, https://www.ne.se/uppslagsverk/encyklopedi/l%C3%A5ng/sverige#befolkning (access 2018-12-21).

million (8 000 000).[214] The Sami population has, as determined by the Supreme Court, throughout history had limited or no political power.[215] Since the Sami population has seldom managed to successfully having had their supposed rights acknowledged this should, according to the strong version of soundness, mean that they do not possess any individual rights.

[214] Government Offices and the Sami Parliament (2004), p. 5. (Sweden no longer register the ethnic backgrounds of its population, due to this the exact number of Sami people in Sweden is not clear).
[215] NJA 1981:1, p. 182.

5 Discussion

Did the Swedish Supreme Court adopt an activist or restrained approach in accordance with Dworkins legal theory, concerning the right to property of the Sami people, in the Taxed Mountain Case? What were the effects of that approach?

5.1 A child of its time

To be able to understand the approach of the Supreme Court in the Taxed Mountain Case I believe it to be important to understand the circumstances and the societal environment in which the Supreme Court was active at the time.

The idea of a living constitution is adapted in the Swedish legal system. The process for changing or altering the constitution is relatively easy and is carried out regularly by the legislator. The tradition of legislative history, and its big influence on the interpretation of the constitution, results in the legislator being a big actor in relation to not only the content of the constitution, but also how that content is to be understood.

No constitutional court is in place in Sweden, instead the idea is that all courts are to perform judicial review. Historically judicial review has however been extremely rare. The Swedish court system has a tradition of being very restrained in the development of legal norms. The court system has historically relied heavily on the legislator and other state actors to ensure individual rights.

The Taxed Mountain Case, when applying the theory of Dworkin, seems very much to be a child of its time. During the 1980s it was theoretically possible for the Supreme Court to carry out judicial review, but the

possibility was rarely not used in practice. This however does not mean that the precedent is not problematic or questionable.

5.2 The interest of the legislator and the general public

The idea of Dworkin, in relation to judicial activism and minority rights, is that a court is to assist the assurance of minority rights even though it might not be in line with the general interest of the majority. I do find it hard to argue that it would be in the interest of the legislator, or the interest of the general public, to determine the ownership of the tax mountain as belonging to the Sami people.

For the case of argument, what would be the results if the Supreme Court sided with the Sami parties and established that the Taxed Mountain were owned by them? I would like to argue that a judgement in that spirit could have opened the Pandoras box. If the Taxed Mountain belong to Sami people, what is to say that not other areas within the geographic area of Sapmi also belongs to the Sami people? A Supreme Court precedent establishing the right to property for a small group of Sami people, contrary to the interests of the Swedish state and the majority, would possibly give hope to the Sami people of regaining the land of Sapmi, that they consider theirs.

Sapmi constitutes one third (1/3) of the geographic area referred to as Sweden. In the area referred to as Sapmi there are also majority representatives, Swedes, living and owning property. If the Sami people were to regain the right to their colonised land quite a few Swedes would suddenly be living in a country not being Sweden. What would be the effects on businesses, infrastructure, State finances and so on. Was the Supreme Court aware of this possible Pandoras box when approaching the Taxed Mountain Case? I think so. Whether this should actually be

considered or be the concern of the Supreme Court might be a question worth asking.

5.3 Moral right

Dworkin and the Swedish Supreme Court has made one fundamentally different assumption. Dworkin believes that when it comes down to moral rights, the right exists no matter if it is laid down in law or not. Using the example of Dworkin, it does not matter if the American legislator has laid down in law that black children are to be segregated from white children within the school system, if this is not in line with the moral conception of the American Supreme Court. If the Swedish Supreme Court were to apply that idea in the Taxed Mountain Case that would result in the possible disregard of the laws created by the legislator.

Regarding moral being silly Dworkin emphasises that the core of his theory is “principles as principles”. The Swedish legal system is heavily influenced by Scandinavian legal realism, which opposes the idea of the existence of natural law and moral. It is therefore not surprising that the Supreme Court does not at all discuss anything related to natural law or moral in the Taxed Mountain Case. It is however laid down in the Swedish constitution that the Supreme Court is to pay regard to the equality of all before the law. In other words, the court should apply “principles as principles”, no matter the circumstances of the case.

I find myself wondering if the Supreme Court created a precedent insinuating that a party slowly starting to behave in a manner expressing ownership to a certain property, over time can gain the right to that property, no matter there already being someone else considering themselves having that right? The person losing its right to property seems to not even have to understand what is happening, no information in a language understood by that person needs to be forwarded. The Supreme Court has an obligation of treating all equally, no matter if they belong to the indigenous ethnic group

of Sami or not. The parties of a case should not affect the outcome of the case.

5.4 Objective and impartial

The Supreme Court clarifies, quite early in the judgement, that the case is only about private law and the right to property and not about the legality of infringements having been carried out by the State against the Sami people. The question is whether this, that I assume is an attempt to be objective, impartial and stay within the frame of the claim, actually makes the Supreme Court act in a subjective and partial way?

The Swedish legislator has a long history of oppressing the Sami people through creating legislation unfavourable for the group. In the Taxed Mountain Case the Supreme Court bases its final decision concerning the right to property on legislation and legal principles, which the Court establishes that the Sami people has had limited, or no, political opportunity to influence. The final decision of the Supreme Court can be understood as the court acknowledging the oppression, and colonisation, executed by the legislator against the Sami people but they choose to ignore that circumstance. The Supreme Court makes an attempt not to pick a side, but by trying to maintain its impartiality, they appear to be siding with the legislator.

Another example of an ambivalent approach towards the Taxed Mountain Case on behalf of the Supreme Court is the burden of evidence. The court places the burden of evidence on both parties which also portrays an air of impartiality. The final decision is however framed using phrasings implying that the Sami parties has not managed to prove a right to the Taxed Mountain, which implies them having had the burden of evidence concerning such circumstances.

The question concerning jurisdiction was raised by the State party in the Taxed Mountain Case, the party implying that the Supreme Court was the wrong forum and that the question should be deferred to the legislator. There is however no part in the judgement showing that the Supreme Court has acknowledged or tried to define what part the court itself considers to be the correct one to play, in relation to the legislator, concerning this kind of issue. It could be argued that the Supreme Court appears to see itself as completely isolated in the Bondeska palatset[216] and shows no awareness of being part of a bigger system, that is the Swedish democracy.

5.5 Chances for the Sami to be heard in the political system

Swedish politicians do not gain the popularity of the general public by bringing up the question of Sami rights. There is a history of severe oppression committed by the Swedish State against the Sami population. No government approved State apology has ever been issued to the Sami people. When the Taxed Mountain Case was delivered in the 1980s the Swedish State and the legislator seems to have had very limited interest in ensuring Sami rights. The Swedish democratic institutions were not taking responsibility for wrong doings committed by them against the Sami people.

The Swedish democracy is based on supremacy of the people *(folksuveränitet)*, all power is to proceed from the people, and negative parliamentarianism. This is in line with the Nordic belief that the state should be the supervisor of state actions and not the court system. However, considering the fact that the Sami population is not represented in the Swedish government, supremacy of the people seems to be a bad deal, concerning having their rights acknowledged, for the Sami people. In a system were state actions are to be supervised by the State itself a minority group is very exposed, if they are not lucky enough that ensuring their rights

[216] The name of the building housing the Supreme Court, http://www.hogstadomstolen.se/Om-Hogsta-domstolen/Byggnad/ (access 2018-12-22).

happens to be in fashion politically. Historically that has proven to very seldom be the case concerning Sami rights.

5.6 Conclusion and answering of the research question

Ronald Dworkin defines judicial restraint at its most extreme as the court allowing decisions of other branches of government to stand, even if the decision offends the judges own sense of principles as required by the broad constitutional doctrine. The exception is if the decision is so offensive to political morality that it violates any plausible interpretation of the constitution or a clear precedent.

By basing its judgement on legislation and legislative history drafted by the legislator the Supreme Court allowed the decisions of the legislator to stand, in relation to the right to property concerning the Taxed Mountain. The reasoning and judgement is at times contradictory and ambivalent. The Supreme Court at times acknowledges that there are certain issues concerning both the balance between the parties but also the evidence being the creation of one of the parties in the case, the state. The Court does however not act on that information and no measure are taken in relation to it.

The Supreme Court seems to adopt a strongly restrained position, in line with the idea presented by Dworkin as the strong version of soundness. The Court did not critically engage with the evidence submitted in the case and based its judgement on state issued documents. Since those documents did not acknowledge a right to the land for the Sami people, the conclusion of the Supreme Court was that such a right does not exist. In other words, the Court send out the message that if rights are not prevailing from the political process, with the assistance of political institutions, it is an improper claim.

As stated by Dworkin, the effects of the strong version of soundness is that the majority is not willing to accommodate minorities any further than to ensure that order is preserved. The majority is unlikely to create political institutions opposing, or diminishing, its own interests to favour the interests of a minority.

The Swedish State, and the majority, has no interest in returning land to the Sami people. A loss of access to land would result in a number of negative consequences for the Swedish State and would be at the cost of the general interest.

The effects of the Supreme Court adapting a restrained approach in the Taxed Mountain Case are that the Sami people appears to have been left without any forum where their rights as a minority can be acknowledged. The chances of the Sami people to successfully gain recognition, from the majority, of their constitutional rights within the political system are slim. The chances of the Sami people to successfully gain recognition of their constitutional rights within the judicial system seems to be as slim, based on the outcome of the Taxed Mountain Case.

Since the Taxed Mountain Case was delivered in the 1980s it has been referred back to in most cases concerning Sami rights. This is also the case concerning the Girjas case, that was as of September 2018 granted a leave for appeal from the Supreme Court. I do find it interesting to see how the Supreme Court is to go about the Girjas case, since the court has changed its working method towards a less restraint approach as of the last twenty years. Maybe the weight, as a precedent, that has been given to the Taxed Mountain Case could be reconsidered and a new, more minority friendly approach could be adopted.

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