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Some legal considerations concerning Saami rights in saltwater

Elisabeth Einarsbøl

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Some legal considerations concerning Saami rights in saltwater

**The extent of ownership rights in saltwater areas under
Norwegian and international law**

ELISABETH EINARSBØL



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Norwegian and international law

Elisabeth Einarsbø

The rights of the coastal Saami

The rights of the coastal Saami form the focus for this paper, which has been written by one of the advisers at the GÁLDU Resource Centre for the Rights of Indigenous Peoples. It explores the views on the rights of the coastal Saami that prevail today in the light of earlier perceptions and practices within sea fishing. The challenge is to attempt to say something about what this development entails in purely legal terms. The paper is one of the first to seek to provide an overview of what has been done with regard to surveys and research in the area, and reveals a great need for further documentation and research. We hope that you will enjoy reading it.

Magne Ove Varsi
Editor

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Some legal considerations concerning Saami rights in saltwater
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international law

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Preface

Among the objectives of the Resource Centre for the Rights of Indigenous Peoples is to provide information on land and water rights of indigenous peoples. Disseminating information on Saami land and water rights is a central part of these efforts, which is a continuation of the work initiated in 2003.

This paper bears the marks of having been written by a person trained in law. I have however tried to write for a wider audience. It should be pointed out that the subject matter is both complicated and extensive. Little has been written on the coastal Saami and their rights to the saltwater areas they traditionally have used. Consequently, these issues merit an exact approach. My main purpose has been to raise some central issues, with discussions and conclusions being of secondary importance. The principal aim has been to place coastal Saami rights in a legal context.

The work on this paper has been an arduous one, and I would like to thank those who provided help and assistance. I am in particular grateful to Kirsti Strøm Bull, Professor of Law, for her valuable comments and suggestions – it has been great to draw on her expertise. I would also like to thank Eva Josefsen, Cand. Polit., who generously read through parts of the study – it has been of great interest to have these issues viewed through the eyes of a social scientist. It should however be emphasised that I alone bear responsibility for the contents of the present paper.

The rights of the coastal Saami are of great interest to many, and hopefully this paper will contribute to further attention to this subject. The work on coastal Saami rights will continue to be important in the years to come, as much remains to be done in this field. Scientific research will be of decisive importance, since the basis for, the exercise of and opinions on the legal status of the rights of the coastal Saami call for further documentation.

Kautokeino, 06 December 2005

Elisabeth Einarsbøl

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1 INTRODUCTION

1.1 A preliminary presentation of the subject matter

This paper shall present the rights the coastal Saami may have to saltwater fishing resources under Norwegian and international law.

In this context, the issue of coastal Saami rights is concerned with the extent to which the coastal Saami can claim rights to the coastal waters they have traditionally used. The Norwegian State has long claimed that saltwater areas cannot be subject to private title – however, the present paper shall discuss the question of whether and possibly to what extent the coastal Saami's use of the coastal waters can amount to the exercise of rights of ownership or use. The paper will examine arguments favouring the possibility that coastal Saami and other fishermen along the coast *may* have acquired certain rights of use to certain coastal waters, thus questioning the State's view that marine resources are subject to public right.

The State's position that the right to the fishery resources is a public right that the State may regulate freely has until the present been considered as representing current Norwegian property law.¹ There are however arguments for considering the right to marine resources as more than merely a public right. One view put forward by the Saami is that fishing in coastal waters has not been unrestricted, as traditional coastal fisheries must be perceived as a *right of common*, which entails, *inter alia*, a certain protection against restrictive interventions by the Norwegian State.² Moreover, it may be argued that the coastal Saami's rights to fishery resources may be based on principles

of property law as a consequence of rights acquired through customary practices and immemorial usage³. This would however depend on additional documentation of the actual use of the coastal and fjord areas, so that the coastal Saami may claim rights and recognition of such rights also in legal terms.

The coastal Saami culture has long been under substantial external pressure, to the extent that its continued existence is seriously threatened. This is largely due to restrictions imposed on fisheries that have affected the coastal Saami fishermen in particular. The fisheries, which also are an important factor in terms of employment and settlement, must be considered a prerequisite for preserving and developing the coastal Saami culture. In the late 1980ies, Norwegian authorities introduced a quota system that reduced the possibilities of coastal Saami and other fjord fishermen of participating in the sea fisheries. In connection with these regulations of sea fisheries, a system of aquaculture licences and fishing quotas has also been developed. In other words, the rights to sea fishing have become transferable, and some argue that the fishery resources in the sea have become subject to privatisation by rights being transferred from the State to individuals.⁴ We are seeing a development where especially rights of use of coastal waters are increasing. The Kåfjord judgment (*Rt 1985*⁵ p 247) forms part of this development, changing the perspective on coastal Saami fisheries from that of a right to a specific economic activity to rights based on principles of property law.⁶

This paper will demonstrate that questions

¹ NOU 1993: 34 p 123.

² Bjørklund, Ivar in Norsk ressursforvaltning og samiske rettighetsforhold [Norwegian Resource Management and Sami Rights] pp 41-42.

³ NOU 1993: 34 p 121

⁴ See section 3.2.3.

⁵ Rt. is an abbreviation of Norsk Retstidende, a yearly publication of Norwegian Supreme Court decisions. Translator's remark.

⁶ See section 4.1.3.

concerning the right to use saltwater areas without government interference are more important than ever. The typical coastal Saami fisheries have often been exercised in a collective way, where fishers may have acquired rights of use, for instance in connection with a common. We see that in practice this may amount to concrete rights under the principles of property law.⁷ The central point is that the general rule that sea-water fisheries are a public right, is not an absolute rule, as principles of property law and notions that the sea may be subject to rights of use are gaining ground.

Havressurslovutvalget [the Legal Committee on Ocean Resources] recently presented a proposal for a new Act on the administration of non-domestic marine resources. This Act is intended to replace and expand the ambit of present legislation regulating salt-water fishing. The committee's mandate included an examination of Norway's international law and political obligations regarding the rights of its indigenous population. Considering the fact that the committee has recommended a change in the current legal situation, from ocean fishing being a common right allowing for individual exceptions based on custom or immemorial usage, to an explicit definition, in which the ocean resources belong to the State. In light of this fact, many people are sceptical and surprised about such a change in the law. The committee does not seem to have considered the minority report on the situation for Saami fishing in fact or in law. The prospects of securing the survival of Saami fishing for the future are thus not the best. The problem is that one is trying to establish a governmental proprietary right to the fish resources of the ocean without clarifying which fishing rights the Coastal Saami may possess to the fjords and coastal areas in which they have practiced traditional Saami fishing. This may be in violation of national and international obligations which Norway has undertaken.

1.2 Delimitations and important definitions

This paper aims at presenting an overview of the principal legal framework, while also raising some relevant issues linked to Saami rights to sea waters and their marine resources. It does not pretend to be exhaustive in terms of the coastal Saami's rights, aiming rather to give an introduction and general overview on the basis of some legal considerations and terminology. Hence, principles of Norwegian property law will be of central importance.

In this paper, which addresses the coastal Saami's rights to the sea waters they have traditionally used, the focus will be on those of the coastal Saami who practise or have practised saltwater fishing. It must however be emphasised that the coastal Saami's settlement areas have an ethnically mixed population. *This entails that the rights to marine resources claimed by the coastal Saami in practice are sought framed as area-linked rights and not just ethnic rights* (cf the report of the Saami Rights Committee, *NOU*⁸ 1997: 4) The focal point of the present paper is nonetheless what rights the *coastal Saami* have in terms of owning and exploiting the marine fishing resources on the basis of the use they have actually practised. This does not exclude the possibility of others having acquired corresponding rights.

In this paper the term "coastal Saami rights" will frequently be used. It refers to legal rights, based on the principles and rules of property law. It encompasses, *inter alia*, rights of ownership and of use. For the coastal Saami, the claim for rights of use is what is of most interest.

A few papers have already been written on the subject of coastal Saami rights. I have aimed at focusing on these papers, as I believe they have not received the attention they deserve. One of the central works in this field is the paper written by the then Professor Carsten Smith, published in *Lov & Rett* 1990 p 507, which discusses the Saami's right to natural resources – in particular within

7 Definition of property law [tingsrett]: Part of the law of obligations and property [formuesrett]. Legal relationships concerning material objects. (definitions from Jusleksikon.)

8 NOU is an abbreviation of Norges Offentlige Utredninger, a series of government white papers. Translator's remark.

the context of fisheries regulations.

As regards my presentation of the historical sources, it should be pointed out that much of the material has been taken from prior research. The present paper does not primarily aim at a critical review of this material, as the paper does not represent new research, but rather a review and presentation of the rights held by coastal Saami under current legislation.

Besides an examination of Norwegian fisheries legislation and its appurtenant regulations, Norwegian property law will constitute a central part of this paper. As regards sources of international law, the main focus will be on provisions concerning the protection of minorities and indigenous peoples, specifically the 1966 UN Covenant on Civil and Political Rights art 27 (CCPR art 27) and the ILO Convention No. 169 concerning Indigenous and Tribal Peoples.

1.3 Some introductory perspectives

The field of Saami rights in saltwater areas may be approached in different ways. I will start by drawing some distinctions I consider important. This is meant as a practical approach to facilitate the understanding of the rights to which the coastal Saami may be entitled. My presentation is based on central legal concepts, and is intended as an introduction to the subsequent review of Norwegian legislation, in which property law will play a central part.

One distinction is between the right to **own**, and the right to exploit fishery resources as a **right of use**. I will later discuss the consequences of this. The central issue is that *different kinds of rights provide for different kinds of control and enjoyment, which in turn have different levels of protection against intervention by third parties*. A public right will for instance not be protected against expropriation in the same way as a right of use or ownership. Hence, it is important to differentiate between different kinds of rights in property, depending on the rights involved in the particular case. Later I will explain what is meant by the concepts right of ownership (title) and right of use, as well

as other central concepts of property law that speak about the relationship between people and objects.⁹

Furthermore, a distinction must be made between the requirements for obtaining rights of ownership and rights of use in respect of natural resources under **Norwegian law** and **international law**, respectively. The requirements for establishing such rights are not necessarily the same under the two systems of law. The reason is that the right of ownership (title) may be perceived differently according to the country and legal tradition concerned.

A third subject I will focus on, is the distinction between **collective** and **individual** rights. It should be pointed out that in this context, *a collective right means the right to exploit natural resources for a limited group of titleholders*. The group of titleholders involved may vary in size, but shall not in this paper be construed as the Saami as a people in the sense of rights held by all in their capacity of being Saami. The condition is that there must be a certain kind of use that has been exercised for a certain period under a certain belief. The question of whether a right can be exercised collectively and/or individually is of importance, *inter alia*, for the enforcement and management of one's rights. It is a question of who is the holder of

«For the coastal Saami the question is whether to claim rights collectively, as for instance in the Kåfjord judgement»

the rights in relation to the provisions concerned. For the coastal Saami the question is whether to claim rights collectively, as for instance in the Kåfjord judgement, or whether to claim individual rights to the coastal fisheries on the basis of old-time practices of exclusive fishing grounds.

Furthermore, a central issue is whether the coastal Saami's rights to fishing resources should be considered as **a right to exercise a specific economic activity or rights based on principles of property law**. It is important to focus on this distinction, since the

⁹ See chapter 2.

protection provided for by legislation varies according to the kind of rights concerned.

The right to exercise a specific economic activity is considered to have less protection against third party interventions than rights under property law, and how a right is construed will thus be decisive for the protection one can claim. An example is art. 105 of the Norwegian Constitution (abbreviated "Gr1"), which provides that compensation shall be paid to any person who must surrender his property or rights.¹⁰ A right to exercise a specific economic activity will not enjoy the same protection under the above constitutional provision as a right under property law. As regards the coastal Saami fisheries, it can be argued that we are experiencing a change in how they are perceived. The traditional view of the coastal Saami fisheries as a right to exercise a specific economic activity that legislators may regulate freely, is now in the process of being replaced by arguments in favour of these being rights under property law.

1.4 Some typical features of coastal Saami fisheries

This paper discusses the coastal Saami's right to exploit the fishery resources in the sea, alone or in combination with other economic activities. The traditional livelihood of the

coastal Saami has been a combination of for instance agriculture, fishing, gathering and duodji (traditional Saami handicrafts).¹¹ The combination of different economic activities can be considered an example of a population's ability to adapt to changing life circumstances. As regards settlement and exploitation of natural resources, the coastal Saami have traditionally lived along the inner fjords of the Norwegian coast, and for geographical reasons they are all Norwegian citizens.¹²

As a consequence of the revitalisation of the coastal Saami culture in the eighties, the fjord fisheries were considered a Saami livelihood, adapted to the ecological conditions in northern Norway. The coastal Saami fisheries have certain distinctive features, including the use of conventional fishing gear and small vessels, and there are several examples of the coastal Saami exhibiting a special concern for resource conservation.¹³ This way of fishing required extensive knowledge of ecological conditions in the sea, like bottom conditions, currents, fish behaviour and yearly cycles, and wind and weather conditions in general. These skills were transferred through everyday practice from one generation to the next. This was necessary knowledge that made the coastal Saami capable of harvesting the local fjord resources.¹⁴

¹⁰ Article 105 of the Norwegian Constitution: "If the welfare of the State requires that any person shall surrender his movable or immovable property for the public use, he shall receive full compensation from the Treasury."

¹¹ NOU 1997: 4 p 306.

¹² NOU 2001: 34 p 596.

¹³ Report from the Saami Fisheries Committee p 30 et seq. and p 102 et seq.

¹⁴ Bjørklund s 16 flg.

2 CLARIFICATION OF CONCEPTS: LEGAL TERMS AND EXPRESSIONS, AS WELL AS TYPICAL FEATURES OF COASTAL SAAMI FISHERIES

Before turning to the present legal situation under Norwegian and international law, I will explain some central legal concepts and different bases of legal title. This is required because these concepts will be recurrent in the subsequent discussion, and because legal concepts sometimes do not have a clear and plain content. Furthermore, a few words will be said about the main features of the coastal Saami fisheries.

2.1 Some property law terms

We will now discuss the right of ownership (title) as opposed to the right of use, and rights of common as opposed to public rights.

If a coastal Saami lives by a fjord or further out by the sea, he or she may have the right of ownership (title) to the seashore land. The **right of ownership** is a right to control and enjoyment of the immovable property concerned, with the exception of such restrictions as may follow from legislation and concern for public and private interests (e.g. a neighbour or a creditor). It is usually said that the right of ownership contains possibilities for positive and negative control and enjoyment. The right of ownership encompasses the right to actual use of the land, the right to deny others the use of it, as well as the right to make legal dispositions over the property, thus denying others the exploitation of the property in legal terms. The right of control and enjoyment is flexible and may change with time. The right of ownership

is also sometimes referred to as the “right of the remainder”, which entails that new kinds of enjoyment and exploitation may arise. The new form of enjoyment or disposition will belong to the holder of the right of ownership, unless the law provides a basis for excepting it in the form of a special right granted to other rightholders.¹⁵

Such **special rights or rights of use** entitle the holder to a specified kind of use of another’s property. Typical rights of use that the coastal Saami may claim on the basis of what is known about their traditional lifestyle and attachment to the natural resources, are the rights to hunting, whaling, sealing and fishing. A main distinction is drawn between the general rights of use and the partial ones. As regards the general rights of use, the rightholder is in possession of the property and exercises a use of it as if he were the owner. Examples of such tenure are land leases (ground lease), where the lessee owns the house, but the lessor owns the land. What characterises the partial rights of use is that they entitle the holder to a more limited use within certain areas. Examples of such rights are rights of grazing, fishing, felling, mooring of a boat or a parking space for a car. Such rights of use are also referred to as «servitudes» and are regulated by the Servitudes Act of 29 November 1968.¹⁶ In certain cases and on certain conditions, a use that is not the exercise of a right may still be acknowledged as one. In the Kåfjord judgment, *Rt. 1985 p 247*, the use exercised by a group

¹⁵ Thor Falkanger, *Tingsrett* pp 43-45 and NOU 1993: 34 s 22.

¹⁶ Falkanger p 64 et seq. and NOU 1993: 34 p 23.

of Saami of a certain area for sea fishing was recognised as a collective right for those who had practised the fishing.¹⁷

Originally the **rights of common** probably comprised areas to which nobody had the right of ownership, and which were used jointly by villagers.¹⁸ From the 17th century on, the King is regarded as holding ownership rights to common land, from which the concept of State-owned common land is derived (original, uninterrupted and continued right of ownership). According to the judgement in Rt 1963 s 1263, all common land is to be considered as originally owned by the State in the private-law sense. It was only when such land was sold to a village community or private individuals that there was any mention of ownership rights for those who exercised the right of use. Exceptions may exist where long-term right of control and immemorial and accepted circumstances have resulted in the development of State-owned common land into community-owned common land or a large condominium.

The *typical* right of common is a right for the owner of a farm in a village society to exploit certain appurtenant resources. The right of common may be characterised as a *preferential right* for the rightholder that enjoys a special protection under law.¹⁹ (The right to use a common is not necessarily attached to a *farm*, but it must be attached to a *rural community* or *hamlet* which since time immemorial has had the right to use the common.)²⁰ The degree of exploitation depends of the nature of the common and the use of it that has taken place over the years, with the needs of the farm (or the rural community) establishing the upper limit of the exploitation that may take place. Some examples of such uses are the right to felling, grazing and to summer pasture farming. These may not be sold or mortgaged separately, but accompany the farm. Other rights of use may be the right to fishing, hunting, trapping and similar activities such as sealing. These

rights need not be associated with ownership of an agricultural property. There is no such requirement to hold an agricultural property for the right to hunting, trapping and fishing in the State-owned common land, in contrast to what applies according to the Act on community-owned common land [bygdeallmenningsloven].

As regards the concept of commons in relation to marine resources, the right of common may be understood as certain rights of use for a certain group of resource users, where concepts such as "commons resources" or "commonly owned resources" are used interchangeably.²¹ Robberstad writes in *Jus og jord, Heidersskrift til professor dr. juris Olav Lid* [«Law and land», publication in honor of Professor Olav Lid, dr. juris] (1978) p 188 that commons according to NL 3-12-1 could also be «the outermost». With this, he maintained that the concept of commons could cover ...»common fishing villages and thus outlying islands and skerries that no one had claimed as property». This can be cited in support of the view that it was not unnatural to think of the sea areas as areas to which one could have rights and thus a certain protection against various forms of intervention.

(Since time immemorial, commons were considered to be the property of the king; hence, it was not until such state-owned commons were sold to village societies or private buyers that the question arose of ownership rights for those who had exercised such usage. Where at least half of the holders of rights of common figure as the buyers of a state-owned common, we are dealing with a *community-owned common*, whereas if the common is bought by a minority of the holders of rights of common or by a non-rightholder, the term *privately-owned common* is used. Land that was originally a state-owned common may also through long-term enjoyment, and established and accepted arrangements, develop into a community-owned common or a large condominium.²²

17 See p

18 Knophs oversikt over Norges rett (Knoph's encyclopedia of Norwegian law), 10th ed. p 285.

19 Recommendation from the Saami Fisheries Committee p 81.

20 See the Uplands Act (Fjelloven) of 06 June 1975 no 31, section 2, 1st subsection.

21 Bjørklund p 32.

22 NOU 1993: 34 s 23 og Falkanger 2000 s 436 flg.

Finally a brief note on **public rights**. What characterises these rights is that they apply to everybody and that they are only weakly protected against lawmakers intervening and limiting or removing a right in favour of other interests. Public rights provide the general public with rights over the property of a third party, for instance uncultivated land, typically the right to *access and passage*, as provided in section 2 of the Act of 28 June 1957 no 16 Relating to Outdoor Recreation. Other examples of public rights are found in section 400 of the Norwegian Penal Code, the *right to pick berries, mushrooms and flowers on uncultivated land* and section 16 of the Water Resources Act of 24 November 2000 no 82 concerning the *right for all to use watercourses for bathing, fetching water and unmotorized transport*, to mention but a few.

2.2 The different bases of legal title that may be invoked

In this section a few words will be said about the bases of legal title *immemorial usage* and *customary practices*. These are bases of legal title that can be alleged under Norwegian law and international law, but the following discussion will be based on the requirements under *Norwegian law*.

It is commonly known that rights and positions may be lost and acquired with time. Norwegian courts have decided that if a certain perception has gained acceptance and a certain use has been established, the one(s) having exercised such use as that of an owner, may be granted title as owner. When sufficient time has passed, Norwegian law acknowledges the fact that a change has occurred, independently of the causes of such change.²³

Customary law is an important source of law in the field of Saami law. The Saami culture is predominantly oral; thus, traditional practices, immemorial usage and local conceptions of law may be more significant than they would in a written culture.²⁴ The view that the oral character of the Saami

culture must be taken into consideration was also supported by the Norwegian Supreme Court in the Selbu case (Rt 2001 p 769) and the Svartskog case (Rt 2001 p 1229).

2.2.1 Immemorial usage

Immemorial usage is a central principle of Norwegian property law, which typically will constitute the basis for claiming right of ownership or use to the immovable property in question. Immemorial usage is generally alleged when circumstances have remained unchanged and have been considered legitimate for a long time. Immemorial usage as a legal figure is found in several Norwegian acts, but draws its legal basis from general rules of customary law. The legal figure *established circumstances* is also used for claiming rights in immovable property. Currently, the concepts *established circumstances* and *immemorial usage* are used somewhat indistinctly, but in the present paper *immemorial usage* will be central. Immemorial usage is also the legal figure used in the latest court decisions in the field of Saami law, for instance in the Selbu and Svartskog cases from 2001.²⁵

Whether any rights can be claimed on the basis of **immemorial usage** will depend on a concrete assessment of the overall circumstances. Certain requirements must however be fulfilled. Firstly, a certain *use* must exist. Elements to be considered include any visible installations, intensity, continuity and exclusiveness. The requirement of a certain kind of use is not as strict as for ordinary acquisitive prescription.²⁶ As distinct from immemorial usage, only 20 years are needed to obtain a right in immovable property through *acquisitive prescription*; consequently, the requirements in terms of the extent of the use and its exclusivity are stricter when acquisitive prescription is alleged.²⁷ Moreover, the use must have been *long-lasting*. The use must have been practiced over time so that the original rightholder has had the opportunity to intervene. Court decisions have

²³ Falkanger p 56.

²⁴ Susann Funderud Skogvang, Samerett (Sami Law) p 30.

²⁵ NOU 1993: 34 p 28.

²⁶ Acquisitive prescription of immovable property: Acquisition of rights of use or ownership and extinction of the rights of another through 20 years of use in good faith.

²⁷ The required prescription period is 50 years if the use is not visible in the form a fixed installation, see section 8, 1st subsection, of the Acquisitive Prescription Act, and for villagers obtaining acquisitive prescription jointly, see section 8, 2nd subsection of the same Act.

often been concerned with periods of use of up to 100 years, but it has been assumed that also shorter periods of use are acceptable, depending on its intensity. In this respect, court decisions could be of help in drawing up the minimum period required. Lastly, claimants must have been in *good faith*. When many have practised the use together, there is no requirement that all of the claimants must have been in good faith. What matters is the general opinion on the case among the people concerned.²⁸

2.2.2 Customary practices / customary law

Besides immemorial usage, **customary practices** and **customary law** are often alleged when rights in immovable property are claimed, often as the basis for rights of use. Under Norwegian law, immemorial usage can also justify the existence of an element of customary law.²⁹ Even though there is a certain difference between customary law and immemorial usage, one cannot help but note that the concepts are being used indistinctly.

A customary practice denotes an established practice or traditional procedure.³⁰ By customary *law* is meant the exercise of a practice for a prolonged period of time in the faith that one is acting in accordance with a legal rule. Not all customary law concerns rights in immovable property; however, this is the kind of customary law that will be discussed in this paper. Such customary practices are termed *customary practices under property law*. The above-mentioned requirements provide a starting point for what is to be perceived as customary law, but give little guidance as to which elements are assessed when legal questions are resolved. It is important to emphasise that it will depend on an overall assessment whether an alleged customary practice will be upheld by a court of law. Factors of varying weight are: how old the customary practice is, how permanent and reasonable it is, as well as whether the practice is performed with a conviction that it is in conformity with the

law (in good faith), or on the basis of a moral conviction. Norwegian courts have practised strict requirements when deciding what is to be considered customary law in relation to rights of use. A use that has been *tolerated* by the owner has traditionally excluded the formation of a customary right, as such use is not considered legitimate.³¹ During a seminar on the proposed Finnmark Act in the light of indigenous peoples' rights to lands and waters, the former Chief Justice of the Norwegian Supreme Court, Dr. Juris Carsten Smith spoke on "tolerated use" as a legal figure in issues concerning Saami title. Smith claims we are seeing a development in Norwegian law whereby "tolerated use" has lost its significance as an argument against acknowledging that Saami use may be constitutive of rights.³² The traditional general rule that nobody has right of ownership to the sea also means that "tolerated use" is not a very appropriate argument in the discussion on coastal Saami rights in saltwater areas.

In *NOU 2001: 34 "Saami Traditional Practices and Conceptions of Law"* there is a chapter on customary law in the fisheries. The main objective of this White Paper is ... "to establish whether the coastal population has a distinct Saami identity that can create and maintain Saami customary practices, specifically within the Saami fisheries."³³ The main conclusion is that there exists a local, but not distinctly Saami customary practice concerning the right to fish in the sea. The opinion is that when Norwegian settlers started coming to Finnmark from the 12th century onwards, the nature of the customary practice was changed by the newcomers' participation in and adaptation to the customary fishing practices of the coastal Saami. It is furthermore claimed that customary law provides no basis for private fishing places. These assertions are however controversial and disputed. One objection that may be raised is that a customary practice does not necessarily lose its distinctiveness because others arrive and copy it. The customary

28 Falkanger p 319, cf the Svartskog case, Rt 2001 p 1229.

29 NOU 1993:34 p 29.

30 Cf Kirsti Strøm Bull, NOU 2001: 34 p 88.

31 Torstein Eckhoff, *Rettskildelære* (Sources of Law) p 260.

32 http://www.galdu.org/govat/doc/samerettsutvalget_tyve_aar_etter.pdf

33 NOU 2001: 34 in the preface.

practice can still be said to be Saami in its origin and character. Furthermore, this paper will demonstrate that views to the effect that fishers along the coast could consider certain stretches of the sea as ones own, were not uncommon. In my opinion, this is an indication of the strong need for further research in this field. For this reason I choose not to discuss the government white paper *NOU 2001: 34* in the present paper.

2.3 Different kinds of legal protection of rights

The question is what legal protection the right to sea fishing enjoys when there are rights based on, for instance, customary law of immemorial usage. By legal protection in this context, we refer to protection against various kinds of intervention by the Norwegian State or other authorities. A central part of this is protection against expropriation, but international law and protection against competing use can also be envisaged.

The expropriation protection includes the right to demand full compensation if the rightholder is deprived of rights attached to immovable property. Both rights of ownership and of use regarding land as well as the sea are to be considered included. The legal foundation for the expropriation protection of rights of ownership and use is found in article 105 of the Norwegian Constitution. Furthermore, there must be a concrete basis in statutory law with indication of purpose and the measures to be implemented if the claim for compensation based on expropriation is to be heard.³⁴ If the holder of the right of ownership or a special right is deprived of his rights in the immovable property through expropriation, he is entitled to full compensation.³⁵ This means, *inter alia*, that a right in an immovable property pursuant to customary law or immemorial usage cannot be cancelled by statutory enactment unless the

rightholder is given full compensation. The expropriation protection is triggered when the right is cancelled or its value reduced. In some very special cases a restriction of the right of control and enjoyment may confer upon the affected party the same right to compensation as when rights are transferred.³⁶

Furthermore, the right to sea fishing may be protected against intervention from the authorities when the fishing is perceived to be the exercise of a right, cf. the Kåfjord judgment. By protection against intervention is meant the right to compensation for the economic loss thereby incurred. Generally speaking, under Norwegian law public rights are poorly protected against restrictions and interventions, but the Kåfjord judgment shows that in certain cases exceptions may be made for sea fishing. As a result, the traditional coast and fjord fisheries may enjoy a certain legal protection against different kinds of intervention if the fishing has been exercised with sufficient regularity and is of sufficient significance to those involved.³⁷

Obligations under international law and constitutional obligations also provide a certain protection against government intervention. Amongst other things, Carsten Smith's 1990 paper on the coastal Saami's rights led Norwegian fisheries authorities to recognise the existence of certain obligations towards the coastal Saami population. This may in turn lead to arguments of a certain protection against competing use by outside fishers and others.³⁸

The central point is that a right to own or use the immovable property is protected against interventions independently of how the right originated and independently of whether the property concerned is on land or in the sea. The decisive factor is the existence of a right of ownership or use of the area concerned.

34 It follows from the principle of legality that a basis in statutory law is required for expropriation to take place.

35 Expropriation: Forced relinquishment of the right of ownership or other rights pursuant to law. (Jusleksikon 2003)

36 NOU 1993: 34 s 41.

37 NOU 1993: 34 p 125.

38 NOU 1993: 34 p 125.

3 DIFFERENT KINDS OF LEGAL TITLE IN A HISTORICAL PERSPECTIVE³⁹

In this paper, the sea fisheries in Finnmark County will be the focus of a historical review. This historical retrospect is meant to illustrate some typical features of the coastal Saami population and their practice of coastal and fjord fishing. The coastal Saami population *south* of Finnmark will not be included in the following, but their history has been documented, *inter alia*, in the report of the Saami Fisheries Committee. Another central element is the presentation of the legal basis for the sea fisheries from the 16th century until the present, in which it will also be pointed out that sea fishing has not always been considered a public right. Finally there will be a few words on the development within the fisheries that took place in the nineties.

3.1 Coastal Saami fisheries in Finnmark – a historical retrospect

The Saami fisheries along the coast of Finnmark has a long history. Written sources tell us that the coastal Saami fished along the coast and fjords since before the 10th century. Until the 13th and 14th centuries, the coastal Saami were the only participants in these fisheries, but largely because the Hanseatic trade made market fishing in the northern areas profitable, Norwegians also started settling in these areas to take up fishing. Population patters and growth varied according to market conditions. Throughout the 17th and 18th centuries, the number of Norwegian fishers living in Finnmark decreased strongly, following the 16th-century increase, while the coastal Saami population grew substan-

tially. From the late 17th century it is also possible to observe a division of the fishing grounds used by the two population groups. While Norwegian fishers had settled along the outer coastline, the coastal Saami fishers were more inclined to fish in and along the fjords.

In the 18th century the influx of Norwegian fishers continued, with the majority coming from Nordland and Troms counties, in addition to Swedish inland Saami, Kvens and Russians. The authorities gradually started regulating the fisheries. The desire to protect local fisheries was partly justified by the crisis suffered by the Norwegian local population at the time, both economically and in terms of population numbers. While the Swedish inland Saami were allowed to continue their sea fishing under the 1751 Lapp Codicil, the situation was different for the seasonal fishers travelling north from Nordland and Troms, who from 1778 were banned from fishing in the fjords.

On 13 September 1830 the “Act relating to fisheries in Finnmarken” was passed. In several studies, this Act has been described as largely cancelling the local inhabitants’ preferential right to the marine resources (e.g. *NOU 1994: 21* p 88). Reference is made to section 39 of the Act, which provides that visiting fishermen were granted fishing rights ... ”on a par with the inhabitants of the land...”. If the Act is read in context, the question may be raised whether the principal purpose of the Act was to regulate conditions in the outer fishing villages, thus not affecting fjord fisheries.^{40 41} The use of the

39 NOU 1997: 4 p 304 et seq.

40 Cf Kirsti Strøm Bull. The definition of fishing villages is found in the travaux préparatoires of the Lofoten Act of 1857.

41 Fishing villages were areas further out towards the ocean where visiting fishermen used to fish. See section 3.2.1.3.

term “fishing village” is repeated so many times in the text of the Act that the question of whether the Act applied only to the fishing villages is a pertinent one. This also coincides with the practice that existed for a long time, whereby the residents of Finnmark considered the local waters as their own, while the more outlying waters were considered common fishing grounds.⁴² As a consequence of the practising of such “exclusive fishing grounds”, visiting fishermen were kept away from the fisheries in the innermost parts of the fjords. From 1850 onwards a practice was established whereby the different population groups conducted fisheries in different places, at different times and with different fishing gear. The fishing of spawning cod in the fjords, called “the good fishing”, was in principle practised by the coastal Saami. Capelin fishing, taking place further out in the fjords, required larger boats and better gear, and was mainly practised by visiting fishermen.

In the 20th century, changes in gear and the establishment of the special loan fund for fishermen from Finnmark increased the gap between the different groups as regards their possibilities of participating in the fisheries. Saami fjord fishermen found it difficult to obtain loans to buy modern boats, as loans would cover only a part of the purchase price. Local merchants could provide financial help, but gave priority to Norwegian fishermen. The introduction of more modern technology also led to resource protection becoming an argument for regulating the fisheries, and on several occasions the coastal Saami demonstrated their strong support for such measures. The regulations covered both traditional and new fishing gear. As an example, resistance against modern trawler fishing led to the approval in 1908 of an act prohibiting trawling within Norwegian territorial waters.

The coastal Saami have, as already mentioned, traditionally used smaller fishing boats than the Norwegian fishermen. The extensive barter between Russians and the Saami fishermen (the Pomor trade) came to

«In the 20th century, changes in gear and the establishment of the special loan fund for fishermen from Finnmark increased the gap between the different groups as regards their possibilities of participating in the fisheries»

an end when Russian wholesale buyers found it more profitable to deal with the fishermen with larger boats located further out in the fjords. This development on the receiver side led to Saami fishermen losing an important source of income. The continued development of fishing vessels also made more fishermen start year-round fishing, which was in line with the official Norwegian fisheries policy founded on arguments of socio-economic principles of profitability. Still, this did not prevent many coastal Saami from continuing to practise combined livelihoods, a practice that was both resource friendly and useful when fishing was poor.

A watershed in Norwegian fisheries policies took place in the 1960ies. The transition from largely open-access fisheries to increased government regulations would soon hit the coastal Saami’s fisheries particularly hard. In the 1980ies, a fisheries crisis arose because of overfishing, which mainly had been caused by large ocean-going vessels. In addition to the overfishing, a large invasion of seals from Greenland stopped the cod from entering the fjords. A Royal Decree of 8 December 1989 introduced a system of vessel quotas and maximum quotas. These regulations strongly affected the conventional fjord fisheries, where the Saami fishermen are the majority. To receive a vessel quota it was necessary to have landed a certain quantity of fish during one of the three preceding years. Those who did not fulfil the requirements for obtaining a vessel quota were left to participate in the much less favourable maximum quota system.⁴³ Even though special arrangements were gradually introduced for fishermen in northern Troms and Finnmark, participation in the maximum quota system entailed a substantial income

⁴² See section 3.2.1.2

⁴³ See section 5.1.1.

reduction when compared to the vessel quota system. The coastal Saami were deprived of any realistic chance of participating in the fisheries on a par with other fishermen.

The consequences of this fisheries policy are discussed in further detail in the following chapters. There is a special focus on the privatisation this policy led to, see chapter 3 section 3.2.3.

3.2 Sea fishing rights – different opinions on their legal basis

Opinions on the right to fish in the sea have varied through the years. Below is a presentation of some kinds of legal basis that are related to the exercise of saltwater fisheries.

3.2.1 Private ownership of fish resources⁴⁴

3.2.1.1 Introduction

Written sources tell us that at least since the Middle Ages it was a commonly held opinion that fishermen along the coast could own certain areas of the sea. This view was not particular to the Saami; it was held by the coastal population as a whole. This shows that ideas have existed about ownership rights to marine resources, contrary to what has been considered applicable property law in Norway at present. The interesting point in this context is that these rights are based on principles like customary law and immemorial usage. These are fundamental Norwegian rules that acknowledge that long-lasting use of certain areas with time may also come to enjoy protection in legal terms.

It has been maintained that perceptions of ownership from earlier times had no clear legal content, and thus stood in contrast to the more modern Roman law doctrine of private ownership. In this way, it has been argued that one cannot talk about the right of ownership and right of use in the legal sense in the period before Roman law gained a foothold. This is in spite of the fact that historical material indicates that those who practised use of grounds on land or water were of the opinion that they held ownership, and demonstrated this in several different ways through the use of the areas.

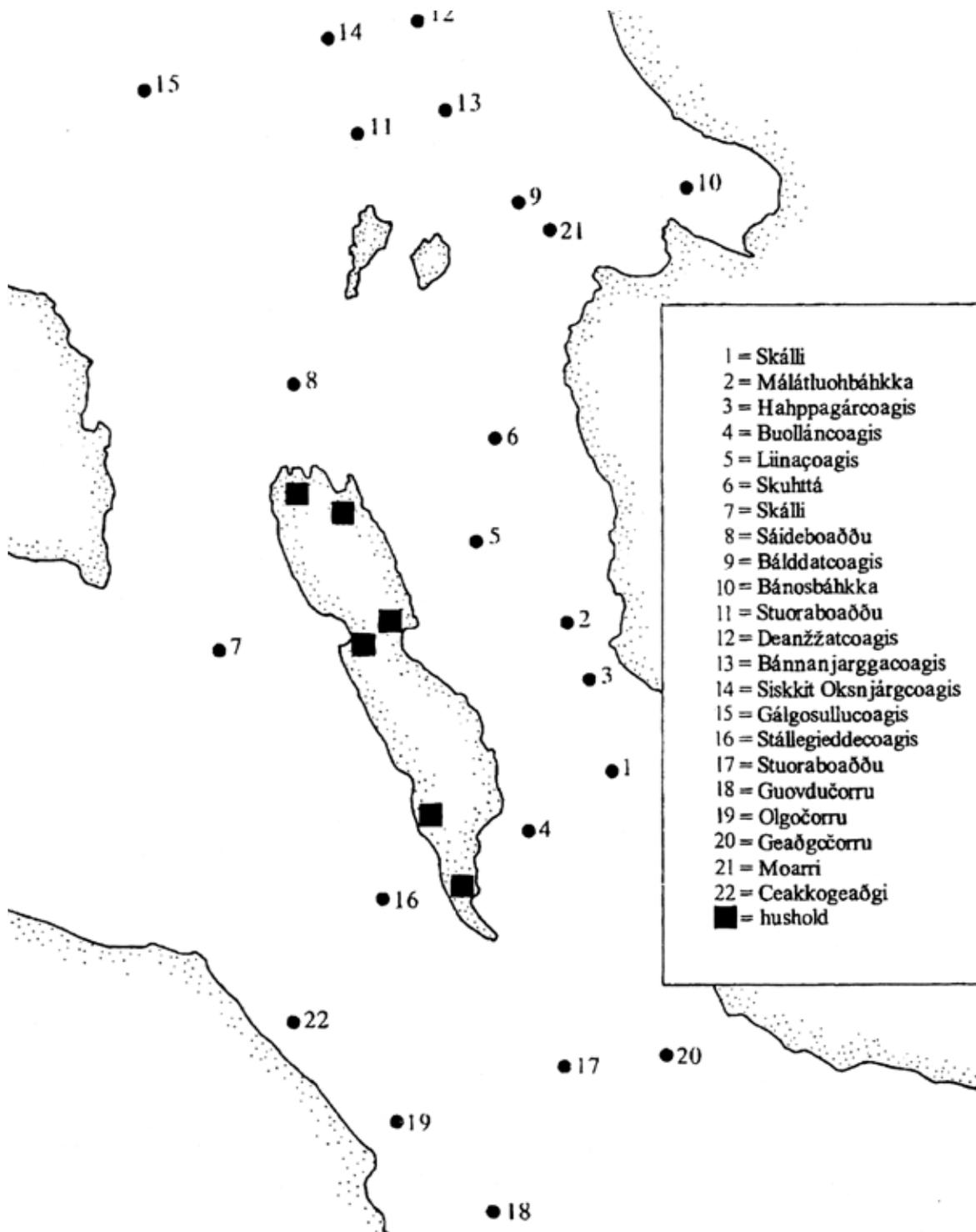
The discussion below will show that one can no longer argue that private ownership first arose with Roman law, but that notions and practice relating to ownership also existed in earlier periods. One must investigate these notions and not reject them before examining the historical sources and evaluating these sources in more detail.

3.2.1.2 Individual rights

From the Middle Ages onwards it was common for people along the coast, Saami as well as others, to consider a certain area of the sea as theirs by virtue of their use of its resources. One way this became manifest was through the habit of naming fishing grounds after their owners. Today we can find traces of the old custom by looking at the naming of fishing places in the fjords, see below. Furthermore, the area closest to the sea was considered part of the property for those who held property rights linked to the sea, whereas areas further out were considered to be a joint area for the adjoining areas. The use was respected by outsiders, who had to tolerate various restrictions on passage and access, as well as paying fees for fishing. The view among people that one could acquire rights of use over fishing resources also followed from the Gulating Law, which was in force at the time.

The practice of exclusive fishing places owned by people along the coast lasted at least into the 19th century, and even longer in some areas. For fishing places in Lofoten and the Varanger Fjord there are publicly registered letters from the 18th century providing evidence of this practice, another example being the island communities along the coast of Sunnmøre, all of which had their own lots in the sea. In addition, judicial reallocation of fishing places took place under the name of “fishing ground”, similar to the judicial reallocation of lots on land. The last known example of a local fishing custom persisting beyond the 19th century dates back to 1951 in the Oslo Fjord, where the landowner’s right to seine represented an exception from the general rule about open access to fishing with fixed gear outside the

44 Kirsti Strøm Bull, at the Aja Conference 2004, and NOU 1986: 6 p 44.



Saami naming of the fjord bottom, Kvænangen around 1950. Toponymic map prepared by Kaisa Rautio Helander, linguist, Nordic Saami Institute. Taken from Bjørklund, Ivar: Norsk ressursforvaltning og samiske rettighetsforhold (Norwegian resource management and Saami rights). Om statlig styring, allmenningens tragedie og lokale sedvaner i Sapmi (On governmental management, the tragedy of the commons and local traditional practices in Sapmi).

shore slope. This shows that local customs have existed until the present day and may still exist in certain coastal and fjord areas.

With time, economic liberalism became prevalent. It has been claimed that the old

boundaries became blurred. Documentation of the claim that the practice of exclusive fishing grounds ceased to exist is however incomplete.

3.2.1.3 Collective rights

A fishing village is a place where fishing is carried out jointly by others than the permanent inhabitants. These fisheries did not take place deep inside the fjords, but further out towards the open sea.⁴⁵ In a rescript of 1775 it is stated that each of the fishing villages is entitled to a stretch of sea.⁴⁶ This rescript expresses an old customary practice having developed into a right under customary law. The fishing was performed jointly within certain areas. In Lofoten the different stretches of sea were kept apart by means of so-called sighting strings on shore. Also in Finnmark a similar practice of drawing boundaries between the fishing villages existed, cf. the Act on the Fisheries in Finnmark or the Bailiff's Districts [Fogderier] of West and East Finnmark from 1830 Art 10, which deals with "the section of the sea assigned to each fishing village". In "Vadsøs historie I" (*Vadsø's History Vol. I*), Einar Niemi describes the right to use the sea areas off the fishing villages as near-exclusive. It manifested itself through a system of fixed longlines that fishermen claimed ownership to and transferred to their descendants through inheritance. The right to longlines was gradually made dependent on access to a fishermen's shack. The Lofoten Act of 1857 put an end to the system of longlines. It would no longer be permitted to operate with boundaries between the fishing villages. It was the Roman law doctrine of free access to fish in the sea that gained ground, together with the belief in economic liberalism and the technological development in fishing.

The new system was however not readily accepted. For instance, the fixed longlines still remained in place near Vadsø around 1890.⁴⁷ Thus, access to fishing was not completely open, and the example of fixed longlines in Vadsø shows the existence of notions of rights to sea areas. In the 1925 report "De viktigste kjensgjerninger vedrørende Norges sjøterritorium" (*The most important facts regarding Norway's territorial waters*)

there is additional evidence that the practice of fishing grounds that people claimed ownership to still lived on in. The report was drawn up by the Territorial Waters Border Committee of 1924.⁴⁸

3.2.1.4 Summary

These historical examples of the practising of exclusive fishing grounds both individually and collectively show that the coastal population considered these sea areas as their own. The practising of exclusive fishing grounds was not discontinued, contrary to what was stated in *NOU 1993: 34* and elsewhere, in spite of changes in legislation influenced by the Roman law doctrine that there should be open access to fisheries. This again shows the great need for further knowledge about the historical use of the sea areas along the Norwegian coast and conceptions of law concerning these areas. In the time ahead it will be important to investigate more closely what practices actually existed. These examples of the practice of exclusive fishing places furthermore show that it would lead to the wrong conclusions if one only looks at what the legislation in force at a given point of time states to be applicable law. According to the principles of property law, it is the use and the good faith of the users that are decisive for the acquisition of rights in the immovable property concerned. Keeping in mind these historical examples, considerations of reasonableness indicate that in principle the possibilities of acquiring rights should be the same in the sea as on land.

3.2.2 The coastal Saami's fjord fisheries as a right of common

It has been claimed that the coastal Saami's exploitation of the fish resources in the sea is above all the exercise of a *right of common*.⁴⁹ In practice there may be rights of use associated with sea fishing which a group of fishers uses collectively and which are included as an important part of the economic base. Such a viewpoint presupposes that the

45 The definition of fishing villages is found in the travaux préparatoires of the Lofoten Act of 1857.

46 Rescript: Term for a written order from the king during the Dano-Norwegian monarchy. Jusleksikon (Law dictionary), Kunnskapsforlaget 2003.

47 NOU 1994: 21 p 88.

48 Cf. Bull, the Aja conference.

49 For a definition of right of common, see section 2.1.

coastal Saami since time immemorial have exercised a certain kind of use jointly, without much outside intervention and in good faith, perhaps in agreement with a legislation that has kept outsiders away and supported the development of local economic activities. If the Act on the Fisheries in Finnmark of 1830 is construed as regulating only the fisheries of the fishing villages, such an interpretation would support the view that the local fjord fisheries were protected from competition, as the opinion is that it was above all the fisheries further out towards the open sea and not the traditional Saami fjord fisheries that were regulated by the 1830 Act. History provides several examples of the sea fishing in the fjords frequently being reserved for the local fishermen, often coastal Saami, and the visiting fishermen in practice kept out of the fjord fisheries.⁵⁰

The question of a Saami right of common to sea fishing has been the subject of several studies, in which it has either been rejected or left undecided.⁵¹ The International Law Group appointed by the Saami Rights Committee on 14 June 1995 raises the question of Saami right of common, but rejects it in *NOU 1997: 5* p 39. As regards the Saami Fisheries Committee, it does not adopt a view on the question of whether special rights of common exist. This does however not mean that the coastal Saami do not have rights of common to the fjord fishing. A project group appointed by the Saami Trade and Industry Council presented a report in 1995 making reference to the fact that the sea in certain legal contexts has been referred to as an “outer common”. This can again be taken in support of the existence of certain rights linked to commons along the coast, including the traditional coastal Saami areas.

3.2.3 A special note on the privatisation of the fish resources in the nineties⁵²

Towards the late eighties the fishing for cod became significantly more difficult due to the severe restrictions introduced by the Norwegian State through the quota system

«If the Act on the Fisheries in Finnmark of 1830 is construed as regulating only the fisheries of the fishing villages, such an interpretation would support the view that the local fjord fisheries were protected from competition, as the opinion is that it was above all the fisheries further out towards the open sea and not the traditional Saami fjord fisheries that were regulated by the 1830 Act »

for the cod fishery. This hit the coastal Saami fishermen particularly hard, as the fishery access requirements forced the coastal Saami to participate in a much less favourable quota system than many other Norwegian fishermen. It has been claimed that fisheries as a consequence of the introduction of the quota system were transformed from a public right to being the private property of a chosen few. The view is that a licence for pisciculture and fish quotas in practice can be transferred and is thus subject to private ownership. Purchase of fishing vessels takes place with an expectation of a certain income resulting from the fact that ownership of a vessel provides access to exclusive fishing rights. Through these regulations the coastal Saami were deprived of participation in the cod fishery. Since access requirements were linked to previous participation in the fishery, this led to a discrimination against the coastal Saami in relation to other groups of fishermen that has persisted to this very day. From the point of view of the coastal Saami it may seem unfair that the fishermen who already had been given access to a quota also should make good money from selling it, while the same system also keeps many coastal Saami out of the fishery. In practice, many fishermen, including coastal Saami, find that access to natural resources is not for all. This discrimination is no good solution to the distribution of the fishery resources, and may also violate our international obligations to the Saami as an indigenous people and ethnic minority.

⁵⁰ See section 3.1.

⁵¹ Bjørklund p 38 et seq.

⁵² Bjørklund p 20.

3.2.4 Summary

Above a presentation has been given of the different opinions of the legal basis for the coastal Saami's rights to fish. The question is how the right to sea fishing should be perceived today in view of the historical development.

The general rule is that the right to sea fishing is a public right. The general rule at present is probably that the right to sea fishing is a public right, except for local customs. This is evident from legal precedent and theory, and the development in recent times with a trend towards privatisation has not changed the fundamental fact that it is up to the legislature or the judicial power to modify the legal basis. By way of example it can be mentioned that the Supreme Court in the Kåfjord judgement allowed for the possibility of making exceptions in certain instances, by making reference to some features that may be considered more or less

typical of coastal Saami fishermen.⁵³ In other words, the general rule that sea fishing is a public right is not without exceptions. As a consequence, Norwegian authorities cannot regulate fisheries completely freely.

Even though sea fishing as a general rule and in legal terms is a public right, in certain cases there may be circumstances warranting exceptions from this point of departure. The Kåfjord judgement is an example of this. Furthermore, there is reason to ask whether former practices and legal conceptions should lead to a certain modification of the general assumption that sea fishing is a public right. There are factors indicating that the coastal Saami may claim certain rights to saltwater areas. In this paper it is however not possible to draw a definite conclusion. What is important is to raise the question. Other sciences must also contribute to clarifying the issue.

⁵³ See below about the Kåfjord judgement.

4 SOME VIEWS ON COASTAL SAAMI RIGHTS IN SALTWATER AREAS

This chapter will present different views on rights of ownership in saltwater areas that may provide an indication of the possibilities of the coastal Saami of claiming rights to the sea areas concerned.

4.1 The extent of ownership rights in salt water under Norwegian law

4.1.1 Some starting points

In order to say something concrete about the extent of ownership rights in salt water we shall start with a review of Norwegian legislation and judicial decisions.

4.1.1.1 Article 110a of the Norwegian Constitution

Under *Norwegian law* the Saami as a group enjoy protection of their cultural practices principally pursuant to **article 110a of the Constitution**. The provision applies to the Saami as a people and shall be considered a guideline for the legislature, those who interpret the law and the public administration in their discretionary decisions.⁵⁴ The central issue is that the Saami are entitled to protection against interventions affecting the practice of their culture, with the term “culture” to be construed widely, and they are entitled to certain positive measures for the preservation and development of Saami culture.

In this context the provisions of the Constitution will limit the extent to which the authorities may intervene to the detriment of the coastal Saami’s existing rights. Specifically, the provision will be of importance as a supportive argument in the interpretation

of legal rules of importance for the coastal Saami’s rights to marine resources.

4.1.1.2 Norwegian property law

Under *Norwegian property law*, the right of ownership in salt water extends to the so-called *marbakke* (shore slope), that is, the area of the sea where the bottom slope becomes steep. Where the shore bottom slopes very gradually, the boundary is drawn at a depth of two metres at middle tide. If the bottom is steep from the very shoreline, the general view is that the boundary of the property shall be drawn in such a way so as to give the owner a right of control and enjoyment that would correspond to a normal shore slope line. In such cases it is up to the courts to draw the boundaries.⁵⁵

For the owner of land by the sea, this means a right to exploit the resources in the sea out to the shore slope or the two-metre depth line and on the land areas adjacent to the sea. Outside this boundary, the landowner has certain rights by virtue of being the owner of a shoreline property. The contents of these “shore rights” will be explained below.

However, the ownership rights of the landowner are not absolute. The existence of a property boundary in the sea does not prevent others from exercising public rights, like the right of free access and passage or the right to fish in the sea. The public rights apply independently of where boundaries for the ownership rights in salt water are drawn.⁵⁶ Certain kinds of salmon fishing are nonetheless reserved for the landowner

54 Skogvang p 97, pp 101 et seq.

55 Falkanger pp 90-91.

56 NOU 1993: 34 p 120.

pursuant to section 16 of the Act Relating to Salmonids and Fresh-water Fish, and make up a substantial part of the aforementioned shore rights. Moreover, there are some statutory exceptions from the landowner's ownership rights concerning certain underground deposits, like petroleum and claimable minerals. Pursuant to section 1 of Act of 4 May 1973 no. 21, the Norwegian State is the owner of underground petroleum on Norwegian territory and the part of the sea bottom that is subject to private ownership. In addition, section 1-1 of the Petroleum Act (Act of 29 November 1996 no. 72) confers upon the Norwegian State ownership rights to subsea petroleum deposits and the exclusive right to resource management. As regards claimable minerals, anyone is entitled to prospect for minerals on land owned by others, cf. section 2 of the Mining Act of 30 June 1972 no 70.⁵⁷ An amendment has been proposed, see Proposition to the Odelsting (bill) no. 35 (1998-99), and there is a question whether the amendment will meet the requirement under ILO 169 art 15 no. 2 that the Saami be consulted in cases where their interests may be prejudiced.⁵⁸

4.1.2 Shore rights

Outside the general property boundary in the sea, public rights apply. In the same way that public rights do not apply unconditionally within the property boundaries, they do not apply unconditionally outside them either. The landowner has certain rights stretching beyond the property boundary in the sea, which collectively are referred to as the "shore rights". Some of these rights are sectorially delimited out of consideration for the other shore owners, while other rights may be claimed even outside the sectorial boundary. An example of a right that can be claimed outside the sector of the individual landowner, is the right to unrestricted access to the property from the sea.⁵⁹

A definition of the shore rights was provided in *Rt 1985* p 1128, where it is stated

that "*the shore rights are the right to the undisturbed enjoyment of the advantages that follow from a property being adjacent to the sea.*" Central elements are the right of access by sea (*tilflottsrett*), the fishing right and the landfill and construction right. The right to exploit seaweed, kelp and sand deposits is also included.⁶⁰ Below an overview of these rights will be given.

4.1.2.1 The right of access by sea

Arriving at and leaving the property by boat is a central part of the shore rights. Hence, man-made barriers of different kinds making access difficult or impossible may be illegal. An installation on ones own property may amount to an encroachment of the neighbour's right of access by sea. Courts have awarded compensation to landowners for installations in the sea that "substantially hamper" access. Judicial decisions have demonstrated that it takes quite a lot to fulfil the requirements for compensation. Aquaculture installations and mooring buoys may also potentially violate the right of access by sea. In *Rt 1985* p 1128 the question was whether an aquaculture installation outside the private ownership boundary amounted to a violation of the shore rights. In the case concerned, the landowners were not heard, as they unable to prove any detriment to current or foreseeable exploitation.⁶¹

4.1.2.2 The right to fish

As already mentioned, the right to fish in the sea is in general open to all, subject to certain limitations and exceptions. The general rule is that all who do not figure in the register of fishermen may fish in the sea, but only with certain kinds of gear, like handlines, fishing rods or gillnets, fish pots or longlines of a certain size. An exception from the public right of fishing has been made in favour of the landowner as regards sea fishing for anadromous salmonids using fixed gear⁶² within the boundaries of his property,

⁵⁷ Falkanger p 60 and pp 85 et seq.

⁵⁸ See " Norway's enforcement of provisions on indigenous peoples and minorities under international law for the protection of Saami rights – the public authorities' enforcement of ILO 169, CCPR art 27, section 2, cf section 3 of the Human Rights Act and Articles 110a and 110c of the Constitution for the protection of the rights of the Saami as an indigenous people and ethnic minority" by Elisabeth Einarsbøl p 42 (title translated from Norwegian). Spesialoppgave juss H 2002

⁵⁹ NOU 1993: 34 p 126.

⁶⁰ Falkanger pp 91 et seq.

⁶¹ Falkanger pp 92 et seq.

⁶² Examples of fixed gear are bag nets, stationary lift nets and bend nets. Cf <http://www.fiskeridir.no/sider/aktuelt/kysten/sidez.html>.

cf. section 16, 1st subsection (b) of the Act Relating to Salmonids and Fresh-water Fish (the Salmon Act). Anadromous salmonids are salmonid fish that migrate between sea and fresh water for reproduction, see section 5a of the Salmon Act. The right to salmon fishing is not limited to a certain distance into the sea, but the landowner cannot freely choose any boundary. The act list several factors to be considered, «taking into account local circumstances such as the topography of the sea floor and the distance from the landowner's property to the fishing place in question, or the customary exercising of fishing rights», section 16, 1st subsection (c) of the Salmon Act. In practice, the right to such salmon fishing may reach far, with the territorial border being the ultimate limit.⁶³ The exclusive rights to fish for salmon for the owner of the closest adjacent property also apply to islets, islands and skerries that are visible at "normal high tide", cf. section 16, 2nd subsection of the Salmon Act.

In Finnmark County the Norwegian State claims ownership to large areas of land, some of which border on the sea. Since the late 19th century the State has granted people certain *fishing places* for salmon fishing. During certain periods, such fishing on state-owned grounds was considered open to all, and it is therefore uncertain whether the State has been entitled to regulate the granting of such fishing places. For the same reason it is also uncertain whether salmon fishing on state-owned ground is a right held by the State as landowner, whether it is a public right that the State has found it appropriate to regulate or whether the practising of exclusive fishing places has made the coastal Saami entitled to claim rights of ownership or use of such areas.⁶⁴

At present, the granting of fishing places is done through Finnmark Land Sales Office, which is part of (the government agency) Statskog Finnmark. The Land Sales Office is subject to the authority of the Land Sales Board, headed by the county governor. One of the tasks of the Land Sales Board is being

the first instance of appeal when applications for salmon fishing spots are rejected. In connection with the transfer of the appeal cases to the Directorate for Nature Management (DN) for their final decision, the Land Sales Board requested an assessment of the regulations in view of our obligations under the Norwegian Constitution and international law. The request was made on 12 February 2002, and it remains to be seen whether it will be followed up. According to our knowledge, there is nothing in the regulations indicating that the situation of the coastal Saami should be taken into consideration.⁶⁵

4.1.2.3 The landfill and construction right

Court practice shows that the landfill and construction right applies beyond the property boundary in the sea to the extent that the landfill or structure does not obstruct public passage. Typical examples of structures in the sea are quays. For landowners in Finnmark who obtained title to shore properties prior to 1965, it should however be pointed out that construction and landfill may not "... constitute a hindrance to fisheries in general". Clauses to this effect were regularly included in deeds when properties were sold in Finnmark at the time. Should anyone nonetheless make landfills or constructions in violation of the above-mentioned clause, the lack of objections and the long time that has passed may render claims for removal unsuccessful.

A particular kind of construction right that is included is the right to place aquaculture installations on the owner's sea ground. The right to place an aquaculture installation is not a right to place such installations outside the boundary of the private ownership right, see the Rugsund case, *Rt 1985* p 1128. The central issue is that the installation should not cause detriment or inconvenience to the exercise of the other shore rights.⁶⁶

Interventions in the right of construction generally trigger a claim for compensation, cf. *Rt 1961* p 1114, but not when public authorities exploit the sea floor outside of the

⁶³ Falkanger p 95.

⁶⁴ NOU 1993: 34 pp 132 et seq.

⁶⁵ cf <http://www.statskog.no/news/jordsalgsstyret/protokoll/02021Prot.asp> and Elisabeth Einarsbøl: Norway's enforcement of provisions on indigenous peoples and minorities under international law for the protection of Saami rights (title translated from Norwegian).

⁶⁶ NOU 1993: 34 p 136.

property boundary, see *Rt 1923 II* p 48 and *Rt 1969* p 613.⁶⁷

4.1.2.4 Rights to seaweed, kelp and sand

The limit for how far out a landowner can claim rights to the exploitation of *seaweed and kelp* is not absolute. In *Rt 1896* p 500 the limit was set at approximately five metres beyond the shore slope line. Local traditional practices and immemorial usage may provide concrete indications of where the line should be drawn in each case. On state-owned ground it is assumed that inhabitants may take whatever they need as long as they have practised such use earlier, and as long as such rights have not been excepted through land lease.⁶⁸ As regards the right to exploit sand deposits immediately beyond the ordinary property boundary, there is less certainty whether it is held by the landowner as a special right. Even here, the formation of local customary law must be considered. In the government white paper *NOU 1988: 16 utk* section 14, it is suggested that the shore property owner's exclusive right to kelp, seaweed, molluscs, sand and gravel should apply out to a depth of 15 metres.

4.1.3 The Kåfjord judgment (*Rt 1985 p 247*) – Protection of certain public rights

The Kåfjord judgment makes an exception from the main rule that the fishing in the sea is a public right. Below follows an analysis of the judgment, which is important because it emphasises circumstances that may justify exceptions from the main rule that sea fishing is a public right, circumstances that are typical of the coastal Saami fishery.

In my examination of the judgment I shall first present the issues put before the Supreme Court, the Court's ruling, the facts of the case and the requirements that must be fulfilled, as well as explaining why the judgment is so important for the coastal Saami's claim for sea fishing rights.

The question before the Supreme Court was whether compensation should be awarded for interventions limiting a public right of fishing. The general rule is that public

«The question before the Supreme Court was whether compensation should be awarded for interventions limiting a public right of fishing.»

rights (like sea fishing) are poorly protected against restrictive interventions; however, if the fishery in question can be considered as a use with the character of being a right, those who practise it are entitled to protection. In the case concerned, the Court found *in favour* of a group of fishermen who claimed compensation, since their fishing had the character of being the exercise of a right.

First a brief presentation of the facts of the case: A group of fishermen in Kåfjorden sued the power company *Troms kraftforsyning* claiming compensation for losses incurred during a certain period as a consequence of ice problems in the fjord following watercourse regulations. The fishermen were mostly of Saami descent. The fishing took place in the winter months on coastal cod migrating to their regular spawning grounds in the innermost parts of Kåfjord. A division of the fishery (in the shape of a prohibition of visiting fishermen and a limitation of the number of gillnets per boat) arose as a consequence of the fishery being limited to certain geographic areas. Externally this fishery had been respected as the exercise of an economic activity, since there had been no competition from fishermen from other parts of the municipality. The fjord fishery was the most important source of income for this group of fishermen, and of substantial importance for preserving the population. It was of particular importance that the general conditions for economic activities in inner Kåfjord were very meagre. It was furthermore emphasised that it was not decisive that the fishery had not been exercised through exclusive fishing places for individual fishermen.

The Supreme Court has established certain requirements for making *exceptions* from the general rule that no compensation is paid when a public right is restricted. It is required, *inter alia*, that the use exercised

67 Falkanger p 94.

68 NOU 1993: 34 p 136.

must have been *exclusive* and of *substantial economic importance* to the users, and the Supreme Court makes reference to the requirements established in its earlier judgments in the Malangen case, published in *Rt 1969* p 1220, and the Altevann case, *Rt 1962* p 163. In the Malangen case, the Court stated that if a use that does not amount to the exercise of a right is to entitle users to a compensation, it must be so «... *concentrated and distinctive that to outsiders it appears essentially similar to the exercise of a right*» (p 1226).

In the Kåfjord judgment, the Court emphasised that the fishery was exercised within certain specific areas, at certain times of the year, without any outside interference, as well as being of substantial economic importance, especially taking into consideration the poor conditions for other economic activities in Kåfjord. In total, these circumstances led to the fishery being considered a use with the features of a right, entitling the users to a compensation for the economic loss they had sustained as a consequence of the watercourse regulations.

What is of interest for our case is firstly that the judgment shows that collective rights to fishery resources may exist on the basis of a certain kind of use.⁶⁹ This is in contrast to the traditional view that no exclusive rights to sea areas can exist, in the sense of rights held by a limited group of fishermen.

Furthermore, the judgement is important because the elements emphasised by the Supreme Court are typical of precisely the traditional fjord fisheries of the coastal Saami. Elements like generally poor income opportunities in the fjord areas and the exercise of fishing in more or less delimited areas without outside interference, are distinctive features of the fjord fisheries, and thus of the coastal Saami fisheries. In this manner, the judgment may pave the way for the perception that collective rights to fish resources may exist also in other places along the coast. This is a central point that may strengthen the coastal Saami's claim for rights in sea areas if equivalent circumstances apply.

The question of whether it was considera-

tions of reasonableness or arguments that a certain kind of use shall enjoy a certain protection also at sea that tipped the scale, cannot be stated with certainty. This does not however alter the fact that a group of fishermen were heard when making reference to a certain kind of use as a central part of their argument. In this way, the judgement will have implications for similar cases. The argument that the Supreme Court made an exception based on reasonableness in the specific case and not on a wish to acknowledge any private-law rights to sea fishing cannot nullify the legal effect of the judgement should a similar case be brought before the courts later. After the Supreme Court judgement, the factors in play in the Kåfjord judgement will be relevant in all subsequent cases of this nature, without this implying that the actual circumstances in subsequent cases will be completely identical. The Supreme Court always gives a specific judgement in the individual case, precisely because no case is absolutely identical to another. A different matter is that through its decisions the Supreme Court creates the basis for a development of the law, in that it specifies criteria for what is relevant and makes a statement regarding the weight of the various arguments. In my opinion, therefore, it cannot be of decisive importance that in the Kåfjord judgement the Supreme Court emphasized tests of reasonableness, as long as the decision is anchored in previous judgements and other sources of law.

For the Saami, with their strong attachment to the use and exploitation of the natural resources, this development of Norwegian law is highly positive. The Kåfjord judgment is part of a legal development in which the court chooses to consider not only the merely formal part of a right, and where special circumstances may be decisive for the outcome. The development has gone from the establishment of certain criteria for compensation of lost fish resources in the Altevann and Malangen judgments, to a specification and thus further development of these requirements in the Kåfjord judgement.

69 Cf. also Bull, the Aja conference 2004.

The question is furthermore whether the state of the law as regards the protection of public rights has been modified through this judgment. Firstly, it must be emphasised that the Kåfjord judgment does not entail a general broadening of the protection of the public rights. It is nonetheless appropriate to say a few words about the protection Norwegian law provides for the exercise of a use in those cases where the use has the character of the exercise of a right. The general rule under Norwegian law that public rights have poor protection against restrictive interventions, cannot apply to cases such as the ones discussed here. A use with the character of being a right is close to being a right in rem that entitles the person(s) concerned to compensation when the right is restricted or cancelled through expropriation. It follows from article 105 of the Norwegian Constitution that upon expropriation, the owner of a property or a right in rem shall be given full compensation.⁷⁰ The Kåfjord judgment has established a new standard for the future assessment of whether a concrete use which is also the exercise of a public right may entitle dispossessed users to a compensation. The duration, intensity and economic importance for the users will be of central importance if new cases concerning the use of certain areas should be brought before the courts.

Another issue is the possible importance of this judgement for the construction of ILO 169 and CCPR art. 27. Here just a few brief comments will be made. As regards the ILO 169, policy considerations indicate that a use with the character of being a right that is protected under Norwegian law, also should enjoy protection under art. 14 as well as under CCPR art. 27. The contents and purposes of ILO art. 14 and CCPR art. 27 indicate that such a construction is reasonable. In *NOU 1993: 34*, one does not exclude the possible existence of local customary fishing rights in fjords, which consequently would enjoy a certain protection against restrictive interventions. It may thus be argued that rights based on local customary law or those that follow from Norwegian legal precedent

should enjoy the same protection under international law.

4.1.4 Narrow fjords

For certain kinds of fjords there may be a question of acknowledging rights of ownership to the fjord because of particular geographical conditions. Some fjords, especially in Finnmark, are particularly closed in and narrow, bearing more resemblance to a river or a lake than to the sea.

As a result, the differences between the rules of what is applicable law for non-saltwater areas on the one hand and saltwater areas on the other may seem unreasonable and illogical.

As regards rivers, the right to fish is held by the landowner, see Rt 1902 p 296. Furthermore, freshwater riverbeds and riverbanks are subject to private ownership. The same is true of lakes, with the exception of the free central part. Furthermore, local customary practices and immemorial usage may also intervene in such a way that even if we are dealing with a sea area in legal terms, local circumstances may indicate that fishing is not open to all⁷¹.

The question is whether any analogies can be drawn from these rules as regards narrow fjords. The Kåfjord judgment is also significant for the question of whether it is possible to draw any parallels between rules applicable to non-saltwater areas and rules for saltwater areas. In its judgment, the Supreme Court makes reference to the 1962 Altevann judgment as regards the requirements for the exercise of a use if it is to be considered a right. The Altevann judgment differs from the Malangen and Kåfjord judgments in that the former concerned interventions restricting the fishing in a non-saltwater area. This may pave the way for the application of rules for watercourses to saltwater areas, which in turn may lead to notions of rights in certain saltwater areas.⁷² In the same direction, Carsten Smith - former Chief Justice of the Supreme Court - states in an article in the Norwegian daily newspaper *Aftenposten* of 13 April 2005 that ... «the same legal prin-

⁷⁰ Article 105 of the Norwegian Constitution: "If the welfare of the State requires that any person shall surrender his movable or immovable property for the public use, he shall receive full compensation from the Treasury."

⁷¹ *NOU 1993: 34* s 121.

⁷² See section 4.1.5.

principles about the continuation of old usage should apply to salt water as to fresh water.”

We are seeing a gradual change in attitudes. The view is gaining ground that rights to saltwater fisheries in certain cases, on the basis of the use that has been exercised, possibly ought to be subject to rights in rem.

4.1.5 The fishery limits dispute between Norway and the United Kingdom ⁷³

In a dispute between Norway and the United Kingdom about how the baselines indicating the sea boundaries off the coast of Norway should be drawn, arguments about local customs in coastal and fjord fisheries played a key role. In brief, the matter dealt with how the fishery limits should be drawn, outside or in the fjords along the coast of Norway. The outcome was that Norway won the dispute when it was brought before the International Court of Justice at The Hague, with reference to the many and long-lasting local customs of restricting access to fishing in the fjords.

The case started with the entry of a British trawler into the Varanger Fjord at the beginning of the 20th century, which Norwegian authorities opposed with reference to the view that the boundary of the fishery zone should be drawn from the straight baselines and not in the fjords. The case was highly important to Norway, as a boundary drawn within the fjords would lead to great disadvantages for Norway, with its many and long fjords. The United Kingdom asserted its right to fish in Norwegian fjords, submitting that the usual point of departure is to measure from the low-water mark along the coast, regardless of the conditions along the coast in other respects.

Norway and the United Kingdom attempted to resolve the conflict through negotiations. Norway maintained a standpoint in which arguments about local conditions played a central role. The Territorial Waters Border Committee [Sjøgrensekomiteen], which negotiated on behalf of Norway, referred to the fact that access to the fishery was not free and that this must imply an exception to the general rule that the limit

of territorial waters should be drawn in the fjords as well.⁷⁴ The Territorial Waters Border Committee referred to the naming of the fjord bottom as an example of local customs in fishing, and to the fact that this practice still existed in many places.

When the negotiations did not succeed, Norway laid down by law a fishery limit of four nautical miles from the straight baselines. The United Kingdom protested, and the case ended up in The Hague in 1949. Here, Norway argued that local customs in fishing existed along the coast and in the fjords, and that the Roman law doctrine that the fish in the ocean is free for all does not apply everywhere. In support of Norway's case, two reports were prepared and presented, which were intended to document the special conditions of the fishery with respect to legal history, including the naming of the fjord bottom as evidence of the existence of fixed fishing places. We understand that this argument finally won through when the court states on p 133 of the judgement:

“Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the importance of which are clearly evidenced by a long usage.” (My emphasis.)

4.1.6 Summary

Researchers disagree on how to consider the practice of exclusive fishing grounds, including whether this practice amounted to the exercise of a right of ownership. It is claimed that because the right of ownership (title) as a concept did not have the same content in the 16th century as today, the coastal Saami cannot claim ownership of these areas on the basis of customary law or immemorial usage.⁷⁵

I find the reasoning behind this scepticism somewhat exaggerated. The central issue must be whether the concrete use and the legal perception of this use meet the requisite criteria for obtaining rights of ownership or use under customary law or through imme-

⁷³ Se artikkel Kirsti Strøm Bull, Kart og Plan nr 1 2005.

⁷⁴ Memorandum 1925: De viktigste kjensgjerninger vedrørende Norges sjøterritorium. [The most important facts regarding Norway's territorial waters]

⁷⁵ NOU 1993: 34 p 121.

morial usage. Firstly, too little research has been done on both the coastal Saami's use and on their conceptions of law in relation to the sea areas concerned to draw such a conclusion. Secondly, it must be pointed out that the issue of Saami land and sea rights for a long time has been based on Norwegian principles and ways of thinking, without due consideration for Saami customary practices and conceptions of law.

The legal developments represented by the Selbu and Svartskog judgments indicate that it should now be easier to be heard with the argument that Saami rights must take in consideration Saami culture and distinctive features. The judgments demonstrate, *inter alia*, that it cannot be decisive that the Saami have not referred to the use of the areas concerned as ownership rights, as long as the extent and intent of the use indicate that they have intended to own or use.

It may appear that the practice of exclusive fishing places would not be of any immediate importance to Saami fishermen today. There are however several reasons why this customary practice is of interest.

Firstly, it shows that it is *not unnatural to think of rights in the sea areas as something that may be subject to rights of ownership or use*. Secondly, this customary practice will be an *argument for present-day Saami for claiming certain rights to sea fishing*. If the authorities were not entitled to restrict the coastal Saami's right to sea fishing in the fjords, this must be pointed out and have consequences for the future discussion of these issues. Of central importance is also a *dispute about fishery limits between Norway and Great Britain from 1951*. In the fishery limits case, Norwegian authorities made reference to precisely this customary practice based on long-lasting, old usage and legal traditions as an argument in favour of allowing Norway to establish so-called straight baselines.⁷⁶ The aim was to secure Norwegian jurisdiction over the numerous and long Norwegian fjords, and the International Court of Justice in The Hague approved Norway's interpretation of international law. The

interesting point is that the statements from Norway may be seen as an expression of a state practice, which must have a bearing on what can be considered as current law with regard to coastal Saami rights in saltwater areas. The fact that the Norwegian State held the official view that private fishing places in the sea existed as late as in the 1950s is thus highly interesting, and must have consequences for the future research related to these matters.

4.2 The extent of ownership rights in salt water under international law

In the following I shall discuss Saami rights to sea resources. ILO 169 and CCPR art. 27 are two important conventions in this context. The central issue in relation to ILO 169 is how the concept "lands" is to be construed. As regards CCPR art. 27, an important question is whether this provision entitles the coastal Saami to claim larger fishing quotas than other fishers.

4.2.1 Some introductory remarks

In terms of obligations under *international law*, Norway has the duty to recognise Saami rights under the human rights convention **ILO no. 169 on Indigenous and Tribal Peoples** of 27 June 1989, ratified on 20 June 1990. ILO 169 contains provisions on indigenous peoples' rights to natural resources, but the Convention also covers areas like health, education and work, language, customary practices, rights of co-determination and protection of ideal values. Additionally, the Saami have rights as an ethnic minority through Norway's ratification of the **UN Covenant on Civil and Political Rights** of 16 December 1966. **Article 27** provides the right to protection against restrictions on the practice of culture and is considered to have the same material content as article 110a of the Norwegian Constitution.⁷⁷ The Covenant on Civil and Political Rights has been transformed into Norwegian law through article 2 of the Human Rights Act of 21 May 1999. The above conventions are by the Saami themselves considered so important that

⁷⁶ Bull, the Aja conference 2004.

⁷⁷ Smith, Lov & Rett 1990 p 519 and NOU 1997: 5 p 17.

other obligations under international law will not be included in this paper.

It should be emphasised that the criteria for obtaining rights of ownership or use under *Norwegian law* and *international law* are not necessarily identical. While the criteria for obtaining rights of ownership or use on the basis of for instance immemorial usage under Norwegian law are *a certain use for a certain time (in practice, approx. 100 years) in good faith*, ILO art. 14 no. 1 uses concepts like *"traditionally occupy"* as regards rights of ownership and *"not exclusively occupy"* in relation to rights of use. Art. 14 focuses on the nature of the use, which is decisive for whether we are dealing with a right of ownership and possession or a right of use. The perception of the right to the natural resources held by the indigenous people concerned may and will surely influence the interpretation of art. 14, but is not part of the "formal" criteria for recognising rights of ownership and possession and rights of use under the provisions of the convention. It is also unclear how long one must have used an area in order to meet the requirement "traditionally occupy". It may thus seem that the criteria for obtaining rights through immemorial usage in Norwegian law are somewhat clearer than the criteria for enjoying the same rights under ILO no. 169 art. 14. There is however too much uncertainty attached to these issues for a clear conclusion to be drawn yet. It is up to the ILO Expert Committee to draw up the lines. Upon any breach of the Convention, the Expert Committee may bring the case before ILO's supreme body, the International Labour Conference, which eventually may point out any breaches of the Convention to the State concerned.

4.2.2 The status of CCPR art. 27 and ILO Convention no. 169 in Norwegian law

International law and Norwegian law are two separate legal systems. It is said that international law is system of law among states, where the states are sovereign and thus not subject to anyone's will but their own, as opposed to the national law, where citizens are subject to the legislative, executive and judiciary authorities of their respective states. As a general rule, international law must be

implemented in Norwegian law before it can become applicable there.

Through the adoption of the Norwegian Human Rights Act of 21 May 1999 no. 30, CCPR art. 27 has been incorporated into Norwegian domestic law. As a result, if there is a conflict between CCPR art. 27 and another provision of Norwegian law, the former shall prevail, cf. section 3 of the Human Rights Act (HRA). Since CCPR art. 27 entitles the Saami to material protection (economically and physically) of their enjoyment of their culture, the implementation of the Covenant is very important for the legal status of the Saami.

The Indigenous and Tribal Peoples Convention ILO 169 has – unlike CCPR – not been incorporated into Norwegian law. ILO 169 is a binding instrument of international law that must be complied with on a par with other obligations under international law. Moreover, there are weighty arguments that it should and must be respected in Norwegian domestic law. Inconsistency can be avoided by interpretation of legal provisions and using, *inter alia*, the principle that Norwegian law is presumed to be in agreement with international law. Additionally, the provisions of articles 110a (the Saami article) and 110c (the human rights article) of the Constitution suggest that ILO 169 should be given great importance. Since ILO 169 is a human rights convention, section 1 of the Human Rights Act, stating that the status of human rights in Norwegian law shall be strengthened, also acquires a certain importance.

4.2.3 A discussion of the concept "lands" in ILO Convention no. 169

In relation to ILO 169, two issues in particular will be discussed. The first is to what extent ILO 169 recognises the coastal Saami's right to participate in the *management* of sea areas, cf. art. 15. The second is to what extent the coastal Saami may claim *rights of ownership or use* to the same areas, cf. art. 14. The question of what rights the coastal Saami have to saltwater areas, in terms of management rights and rights in rem (as in the difference between public law and private law considerations), depends amongst

other things on how the concept "lands" in arts. 15 and 14 is to be construed. I will not include other aspects of the provisions of art. 15 concerning management in this discussion, as the main purpose is to examine the concept "lands".

Art. 15 states that the rights of indigenous peoples to the natural resources shall be specially safeguarded. Art. 15 (1) entitles indigenous peoples to participate in the management of these resources. Additionally, art. 15 (2) provides that when the State retains ownership of such resources, governments shall consult the indigenous peoples concerned prior to commencement of activities that may prejudice the interests of these peoples.

Article 15

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Art. 14 (1) regulates indigenous peoples' rights of ownership, possession and use of the areas which they traditionally occupy.

Article 14

1. The rights of ownership and possession of the peoples concerned over the lands

«The question of what rights the coastal Saami have to saltwater areas, in terms of management rights and rights in rem (as in the difference between public law and private law considerations), depends amongst other things on how the concept "lands" in arts 15 and 14 is to be construed.»

which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

As regards the understanding of rights of ownership and use to sea areas, and the right of management, it is important to distinguish between art. 14 on the one hand and arts. 15 and 16 on the other. *This is because the concept "lands" does not have the same content in art. 14 and in arts. 15 and 16*, respectively. Art. 14 concerns the rights of indigenous peoples to own and to possess, and to use the areas they traditionally have occupied and had access to, while arts. 15 and 16 restricts the extent to which governments may regulate those same areas.

As far as arts. 15 and 16 are concerned, art. 13 (2) specifies what the term «lands» includes: «Lands» is to be understood as «the total environment». The definition provided in art. 13 (2) implies that the term "lands" as used in arts. 15 and 16 must be construed widely. There is no similar provision telling how "lands" in art. 14 is to be understood.

A *natural understanding* of the concept "lands" would include the ground with trees and other plants, and less fixed elements like sand and stones. Sub-surface resources are generally also included, unless such rights are excluded through legislation.⁷⁸

⁷⁸ Skogvang p 82.

First a short note on the rights of indigenous peoples to watercourses, that is, **non-saltwater areas**.

Rivers and lakes are evidently covered by art. 15 as a consequence of the wide-ranging scope of "lands" pursuant to art. 13. Taking into consideration the views on ILO 107, of which ILO 169 is a continuation, and the Convention's aim to strengthen and preserve indigenous peoples' cultures and ways of life, rivers and lakes must also be considered covered by the provisions of art. 14.⁷⁹

As regards the Conventions applicability to **sea areas**, the legal situation is less certain.

In relation to art. 15 there are good reasons to consider sea areas as also being covered. The definition of the term "lands" in art. 13 (2) is sufficiently wide for the coastal Saami's use of sea areas to be covered. Especially the purpose of art. 13 (2) - to secure for the Saami control over areas they traditionally have used, but that are not subject to ownership - as well as general considerations of the importance of preserving the resource basis at sea, also speak in favour of sea areas being covered by art. 15.⁸⁰ This implies that government authorities have a duty to consult the coastal Saami upon implementation of restrictive interventions in saltwater areas that threaten their interests.

The question is whether the same areas are protected under art. 14. As regards the question of whether saltwater areas are covered by art. 14, one must distinguish between rights of ownership and rights of use.

It is presumed that it takes quite a lot for an indigenous people to have a *right of ownership* to saltwater areas under international law when the issue is not expressly regulated, especially considering that rights in saltwater areas under domestic law are not held by the population as private ownership rights, but as public rights. However, one cannot exclude the existence of rights on the basis of immemorial usage, and the practice of exclusive fishing places shows the existence of notions of rights of ownership (or use) to sea areas. The second population group adopts

«Firstly, the Norwegian Supreme Court judgment in the Kåffjord case demonstrates that the exclusive exploitation of fishery resources in a certain geographical area may enjoy protection against restrictive interventions. »

the position that ILO 169 does not give the Saami any rights in saltwater areas under art. 14.⁸¹

In relation to *rights of use* one may question whether this position can be maintained to its full extent.⁸² The starting point is that the coastal Saami's claim for rights in saltwater areas has not been definitely settled. ILO 169 art. 14 uses the term «lands» about the areas to which indigenous peoples have rights of ownership and use on certain conditions. In the Norwegian version, the expression "land areas" is used. During the ILO negotiations there was strong disagreement as to the intended scope of the term; consequently, the literal wording must be given considerable importance. In addition, considerations of purpose and public policy carry substantial weight.

Firstly, the Norwegian Supreme Court judgment in the Kåffjord case demonstrates that the exclusive exploitation of fishery resources in a certain geographical area may enjoy protection against restrictive interventions. Furthermore, other cultures hold a different view of rights in saltwater areas that must be taken into consideration. One example of this is an indigenous people in the USA that was awarded certain quota rights in saltwater areas on an ethnic basis. In addition, the considerations of purpose that have been alleged in favour of including rivers and lakes under art. 14, must be relevant here. These considerations include the preservation and development of a traditional Saami livelihood that is strongly linked to nature

79 Skogvang p 82.

80 NOU 1997: 5 p 39.

81 NOU 1997: 5 p 39.

82 Skogvang p 83.

and particularly vulnerable to new restrictive interventions.⁸³ Public policy considerations are particularly important in this case and should be regarded for purposes of interpretation. Especially noteworthy is the current development in the perception of Saami fishing rights, with the attitude that the fishery is a right to exercise an economic activity that authorities may regulate freely, gradually being replaced by notions of special rights of use through immemorial usage and customary practices.

4.2.4 What are the obligations of Norwegian authorities towards the coastal Saami under CCPR art. 27?

The UN Covenant on Civil and Political Rights of 1966 art. 27:

"In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

CCPR art. 27 is a precursor to the ILO Convention no. 169 dealing with the right of minorities to enjoy their own language, religion and culture. CCPR art. 27 is worded as a prohibition of discrimination, but legal precedent firmly establishes that this article also provides material protection against restrictive interventions and a claim for positive measures. The Saami are an ethnic minority and a subject of rights under the provision, while the State is the subject of duties and responsible for following up by implementing measures.

The discussion of what rights the coastal Saami hold under CCPR art. 27, is based on a report written by the then professor Carsten Smith, presented in *Lov & rett 1990 p 507*. At that time, Norway had recently ratified ILO 169 and had granted the Saami as a people constitutional protection just a few years before. These elements should be kept in mind when reading the discussion below.

Carsten Smith's report is important for several reasons. Firstly, the report is written by one of Norway's most prominent legal

scholars. Secondly, the report was commissioned by the Saami Parliament and the Ministry of Fisheries, with the purpose of examining the extent of legal duties binding the authorities in the fisheries field. Thirdly, the report is important because it is the first of its kind to examine Saami fishing rights in a legal context.

Since the present paper deals with the same issues as those examined by Carsten Smith in 1990, substantial parts of his report will be presented below. First there will be a short presentation of Norwegian rules in the fisheries field as an introduction to a discussion of obligations under international law, similar to the structure of Smith's report.

Carsten Smith starts with the *legal principles* that government authorities are bound by in their regulations of fisheries. There are no Norwegian rules in the fisheries area that apply particularly to the Saami; thus, their rights must be based on their general access to natural resources.

Initially, Smith examines the Participant Act of 1972 no. 57 (now superseded by the Participant Act of 26 March 1999 no. 15) and the Saltwater Fisheries Act 1983 no. 40, and he comments on the wide-ranging *regulatory powers* contained therein.

Firstly, he states that there are no provisions that make particular mention of *Saami* considerations. He does however point out that there is nothing preventing such considerations being taken into account and that this should indeed be done. Both international law and Norwegian law through article 110 a of the Constitution indicate that these are relevant considerations when fisheries are regulated. Smith claims that public authorities must comply with international and constitutional obligations also in their discretionary decisions, making reference to the Supreme Court's ruling in the case concerning the Alta-Kautokeino watercourse in 1982.

Smith concludes that Saami interests have suffered as a result of how Norwegian authorities have drawn up regulations in the fisheries field. In 1990, the most important constraint was represented by the size of ves-

83 Cf Smith, Carsten in *Lov & Rett 1990 p 507 p 522*.

sel quotas. This in turn affected employment among fishers along the coast, in particular in the small fishery-dependent Saami communities.

Smith then goes on to discuss international law obligations under CCPR art. 27 and ILO 169.

First he reviews **CCPR art. 27**, which he interprets precisely in the light of ILO 169 and the fact that the Saami are recognised as an indigenous people in Norway. He establishes that CCPR art. 27 provides protection of the culture in material terms (physically and economically) and a claim for positive measures. Then Smith makes a comparison with art. 110a of the Constitution, stating that its contents provide the Saami with the same rights as CCPR art. 27. As regards **ILO 169**, he is more cautious, claiming that saltwater areas cannot be considered covered by the convention. Considering the developments of the last 14 years, it can be argued that such an interpretation of ILO 169 is not as indisputable as before. Especially in relation to the right to participate in management under art. 15 and rights of use under art. 14, the discussion can be broadened, see for instance Skogvang p 83 in the textbook "*Samerett*" (*Saami Law*).

Starting with art. 110a of the Constitution and CCPR art. 27, Smith discusses whether the Saami, given their right to positive discrimination when required to safeguard their culture, have the *right to a larger share of total catches* in relation to other fishers. The assessment of whether restrictive interventions in the Saami fisheries are contrary to the authorities' obligations in the field of Saami law, in the sense of negative or positive discrimination, must start with an evaluation of the nature and scope of the intervention.

As regards the *nature* of the intervention, the reasons given for it will be an important element. If restrictions of the fishery are made for reasons of sound resource management, the intervention is by its nature not a violation of the Saami rights, as the regulation will be a measure of protection and not a restrictive intervention into the fishery. A central question is whether Saami fisheries have a so-called Saami distinctiveness. The question is whether only the traditional

and culture-specific economic activities are protected by the provision, or whether even other economic activities are entitled to protection against restrictive interventions. Fishing is a traditional, but not culture-specific economic activity in the sense of the Saami being the only ones to practise fishing. The government white paper *NOU 1984: 18* employs the concept of a "core zone", where the protection becomes weaker the further away one gets from the culture-specific and traditional economic activities. Smith points out that what is decisive is not what measures are implemented, but their effect on the Saami culture. Here two factors are of particular importance. Firstly, the fact that Saami culture is closely linked to nature, and secondly that Saami culture is in a precarious situation. These elements are arguments in favour of considering Saami fisheries as a traditional Saami economic activity, which as such is covered by the traditional culture protection provisions of CCPR art. 27.

As regards the *scope of the restrictive intervention*, Smith claims that an overall assessment must be performed. The Alta judgment (*Rt 1982 p 299*) employs as a minimum requirement "substantial and very harmful interventions" into Saami interests. These criteria, Smith argues, cannot be applied unreservedly to the fisheries field. In our case we are concerned with a change in regulations and a positive special treatment of the Saami, as distinct from the Alta judgment, where the question was whether CCPR art. 27 could prevent a regulation of the Alta-Kautokeino watercourse. This, and the fact that Norwegian authorities have modified the Supreme Court's points of view in this area, indicates that we in any case must perform an overall assessment. The decisive element must be the cultural basis that is left after implementation of the intervention. Any intervention that threatens the Saami population and settlements will thus also be substantially negative for the Saami culture and hence to the coastal Saami culture.

Smith concludes that the State has certain legal duties towards the coastal Saami under Norwegian and international law.

As a continuative note, below follow some remarks on the restrictions that have

taken place in the 1990ies, which have hit the coastal Saami fishers particularly hard. The coastal Saami are many places in such a difficult situation that any further regulations of sea fisheries may lead to the discontinuance of the coastal Saami fisheries. This might be in direct contravention of Norway's international duties, inter alia, under CCPR 27, where Smith points out that the decisive question is what cultural basis would remain after the restrictive intervention. After almost 15 years of substantial restrictive interventions and extensive regulations, many coastal Saami now find it difficult to make ends meet. One may therefore ask whether these regulations amount to an infringement of rights protected under CCPR 27, thus rendering illegal the total restrictions levied on the sea fisheries throughout these years.

The report, which was commissioned by the Ministry of Fisheries, has however not had any bearing on the government's fisheries policies in relation to the coastal Saami's rights. This was demonstrated by a 2002 sur-

vey among government agencies, where the various ministries were asked to state what they had done to follow up on international obligations in their respective fields.⁸⁴ The Ministry of Fisheries had done little or nothing to follow up on the obligations by which the Smith report concludes the Ministry is bound. This reflects an attitude that unfortunately is widespread also among other government agencies, where Saami rights are not taken seriously enough.

«Firstly, the fact that Saami culture is closely linked to nature, and secondly that Saami culture is in a precarious situation. These elements are arguments in favour of considering Saami fisheries as a traditional Saami economic activity, which as such is covered by the traditional culture protection provisions of CCPR art. 27.»

⁸⁴ Einarsbøl, Elisabeth. "Norway's enforcement of provisions concerning indigenous peoples and minorities under international law for the protection of the rights of the Saami" (translation of Norwegian title)

5 NORWEGIAN FISHERIES LEGISLATION AND MANAGEMENT

In this chapter I will assess and comment on Norwegian acts concerning fisheries and some of the regulations relating to them. I also examine central concepts in the fisheries field and the relationship between Norwegian fisheries legislation and international law. Furthermore, an outline of the management system is included.

5.1 Norwegian fisheries legislation

Central acts are the Saltwater Fisheries Act of 3 June 1983 no. 40 (SWFA) and the Participant Act of 26 March 1999 no. 15 (PA). None of these acts state expressly that the situation of the coastal Saami may or should be taken into consideration.⁸⁵ While the Saltwater Fisheries Act is an act regulating catch volumes with rules for how sea fishing should be practised, the Participant Act regulates fishing efforts by establishing the requirements for participating in fisheries. Both acts give government agencies ample powers to regulate the exercise of fishing by issuing regulations. Such regulations may apply to certain areas or the entire country. Regulations are also divided into permanent and provisional ones. Regulations may be issued by authority provided in one or more acts.

5.1.1 Central concepts

In the following I will explain some central concepts and arrangements within the fisheries sector that may be useful to know.

When there is mention of **conventional fishing gear** as compared to unconventional gear, a parallel may be drawn to the distinc-

tion between active and passive fishing gear. The conventional gears are considered passive in the sense that they are more resource-friendly, thus reducing the danger of overfishing. Examples of such gear are longlines, gillnets and handlines; central gear in the traditional coastal fishery. Examples of more active gear are trawl and purse seine. These kinds of gear are a threat to fjord fisheries by reducing the local population's chances for making a living from fishing, and have never been used in the traditional fjord fisheries in Finnmark.⁸⁶ Boats with active gear are often larger vessels of a size that enables them to fish outside the fjords. Exceptionally, even passive gear may be very efficient. An example is fishing with the so-called Danish seine, which authorities have restricted, as it is a highly efficient fishing gear.⁸⁷

There are several registers in the fisheries field, with different functions. **The Fishermen's Register** is a central register that includes all commercial fishermen. It is used as a basis for allocating rights, ranging from commercial fishing licences to fishermen's pensions. The fisherman must be at least 15 years old; if fishing is the person's main source of income he is registered on sheet B, and on sheet A if fishing is one of several sources of income. Depending on the sheet the person is registered on, there are certain requirements concerning the size of income from fishing and/or other income. When a vessel has been granted a commercial fishing licence, it must be entered in the **Sign Register**. Here factual information about the vessel is registered. The purpose of such a

⁸⁵ Cf the Smith report.

⁸⁶ NOU 1997: 4 p 313.

⁸⁷ NOU 1997: 4 p 313.

signing of the vessels in a sign register is to facilitate the work of inspection authorities.

In the early 1990ies a system of **vessel quotas** and **maximum quotas** for coastal fisheries was introduced. To participate in a vessel quota arrangement, applicants were required to have landed a certain catch volume in one of the three preceding years. In addition, the fisherman had to be a full-time fisher and the vessel registered in the Sign Register. Participation in the vessel quota system entails the allocation of a quota that depends on the size of the vessel. Those who did not fulfil the requirements were left to participate in a maximum quota system. The fishing within the latter system would be halted when the total quota had been caught, independently of whether the individual fishermen had caught their individual maximum quota. The idea behind the regulations, designed by the authorities during the cod crisis, was to favour the most cod-dependent fishermen by assigning them somewhat larger quotas than others. This hit the coastal Saami fishermen particularly hard.⁸⁸ With time these quota systems have been replaced by other names; vessel quotas are now termed Group I, and maximum quotas Group II.

5.1.2 The relationship to international law

It is important to note that section 3 of the Saltwater Fisheries Act expressly states that the provisions of this Act apply subject to such limitations as follow from international law or agreements with foreign states. Consequently, both international conventions and international customary law may take precedence over Norwegian domestic law.

Hence, *inter alia*, ILO 169 and CCPR art. 27 may be significant, as it is contrary to reason that the above provision should only concern international obligations in the fisheries field. There is particular reason to emphasize the wording here, as we are within the sphere of human rights. That certain Saami considerations must be taken into account in the administration of the fishery resources further follows from Norwegian law through the Saami Act [sameloven], the Norwegian Human Rights Act [mennesker-

«The idea behind the regulations, designed by the authorities during the cod crisis, was to favour the most cod-dependent fishermen by assigning them somewhat larger quotas than others.»

ettsloven] which incorporates CCPR art. 27, and Article 110a of the Norwegian Constitution, in addition to international law.

Section 4 of the Saltwater Fisheries Act vests the Ministry of Fisheries with extensive powers to regulate fisheries.

If the Ministry is to issue regulations, certain requirements apply. As a general rule, regulations may be issued if it is required to *ensure the proper management of resources in the sea, if international agreements so require, or if it is necessary for conducting or completing fishing or hunting activities in a rational or proper manner*, cf section 4 (1). The wording of the provision might indicate that the authorities have a duty of assessing our obligations under international law only *when considered necessary*. In his report, Smith points out that the *travaux préparatoires* make reference only to international agreements in the fisheries field. It is not necessary to establish the scope of the above-mentioned provision, as it follows from section 3 of the Saltwater Fisheries Act that such international obligations in any case must be respected and complied with. Moreover, it follows from Norwegian law through the Saami Act and article 110 a of the Constitution, but also from international law through ILO169 and CCPR art. 27, that certain Saami considerations should apply in the management of fishery resources.

5.1.3 Brief note on the Saltwater Fisheries Act and the Participant Act

In summary, the Saltwater Fishing Act contains provisions on regulations, enforcement and control. The provisions of the Act give authority, *inter alia*, to issue regulations on various kinds of catch restrictions, with stipulations on quotas, catch periods, species

⁸⁸ Report and proposition from the Saami Fisheries Committee p 93.

and fishing gear as central elements. In this context, quota regulations are important. It is especially in this respect the coastal Saami feel discriminated, as the quota systems of the past 10-15 years have favoured other non-coastal Saami fisheries. The main problem is that the right to a vessel quota was linked to a certain kind of access restriction. Only fishermen who could document a certain catch volume in the preceding years were entitled to a vessel quota, and because of the seal invasion and overfishing this requirement prevented most of the coastal Saami from participating. Instead, the coastal Saami were forced into a maximum quota system. For the coastal Saami, this led to smaller quotas and reduced income from sea fisheries.

The Participant Act, on the other hand, contains provisions regulating access to sea fisheries. As a general rule, there are three criteria for participation, linked to registration in the Fishermen's Register, in the Sign Register, and the requisite commercial fishing licence.

One of the requirements for a commercial fishing licence is that the fishing must be occupational, cf. section 4 (1) of the Participant Act. According to section 3 (1) of the Act, fishing is occupational when it constitutes a living alone or in combination with another economic activity. It follows from regulations concerning the Fishermen's Register that fishing, if combined with another economic activity, must account for a certain percentage of the total income if the person concerned is to be allowed to figure in the Register.⁸⁹ For coastal Saami fishermen, who normally will be registered on Sheet A with fishing as a secondary source of income, the requirement is that income from fishing should be at least 50 % of the National Insurance's so-called Basic Amount. The rules have not been drawn up with the coastal Saami's traditional livelihoods in mind. A minimum requirement must be that quotas should make it possible to make a living from fishing, either alone or in combination with other livelihoods. Additionally, the restriction applies that a fisherman cannot be

admitted to the Register if he has a full-time occupation other than fishing, with "full-time" being defined as generating income exceeding the Basic Amount multiplied by four. One may also question whether this limit on income from other activities than fishing can be maintained. Another problem is the Participant Act's requirement of former participation in fishing. Requirements were made more stringent by a 1999 amendment, with requisite prior fishing activity being changed from three out of the last ten years to three out of the last five years. Consequently, we see that certain restrictions apply for the acquisition of a commercial fishing licence that because of the general resource situation place the coastal Saami at a disadvantage. The problem is not only the access limitations in themselves, but also the lack of compensatory schemes addressing the unreasonable consequences that these regulations have for the coastal Saami fisheries.

5.1.4 Applicable regulations – a selection

Below I will present a few central regulations that shed some light on the coastal Saami's current situation. Only a limited selection is presented, centred on regulations presumed to be relevant to the typical coastal Saami fisheries. The main focus is on cod fishery with conventional fishing gear and red king crab fishing.

Under powers granted in sections 4, 5 and 9 of the Saltwater Fisheries Act, regulations have been issued that regulate the *cod fishery with conventional fishing gear north of the 62nd latitude for 2004*.

The general rule is a prohibition of fishing cod with conventional gear north of the 62nd latitude. An exception is done in section 2 for vessels covered by the provisions of the regulations. A distinction is made between vessels with an overall length exceeding 28 metres and smaller vessels. As an example, vessels under 28 metres in group I may fish up to 118,017 tonnes of cod, while vessels under 28 metres in group II may fish 14,431 tonnes of cod, cf. section 3. In other words, whether the fisherman concerned belongs to group I or group II is of great importance

89 Cf. Regulations on the registration of fishermen, whalers and sealers, etc.

for how profitable the fishing is because of the great difference in fish available and the design of the existing quota system.

Moreover, regulations no. 1484 of 12 December 2003 stipulate additional requirements for access to this fishery. Section 2 of the regulations contain criteria for the participation of vessels in **group I**. In addition to the vessel being registered in the Sign Register, the owner and the captain being registered on sheet B of the Fishermen's Register, and the vessel being appropriate, the vessel must have been qualified for participation in the 2003 fishery. An exception can be made from the latter requirement if the vessel meets certain criteria of fishing activities in the years 1999, 2000 and 2001 in relation to certain fish species or combinations of such. For vessels in **group II**, the same criteria apply as to vessels in group I, with the exception of requirements of a certain fishing activity in the past few years.

Even as regards *red king crab* fishing, there is evidence that Norwegian authorities do not have in mind the possible consequences for the coastal Saami's situation when they draw up regulations. The provisions are found in *regulations of 11 August 2003 on the fishing of red king crab and access to this fishery in 2003*. Firstly, the requirements for red king crab fishing are dependent on the group to which the fisherman belongs.

For group I there are some entry requirements, like the boat being registered in the Sign Registry, having a maximum length between 7 and 15 metres and fishing being the main source of income; in addition, the fisherman must have had access to participate in group I fisheries in 2002. An exception from the requirement of access to the 2002 fisheries can be made if either at least 5 tonnes of cod or 1600 litres of lumpfish roe were landed in at least two of the years 2000, 2001 and 2002.

For group II, on the other hand, the same entrance requirements apply, with the exception of fishing being a secondary source of income and not the main one. Even her an exception can be made if a certain volume of cod or lumpfish roe was landed in at least two of the years 2000, 2001 and 2002, the required quantities being 3 tonnes of cod or

800 litres of lumpfish roe. We see that the distinction between fishing in group I and group II mainly depends on whether fishing is a full-time or part-time occupation, and the catch volumes needed for being excepted from the general requirement of participation in the 2002 fisheries is somewhat lower for those with fishing as a part-time occupation.

An important question is how the expression "participated with the vessel" should be understood in section 3 (2) (a) and (b), and section 10 (2) (a) and (b) of the regulations. The question is whether it is required that the vessel used for fishing cod and lumpfish in the preceding years must also be used for the red king crab fishery. A natural interpretation would be that the *same* vessel must be used during the entire reference period, as the provisions use the wording "the vessel" in the definite singular. Since this would strongly affect those who for different reasons traded their old vessel for another, the *instructions for processing of applications for participation in the red king crab fishery in 2003* allow a change of vessels, on the condition that both the substituted and the substitute vessel meet the statutory criteria. For instance, the vessel length criteria will apply to both the substituted and the substitute vessel. This interpretation, which is one of several possible interpretations of the expression "participated with the vessel", is very unfortunate for the situation of the coastal Saami. In addition to the problem that coastal Saami in some cases must fish a certain volume of cod or lumpfish to have access to the red king crab fishery, it is a requirement that the vessel used for fishing the cod or lumpfish also must meet the 7 to 15 metres length requirement.

It would be of interest to know the decisive concerns behind this requirement, which implies that boats less than 7 metres long are considered unfit for fishing precisely cod or lumpfish. The coastal Saami themselves do not find such lesser-sized vessels unfit for such fishing.

The instructions furthermore state that the legislation concerning the red king crab fishery should be designed so as to allow the participation of those fishermen that

experience the most bycatch when fishing for cod and lumpfish. In light of the above it seems very strange that the coastal Saami of the Tanafjord, who suffer the negative effects of king crabs getting entangled in their gillnets and reducing catches, are precisely the ones who are not given priority. Today, gillnet fishing is virtually impossible in the Tanafjord. It may seem that the Ministry's instructions as to who should be prioritised, run contrary to the regulatory framework the Ministry itself has participated in drawing up. Concern for the special conditions of the coastal Saami seems to have had no bearing on the design of the current regulations for red king crab fishing.

5.2 Government agencies

In this chapter we shall examine how regulations are drawn up and who have authority to decide in fisheries issues. We shall see that the government agencies wield much influence over central parts of the fisheries policies through their authority to issue regulations, with the design of quota systems being an important part of this authority.

5.2.1 The development towards a fisheries management

Even in medieval times, sea traffic was regulated through different kinds of decrees.⁹⁰ These decrees might apply locally or to the entire country, which is also true of present-day regulations. In 1270, King Magnus the Lawmender gathered local laws into a nationwide code. In spite of this, local decrees were the most widely used even after the introduction of a national law. Until the mid-19th century, rights based on acquisitive prescription and local rules and arrangements were predominant. Local laws were respected to varying degrees. However, what is interesting is that these local laws represent an emerging Norwegian fisheries management. In 1859, Norway got a separate fisheries management through the appointment of a scientist who was given the responsibility for fisheries studies. It was not until 1886 that a separate fisheries adminis-

«In 1946, the Ministry of Fisheries was established as the world's first ministry dedicated solely to fishery issues»

tration was established, which later would develop into the present-day Directorate of Fisheries.⁹¹ In 1946, the Ministry of Fisheries was established as the world's first ministry dedicated solely to fishery issues.

5.2.2 Present-day fisheries management agencies⁹²

5.2.2.1 Introduction

There are several fisheries management agencies in Norway, with the Ministry of Fisheries as the highest political authority. The Ministry of Fisheries is responsible for such areas as fisheries, whaling, sealing, fishing industry, aquaculture and coastal management. The principal tasks are to draw up and execute fisheries policies, create sustainable and economically profitable fisheries and aquaculture industry, and ensure safety at sea. Under the Ministry of Fisheries there are various research and management institutions. The Coastal Administration and the Directorate of Fisheries are agencies that take care of practical management issues, from the design of navigation systems to the regulation of fisheries. This paper will also examine the activities of the Directorate of Fisheries in further detail.

In practice, much of the responsibility for fisheries policies is delegated to subordinate bodies and attached agencies, based on the idea that decisions should be made in proximity to the participants in the fishing industry. Both the Saltwater Fisheries Act and the Participant Act give government agencies, including the Directorate of Fisheries, great possibilities of exercising influence over fisheries policies through the extensive authorities to issue regulations granted by these acts. Regulations may be issued by virtue

⁹⁰ During the absolute monarchy from 1660 to 1814, royal acts that applied to all subjects

⁹¹ See section 5.2.2.2.

⁹² Fiskerilovgivning [Fishery Legislation], Lekve, Olav p 12 et seq.

of authority provided in an act or a regulation. Some are permanent, while other are of shorter duration. The transitory regulations may have a validity of one year or less. We therefore distinguish between yearly regulations and those of a more provisional nature. In this way, agencies with powers of decision within the fisheries management may greatly influence the development of fisheries policies.

5.2.2.2 *The Directorate of Fisheries*⁹³

The Directorate of Fisheries is a separate agency attached to the Ministry of Fisheries. The Directorate of Fisheries acts as one of the most important advisory and executive expert bodies on fisheries management issues. The Directorate is headed by the Director General of Fisheries; under him there are seven Regional Offices collectively termed the *External Agency*. The Director General of Fisheries is the administrative head of the Directorate and the External Agency, and is responsible for presenting measures favouring the natural resource basis of the fishing industry.⁹⁴ The External Agency is responsible for management and control activities locally and at the county and municipal levels, and is the part of the Directorate that is in daily contact with the participants in the fishing industry.

In addition to the various administrative units, the Directorate of Fisheries is divided into three central sections. They are the Resource Management Department, the Aquaculture and Coastal Department, and the Statistics Department. Most central to this paper is the Resource Management Department, dealing with, *inter alia*, issues like the regulation of fisheries, licences⁹⁵ and the quota control system. The Resource Management Department is also the appeals body for licence applications that are handled by the regional offices.⁹⁶

The Directorate of Fisheries has the authority to draw up regulations for the management of sea resources at a rather detailed level, which is illustrative of the power of

the Directorate in such cases. The regulations issued by the Directorate of Fisheries are called J-notes, and total approximately 200 per year. Most often these notes are publications from the Director General of Fisheries and concern precisely the exercise of sea fisheries. J-notes are often regulations issued under authority given in the Saltwater Fisheries Act or other acts or regulations. The Director General of Fisheries may also have authority to regulate fisheries when this is practical; such regulations must be drawn up in accordance with the objective of the Saltwater Fisheries Act that fishing activities should be conducted in a rational and proper manner, cf section 4 of the Act.

5.2.2.3 *The Regulatory Council*⁹⁷

The Regulatory Council is appointed by the Ministry of Fisheries and is headed by the Director General of Fisheries. One of the most important tasks of the Regulatory Council is to establish rules for the conduct of sea fisheries. The Regulatory Council holds two meetings per year. These meetings are intended to replace an ordinary consultation process by letting stakeholders present views and initiatives on behalf of their respective organisations and institutions at the meetings.

The Directorate of Fisheries is responsible for preparing the documents for the Regulatory Council meetings, where advice is given on how Norwegian fishery resources should be distributed among the Norwegian vessels. The Directorate of Fisheries presents proposals for the distribution of quotas and rules for the conduct of the fisheries. Proposals are based on the available fishery resources and prior experience with regulations of the fisheries. The members of the Regulatory Council present their own proposals, and on the basis of the Council's proceedings the Directorate of Fisheries make recommendations to the Ministry for regulations to be drawn up. It is thus the Ministry of Fisheries that draws up the final regulatory provisions.

The Regulatory Council has 11 members appointed by the Ministry of Fisheries, one

93 See <http://www.fiskeridir.no/sider/virksomhet/virksomhet.html> and Lekve, *Fiskerilovgivning* [Fisheries Legislation] p 17 et seq.

94 <http://www.fiskeridir.no/sider/virksomhet/virksomhet2.html>.

95 A licence means a special permit for a vessel to perform a particular fishery. Cf Olav Lekve, p 33.

96 <http://www.fiskeridir.no/sider/virksomhet/ressurs.html>.

97 <http://odin.dep.no/fid/norsk/tema/fiskeogfangst/p10001372/008001-990053/>.

of whom represents the Saami Parliament. At present, the Regulatory Council is the only body where Saami fishery interests are formally represented in the fisheries management system. In addition, there are examples of the Ministry of Fisheries having instructed the Directorate of Fisheries to include the Saami Parliament in various committees, but this representation depends on a request by the Ministry and is thus uncertain and unsatisfactory.

6 SUMMARY

The report demonstrates that the coastal Saami may have rights to the sea areas they traditionally have used. The Kåfjord judgment shows that the perception of the right to fish in the sea has changed from being considered a right to a certain economic activity to being subject to rights of ownership and use under rules of property law. This has strengthened the protection against restrictive interventions.

At present, the general rule is that the right to sea fishing is a public right. Exceptions may be made from the general rule in certain cases, but must be decided concretely in each individual case on the basis of the use concerned. The practice of exclusive fishing places in earlier times, the Kåfjord judgment, the fishery limits dispute between Norway and Great Britain, and international law provisions may be considered arguments in favour of sea resources being subject to private ownership.

We may compare the current situation of the coastal Saami to that of the reindeer-herding Saami after the Altevann judgment of 1968.⁹⁸ The Altevann judgment recognises that the right to reindeer herding is based on rights acquired through immemorial usage

and customary law, it is not merely a right to conduct an economic activity that authorities may freely regulate by law. It may be argued that we are now seeing the same development in relation to the coastal Saami and their struggle for recognition of their rights to the sea areas.

The report has raised some central issues within the field of coastal Saami rights. The questions are numerous, and the intention has not been to discuss or conclude on all of the issues that arise. The subject matter is too wide-ranging for that. Instead, it has been considered important to place these issues in a legal context. At the same time, this report is an appeal to legal scientists to examine more closely the questions raised by the issue of coastal Saami rights in saltwater areas.

An important challenge is to document the actual use of the coasts and fjords of the Saami settlement areas. However, the need for additional documentation of Saami customary practices, conceptions of law and use of fishing places and fishing villages demonstrates that a lot remains to be done. The field presents scientist with numerous challenges in the time ahead.

98 Cf Bull, the Aja conference 2004.

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Resource Centre for the Rights of Indigenous Peoples
(Álgoálbmotvuoigatvuođaid gelbbolašvuođaguovddáš) is located in Guovdageaidnu/Kautokeino, Norway, and aims to increase general knowledge about and understanding of Saami and indigenous rights. Our principal activity consists of collecting, adapting and distributing relevant information and documentation regarding indigenous rights in Norway and abroad. Targeted are seekers of knowledge about indigenous rights, including schools, voluntary organisations, public institutions and authorities.



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