

# Mapping Rights in Coastal Sami Seascapes

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## **Abstract**

With the help of two recent Sami rights reports, this article identifies and discusses challenges for research and government in Norway related to indigenous fishery rights issues. Both the Coastal Fishing Commission and the Sami Rights Commission reports address how to accommodate local and indigenous rights to harvest marine resources within the national fisheries management regime. A thorough rights identification and mapping process of existing private and collective rights to marine resources is proposed. Until recently little research into fisheries from a Sami perspective and the customary use of fjords and coastal areas in Norway has been done. The article examines historical and current knowledge used in the two reports to meet the challenge of indigenous fishery rights issues, and how these claims were met by the Norwegian government. The author argues more research on the customary use of the seascape is needed, combining local knowledge with community participation to fill knowledge gaps in marine resources rights issues.

**Key words:** Coastal Sami, indigenous fishing rights, national fisheries management, seascape, mapping, local knowledge.

## 1. Introduction

Indigenous rights to fish in salt water and harvest marine resources have recently given rise to much debate in Norway. Rights-based prioritization of certain groups according to traditional fisheries activity remains an issue still unresolved after decades of political debate and rights investigations. A tendency to focus on the distribution of quotas among different ethnic and geographical groups may serve to conceal other important aspects of the right to harvest marine resources, a diverse and complex issue. This article describes how these rights have been investigated within the Norwegian and Sami context, both historically and today, with a special focus on customary fishing rights.

For many Norwegians the introduction of the Sami as an ethnic stakeholder group rocks the very foundation of the Norwegian fisheries management system. In the Norwegian context rights to marine resources are very much tied to the idea of equal access to the sea, a commons owned by all Norwegian citizens.<sup>1</sup> Equity, stability, and a unified set of rules, as developed by the national fisheries organization and the Ministry of Fisheries, have been key principles in Norwegian fisheries management at least since the Second World War, but with some exceptions. This centralized fisheries regime allows for little in the way of regional and local management, and it has certainly not been open to the idea of managing fisheries in relation to ethnic categories.<sup>2</sup> Introducing a human rights perspective in fisheries management also confronts the image of the Sami as a traditional reindeer-herding people living in remote villages in the Arctic. This notion is probably as widespread in the minds of outsiders, and just as inaccurate, as the belief that blood-thirsty Indians with feathers in their hair still live in tipis in North America. Today's reality is that indigenous peoples no longer live in pre-colonial

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1. During the process leading up to the current Marine Resources Act, a central issue concerned whether marine resources are owned by the Norwegian state or by the people, or even by the Norwegian and Sami people. After all the Norwegian national state is founded on the traditional territories of both the Norwegians and the Sami (cf. Sami Parliament consultation protocols). After a round of discussion, the Act today states that marine resources are owned by "the community of Norway" (*felleskapet i Noreg*) (see § 2 "The right to resources," Marine Resources Act. The full Norwegian title: *Lov om forvaltning av viltlevande marine ressursar (havressurslova)* av 6. juni 2008. It came into force 1 January 2009. All translations are by the author).
  2. In the early 1990s the Sami Parliament and an expert group tasked with investigating Sami fishery rights proposed a "Sami fisheries zone" in the northern parts of Norway. This proposal was shelved by the Ministry of Fisheries. See, for instance, Brattland 2009: 47.

conditions and are just as diverse and modern as other peoples Norway has been a front-runner with respect to indigenous rights, among the first to ratify ILO Convention 169,<sup>3</sup> and to establish a Sami Parliament as a representative organ for the Sami people in 1989. Even so, in current political debates about the right to harvest marine resources in Norway, a lack of knowledge and poorly-grounded assumptions about both modern Sami culture and northern Norwegian culture in general, are common.<sup>4</sup> Against this background the author will concentrate on two main challenges pertaining to indigenous peoples in general, and to the coastal Sami situation in Norway in particular. The justification for special rights protection for indigenous peoples has been an issue in international rights development throughout the post-colonial age, and will not be discussed further here.<sup>5</sup>

The *first challenge* is where to draw the line between those who fall into the indigenous rights category, and the rights of the majority, and the general tendency to categorize and assume that only those customs and practices which are characteristic of indigenous peoples are deserving of rights protection, special policies measures, or research. On the other hand, researchers and governments alike require information about customs, practices and general characteristics to study and render policy decisions about these issues. The *second challenge* is to address the material lack of knowledge of local and Sami characteristics, practices, and customs, in particular with regard to the current coastal Sami marine resources rights situation. These two challenges are interrelated in the sense that a lack of knowledge is often the cause of inaccurate assumptions, incorrect categorizations, and resistance to change.

The central question addressed in the following pages is how this double challenge is currently met, both by the Norwegian government and by researchers tasked with Sami rights investigations. The method used here is an analysis of how the two most recent government-initiated commissions on Sami rights dealt

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3. ILO Convention no. 169 concerning Indigenous and Tribal Peoples in Independent Countries, adopted by the ILO in Geneva on the 27 June 1989 (ILOLEX).
  4. For instance, the Attorney General stated in a letter from the office that "it is doubtful whether any possible obligations for the state reach further than giving protection for the practices that are characteristic of Sami culture" (Regjeringsadvokaten 2009) thereby implying, perhaps, that the Sami should continue fishing with oars and sails in order to maintain rights in the national fisheries (Smith 2009).
  5. See, for instance, Weigård 2008: "Is There a Special Justification for Indigenous Rights?" and James Anaya 2004: "Indigenous peoples in international law."

with these challenges, and how the government has acted on previous occasions. The discussion is limited to these two reports because they represent the most up-to-date developments and research on these issues in a long history concerning Sami rights to land and water.<sup>6</sup> The article focuses in particular on historical and current sources of knowledge about private and collective property rights in coastal waters, then presents a current research project on the mapping of the local use of seascapes.

The conclusion presents specific challenges for future mapping of Sami rights to marine resources in Norway, and what this means for research and advocacy for indigenous peoples' rights in general. Before beginning the discussion, an overview of the history of coastal Sami marine resources rights in Norway is presented.

## 2. Background

The coastal Sami inhabit the coastal and fjord areas of northern Norway, with the majority living in the northernmost county of Finnmark and the bordering county of Troms. Fishing and farming were the traditional primary industries for the population in this area.<sup>7</sup> The Norwegianization policy undertaken by the Norwegian government from the 1850s up until the Second World War resulted in the apparent loss of Sami language and assimilation of the coastal Sami as an ethnically-distinct people into the northern Norwegian population. Together with the rise of an ethno-political movement since the 1970s, however, Sami culture has seen a revitalization of language, cultural activities, and ethnic identity. The Alta Case<sup>8</sup> in the early 1980s became a turning-point for the government's treatment of the Sami, and several legal and societal changes were made. The Constitution was amended to include a paragraph (§ 110) stipulating it was the responsibility of the state to ensure the survival of the Sami culture and language, and a separate Sami Act on language and culture was enforced, in addition to the establishment

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6. The reports were written in Norwegian, with an English summary for the Sami Rights Commission. All translations into English are by the author, who is fully accountable for any inaccuracies.

7. Coastal Sami and small-scale fisheries resource management has been a topic of research especially since the 1990s with social anthropologists and social scientists in the lead. See, for instance, Bjørklund 1992, Jentoft and Mikalsen 1994, and Nilsen 1998. In the legal field, Jørn Øyrehaugen Sunde's work (Sunde 2006) on customary fishing rights in general in Norway represents a unique contribution in this respect.

8. For a more thorough account, see for instance, Henry Minde 2003.

of the Sami Parliament ten years later. These developments brought Norway to the forefront on indigenous rights issues. Coastal Sami fishing rights became articulated in public discourse from the early 1990s, both in the Sami Parliament and in coastal Sami communities.<sup>9</sup>

In the early 1990s, following an ecological crisis in the Barents Sea cod stocks, the Ministry of Fisheries closed the fisheries that had been open for entry until then for all practical purposes, and introduced an individual-vessel quota system. In a single year a significant number of fishing vessels that had previously fished under a maximum quota system were no longer qualified to enter the closed fisheries. Within the group of small-scale fishing vessels, the coastal Sami fishermen were particularly hard-pressed.<sup>10</sup> The regulations, together with an individual-vessel quota system which favoured those with a certain level of income from fisheries in the years preceding the introduction of the system, created problems not only for the coastal Sami but for many fishing communities all along the Norwegian coast.<sup>11</sup> What made the fisheries issue relevant as a rights issue for the coastal Sami was, among other things, the provision in international law for the protection of minorities and indigenous peoples, which concerned both cultural protection for minority cultures as well as property rights. The Coastal Fishing Commission points to the fact that Article 27 of the UN International Covenant on Civil and Political Rights is a recognized source for the Sami, not only for the protection of their culture, but also for rights to natural resources serving as a basis for their culture in the areas they have traditionally inhabited.<sup>12</sup> Since the Sami are a minority indigenous to the Norwegian state, and Norway has ratified the Convention

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9. See Brattland 2009 for a case study from northern Troms on the development of the rights discourse.

10. See, for instance, Jentoft 1999.

11. This story is also recounted by Einar Eythorsson, who looked closely at how small-scale fjord fishers went systematically unheard by Norwegian fisheries management. Eythorsson characterizes the relationship between coastal Sami fishers and fisheries management authorities as one in which the coastal Sami were considered a “pariah caste” of Norwegian fisheries (Eythorsson 2003). See also Eythorsson 2009.

12. NOU 2008: 5, chapter 8.3.2. Art. 27 states, in short, that minorities shall not be denied the right to practice their own culture. The ILO Convention 169 also states in Art. 14 that indigenous peoples have the right to lands they have traditionally used. This property rights provision can be interpreted as not including marine resources, thereby making Art. 27 of the ICCPR the most frequently-used reference for fishing rights.

as a universally-endorsed human rights instrument, the State has an obligation to protect coastal Sami culture through positive measures.

In the years following establishment of the Sami Parliament in 1989, the right to harvest marine resources and fish in the sea became top priority for the first President of the Sami Parliament, Ole Henrik Magga. The Norwegian Fishermen's Association, which organized the majority of fishermen in Norway, was opposed to the idea that one group could have special status in the fisheries. The Sami Parliament nonetheless began participating in the national fisheries management system, joining national interest groups such as the Fishermen's Association, environmental organizations, and others that were already represented in the system. Since 2005, with the introduction of the consultation agreement<sup>13</sup> between the Norwegian government and the Sami Parliament, however, the Sami Parliament has had a greater opportunity to express its opinion in all matters concerning Sami culture, including fisheries issues. One of the main purposes of the consultations is that the Sami Parliament and the state body in question are obliged to reach common agreement. The right to fish in the sea and harvest marine resources is also a subject of consultation with the Sami Parliament.

In the next section, how the Coastal Fishing Commission met the double challenge raised by the coastal Sami marine resources rights issue is examined.

### **3. The Finnmark Coastal Fishing Commission**

#### **3.1 The Right to Fish in the Sea**

The Finnmark Coastal Fishing Commission was established in 2006 on the recommendation of the Ministry of Fisheries. The Commission of nine members was led by Professor Carsten Smith, and consisted of a former Minister of Fisheries, a fisherman judges, social science and law researchers, and professors. In principle, the mandate was to investigate the Sami and others' rights to fish in the sea off Finnmark. The Commission made use of both legal and historical expertise, as well as statistical and economic material, and existing social science research on coastal Sami in Finnmark. They also conducted a number of meetings with

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13. "Avtale om konsultasjoner i alle saker som berører samene," Sami Parliament and Ministry of Local Government and Regional Development, 2005. The consultation agreement, among other things, is part fulfillment of ILO Convention no. 169 § 6, prescriptions on the state's obligation to consult indigenous peoples.

coastal municipalities in Finnmark. The Commission delivered a unanimously-agreed proposal, signalling that the diverse members had managed to come to a consensus on the difficult issues at hand.

The following section first briefly looks at what the Finnmark Coastal Fishing Commission proposed regarding the right to fish in the sea. The Commission proposed an Act, the Finnmark Fishery Act, with 15 articles. The proposal was presented by a unanimous Commission, and stated the population of Finnmark had the right to fish for their own use and for industrial purposes in the sea off Finnmark county (§ 2). The proposal makes a distinction between the fjords and the coast off Finnmark, stating that outside the fjords those from other parts of the country can also partake in the fisheries as they have traditionally done. In the fjords, however, permanent settlers had the exclusive right to fish on those stocks, and no one else, unless decided otherwise by the proposed regional management body (§ 3). The proposal focused on giving all inhabitants inside a geographically-defined area, Finnmark, the same rights to fish in the sea and harvest marine resources, regardless of their ethnicity. This accorded with current policies in other areas, such as the land rights policies behind the Finnmark Act.<sup>14</sup> Furthermore, all inhabitants of Finnmark County had a right to harvest marine resources in the sea on the outer coast of Finnmark, although foreign fishers also had a customary right to fish those waters, the proposal states.<sup>15</sup> The first challenge relating to the border between rights regimes thus fell away, since the borderline coincided with the county border and the geographical inner and outer seawater areas (the fjords and the coast).

The Commission also proposed the establishment of a regional fisheries management body, which according to the purpose of the law would regulate fisheries in the County (§ 7). The regional management had to take into special account the obligation to ensure the survival of coastal Sami culture and the coastal culture of Finnmark, and was proposed to be led by a board of members from the Finnmark

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14. The Finnmark Act came into force in 2005 and regulates the use of formerly state-owned land in Finnmark. It resulted from a Sami rights process investigating ownership of the land and waters in Finnmark, which created a land management body called the Finnmark Property, with equal Sami and Norwegian representation. The law also created the Finnmark Commission to further investigate private and collective land-ownership claims. In fact the Coastal Fishing Commission was established as a result of the Finnmark Law, which only deals with land rights, and does not deal with the right to fish or the use of coastal waters off Finnmark.

15. NOU 2008: 5 p. 383.

County government and the Sami Parliament. In Art. 13, the proposed Act contains a reservation saying that it does not infringe upon existing individual or collective property rights to the sea outside Finnmark which may have been established by custom or usage from time immemorial. To establish the existence of such rights, the claimants must direct their claims to the Finnmark Commission, the mapping commission established by the Finnmark Act to resolve land rights issues (§ 13).<sup>16</sup>

### 3.2 Private, Collective and Public Rights in Salt Water

The law proposal distinguishes between two aspects of fishery rights. The report establishes a division between (1) *the right to fish that is regulated by public acts and regulations*, and (2) *private or collective property rights to fishing grounds or defined fjord areas that are established through usage from time immemorial or custom (cf Art. 13)*:

“This can be collective rights, like a right of a community, or it can be individual rights for a fisherman, and alternatively his household. It can apply to a single fishing place or a larger area, such as a fishing ground. It could apply to a specific use of gear or a specific fish species. Probably it will, the times that it happens, apply to the right to fish itself, which means a form of use right to the area.”<sup>17</sup>

However, the Commission did not have the opportunity to further investigate whether these types of rights already existed in some places within fjords and along the coast of Finnmark, since their task and their mandate was limited to principle issues only. “That must in case happen by documentation of use connected to the specific area in question,” the report says. And according to the report the question of collective rights for communities was touched upon in open meetings arranged as part of the Commission’s work, and further discussed in Sami rights debates.<sup>18</sup> No systematic investigation of these rights was proposed, but any possible private or collective rights claims are to be addressed by the Finnmark Commission, and § 13 in the law proposal is set aside especially for the issue of private or collective property rights in salt water.

16. NOU 2008: 5 p. 411.

17. NOU 2008: 5 p. 373.

18. Ibid, page 405.

The next section describes a little closer the factual background upon which the Coastal Fishing Commission based its propositions. How did they meet the challenges related to acquiring knowledge about indigenous rights to marine resources?

### 3.3 A History of Fisheries in Finnmark

The Finnmark Coastal Fishing Commission made use of historical sources, knowledge of social relationships in coastal Sami society, and also held open hearings with the local population in the course of their work, in every coastal and fjord municipality in Finnmark. The issues under discussion at the meetings for the most part concerned fishery gear and regulatory conflict, issues much-debated and regularly receiving public attention in the media. An historical account of the fisheries in Finnmark is found in chapter five of the report, written by Professor Kirsti Strøm Bull, which will here be the focus of attention.

Apart from official material produced by the state and managerial system regarding acts and fisheries regulations in Finnmark, Bull references letters from local fishermen and coastal communities to fisheries managers. From the beginning of the 1900s up until the Second World War, letters from local communities in Finnmark requested the right to exclude boats using active gear from local fishing grounds. One example is a letter from 1926 sent to the Finnmark County Governor after a mass meeting in Snefjord:

“We the fishermen meeting in Snefjord permit ourselves again to request Mr. County Governor to effect that a ban on dragnet and seine in Snefjord be established by law as soon as possible. One shall as a reason give the following information: In Snefjord are 50 small rowboats with small nets as the only gear in operation in the place. In January and the first half of February there were a lot of fish and good fishery for the conditions. But then 5 seine and dragnet boats came to operate every day, and in a week the fishery was over and now one cannot catch anything in the nets. Experience shows that fishing operations like seine and dragnets destroy this fjord, so made it can be emptied totally by dragging with nets.”<sup>19</sup>

The County Council supported the request and Snefjord was protected, but only for two months during parts of the fishing season. It seems the national government either met only in part the requests of Finnmark fishermen or did not comply at

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19. NOU 2008: 5 p. 97.

all. The claims from the fjords continued after the Second World War with an increasing Sami dimension to the arguments, and Bull sums up the protests as a clear sign that “the new-comers’ use is not accepted.”<sup>20</sup>

Regarding the Commission’s categorizations of the source material, Bull observes a division in the material between fjord fishing rights and open sea fishing rights.<sup>21</sup> She says that from the material presented, and also from investigations into the history of Norwegian law, the main principle as a rule was that fishing was tied to individual or collective fishing rights on especially-rich fishing grounds. From the 1850s onward, however, national policies changed with the advent of emerging technology and an increasing number of participants in the fisheries. However, Bull says the material dating from before the 1800s demonstrates there was a clear divide between the people in the fjords, who were mainly coastal Sami, and those who fished in the open sea, and that this situation still prevailed at the beginning of the 1900s.<sup>22</sup> She also states this usage established certain rights:

“The use that the Sami from old times have practiced in the fjords was in the beginning of the 1800s of a character that it gave ground to establish rights. Seen like this, there is no reason to consider their use different from the use that reindeer-herding Sami and others were practicing on land.”<sup>23</sup>

Apart from the letters and other historical sources presented by the Finnmark Coastal Fishing Commission, there is little material available on customs connected to the harvest of collective fishing grounds. This is probably due to the fact that access was based on unwritten customs that went unchallenged by the state until the beginning of the 1900s. Due to the Norwegianization policy, it would have been difficult to explain local customs in the Norwegian language and within the dominant positivistic scientific discourse at the time. But there is one main exception in the material presented in the report of the Finnmark Coastal Fisheries Commission, namely the Anglo-Norwegian Fisheries Case.

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20. Ibid. p. 144.

21. These correspond with Sunde’s distinction between open sea rights and rights attached to nearby waters.

22. Ibid. p. 157.

23. Ibid. p. 156.

### 3.4 The Anglo-Norwegian Fisheries Case of 1951

The Anglo-Norwegian Fisheries Case strengthened the argument that the inhabitants of Finnmark had a traditional right to fish in the sea, since this had already been recognized by the Norwegian government in 1951 for the whole of the Norwegian coast. The case has therefore been given considerable space in the Commission's account.

Collective and individual use and property rights had special significance for the fisheries border demarcation case between Norway and the United Kingdom, which was brought to the International Court of Justice in the Hague in 1951. The case began when British steam trawlers approached the Norwegian coast in the early 1900s, and were denied access by Norwegian authorities. Britain protested Norway's claim that Norway could exercise authority over waters more than a few miles from land. Without going further into detail of the Fisheries Case, what is particularly interesting is the historical presentation of the fisheries in Finnmark used as evidence for the Norwegian side. This presentation became one of the very few sources describing the right to fish as a customary collective and/or individual right of the inhabitants.

Norway argued in the International Court of Justice that the use of coastal waters off Norway was particularly important for its people, and therefore they had the sole right of use of coastal waters over a larger area than was the custom elsewhere in Europe. This position constituted an exception to the Roman principle of law of freedom of the sea, and Norway emphasized that the use of the coast had special characteristics.<sup>24</sup> Knut Robberstad, Professor at the Faculty of Law at the University of Oslo, was tasked with investigation of the issue and one of the first to research and systematize the history of fishing rights in Norway. Robberstad described how local courts in Norway took decisions supporting fishermen's exclusive use rights to "their own fishing grounds" as far back as the 1600s, and that the custom of exclusive use and ownership rights on sea existed up until the beginning of the 1900s. Regarding Finnmark, Robberstad stated in his report to the Fisheries Case that:

"there was an exclusive fishing right for those who lived in Finnmark, and to some degree access for people from Nordland and Troms, to fish on the outer islands.

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24. NOU 2008: 5, p. 129.

These people could not fish or set their nets where the population of the County had their gear (lines).<sup>25</sup>

In addition to his own work, Robberstad presented that of Per Hovda, who studied place names connected to fishing grounds, and navigational lines used to find certain fishing grounds<sup>26</sup> all along the Norwegian coast. Per Hovda at the time was head of the institute for Norwegian place names. The material gathered by Hovda was used to show how long fishing had continued in the same place, to whom it belonged (individuals or communities), and how far out to sea the right to fish extended.<sup>27</sup> Figure 1 shows a section of a map produced by Hovda for the Fisheries Case, covering eastern Finnmark from the Tana fjord towards Vardø.<sup>28</sup>

Based on Hovda's place name material and his own studies, Robberstad concluded "it is the Norwegian government's opinion that this information clearly shows the whereabouts of the Norwegian coastal fisheries, enjoyed in peace and quiet from old age to the day when foreign trawlers, first and foremost the British, arrived."<sup>29</sup> Britain argued that for such fishing rights to exist there had to be formal approval of these rights by an Act of state. Norway responded these rights had been established "so far back in time and under such circumstances that their origin is hidden from our knowledge."<sup>30</sup> The International Court of Justice in the Hague decided the case in Norway's favour, granting Norway a larger area of authority than is customary in the rest of Europe.

25. Op.cit.

26. In Norwegian: méd.

27. NOU 2008: 5 p. 131.

28. The maps were not reproduced in the Finnmark Coastal Fishing Commission report. The 32 maps consisted of three sets, two submitted by the United Kingdom, and one Norwegian set from which this map is taken. The maps show the coast from the Russian border to Vestfjorden in the middle of Nordland. The names of fishing grounds gathered by Per Hovda are set in yellow. Some land sighting lines are shown in purple. The dotted line shows the British-drawn fisheries borderline, while the dark line shows the intended Norwegian fisheries borderline.

29. Op.cit.

30. NOU 2008: 5 p. 133.



Figure 1 Map from Fisheries Case 1951, 5th volume, map no XII

### 3.5 Challenges met?

Considering the above, how did the Finnmark Coastal Fishing Commission and the Norwegian government meet the challenges highlighted in the introduction (indigenous versus majority rights, and limited knowledge of local and Sami customs)? Regarding the dangers of categorization of rights, one of the main points of the entire work was that the Commission did not differentiate between coastal Sami and others in their recommendations for acknowledging the right to fish. Rather, the distinction made was between fjord rights and open sea fishing rights to participate in the fisheries. This did not involve an ethnic categorization, but rather acknowledged the general historical and societal patterns found by the Commission during the course of their work. By making participation in the larger fisheries a common right for everyone inhabiting the fjords and the coast, the Commission avoided categorization of any one ethnic group.

When it comes to the challenge of limited knowledge, it is interesting to note how the sources used by the Commission were connected to different categories of rights. The place name material presented as the source for recognition of the Norwegian right to fish in salt water in the 1951 Fisheries Case gave grounds

for recognizing *the individual and collective use and property rights to the fishing grounds by the people*, while the official protest letters from Sami communities regarding fisheries regulations gave ground for recognizing *the right to harvest the marine resources – the fish stocks*, in other words the right to participate in the state-managed open commons fisheries. The totality of the Commission's work is not presented here, which contains other historical and statistical material. However, considering the final proposals from the Commission which concentrate on the right to harvest resources within the sea as a commons, it is clear that the Commission concentrated on the right to harvest marine resources within the framework of state management. The customs underlying possible private or collective rights to the sea, meaning the sea not as a commons but as consisting of separate fishing grounds or spatial areas, are handled in one paragraph in the law proposal, leaving this question open for future investigation. The Marine Resources Act neither treats this question, but defines all of the marine resources within one single commons. The definition of what the sea is, and what rights groups of people have to different spatial aspects of the sea, is thus of the essence for future rights investigations.

The Norwegian government, it seems, actually did a very thorough job of gathering knowledge about local fishing practices, and addressing gaps in Norwegian research on the individual and collective use of fishing grounds. The research undertaken for the Fisheries Case shows the government at the time made an effort to research fishing practices, as well as apply their findings to the international scene. The findings revealed that the local population along the coast had used the fishing grounds extensively, the local population meaning separate communities along the coast, regardless of ethnicity. However, the research also included Sami fishing practices baked into the larger picture, if the researchers did not deliberately exclude the coastal Sami population intermixed with the Norwegian, which is hard to believe. The difference from today's rights investigation is that this time, the researchers included and deliberately looked for coastal Sami rights in their investigations. In conclusion, the Norwegian government met the knowledge challenge some sixty years ago, however flawed in the Sami rights dimension, but without assuming that only those areas where the local population still retained their traditional fishing practices were deserving of rights protection.

Regarding the current government's treatment of the Commission's proposals, the issue remains unresolved. After the Norwegian parliamentary electi-

on in the autumn of 2009, the Fisheries Minister stated that her Ministry did not believe the people of Finnmark had any special rights to fish in salt water, thereby largely dismissing central conclusions of the Finnmark Coastal Fishing Commission.<sup>31</sup> Professor Carsten Smith said in a statement to the media that he was deeply disappointed with the Fisheries Minister, and that he was surprised with the Ministry's interpretation of international law.<sup>32</sup> Recalling the response of the Attorney General, it is not unforeseeable the government would come to this preliminary conclusion, but the stance does not contribute to a balanced view of coastal Sami fishing rights. Following this development, the issue of the right to fish in the sea for both local fishermen and coastal Sami alike could become even more important in the future.

The Sami Rights Commission did not investigate the fishing rights issue in the same depth as the Finnmark Coastal Fishing Commission. Although the challenges presented in the introduction are largely addressed, the contributions of the Sami Rights Commission is next presented, in addition to one example from current research related to rights mapping.

## 4. Mapping Rights in Coastal Waters

### 4.1 Mapping and Recognition of Fishing Rights

Published in 2007, the report of the Sami Rights Commission<sup>33</sup> (appointed in 2001 by the Ministry of Justice and the Police) led to much debate on the future model for ownership and governance in Troms, Nordland, and the southern Sami areas in Norway. The Commission's task was to investigate Sami rights to land and water in these areas, and they proposed a similar solution to that of the Finnmark Act, which transferred ownership of the majority of land in Finnmark from the state to a new regional land-owning body with Sami representation. The Sami Rights Commission proposed a set of new acts that if passed would change the governance and ownership of the currently state-owned portions of large parts of Norway.

Regarding claims for use rights and property rights to land and water, the Commission proposed an act for mapping and recognition of use rights and pro-

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31. NRK 2009 "Helga bøyer av for stormen."

32. NRK 2009 "Carsten Smith: Dypt skuffet."

33. NOU 2007: 13 "Den nye sameretten." The background sources for the Commission were published in NOU 2007: 14 "Samisk naturbruk og rettssituasjon fra Hedmark til Troms."

perty rights in traditional Sami areas, including salt water one nautical mile from shore. This mapping commission would report on who owns the land, existing rights of use, and the grounds for conclusions on these issues. A special court of law would ultimately decide the cases, including the right to fish in salt water. There are no specific proposals for legal acts on the right to fish, as in the Finnmark Coastal Fishing Commission report. The Sami Commission's report did not lead to the same public media debate on the right to harvest marine resources, as the debate following the Finnmark Coastal Fishing Commission.

In chapter 22 of the Sami Rights Commission report the right to fish in salt water is addressed. The Sami Rights Commission itself gives only a brief historical account of coastal Sami fisheries, as it awaited the work of the Finnmark County Fishery Commission. However, as opposed to the Finnmark County Fishery Commission, the Sami Rights Commission emphasized treating rights claims in coastal waters in the same way as rights claims on land. According to the concrete criteria listed, it is largely individual property or use rights that the Sami Rights Commission presumes are to be mapped by the mapping commission:

“(...) to have their rights of use acknowledged the rights pretenders must have been fishing relatively extensively, attached to a relatively delimited area, and the fishing must have been exclusive in character, in relation to the fishing exercised by fishermen from elsewhere, over a relatively long period of time.”<sup>34</sup>

Furthermore, the Sami Rights Commission presumes this may be the case in “fjords, bays, sounds and other stretches of the coast that due to natural circumstances have mainly been exploited by local fishermen.”<sup>35</sup> In this sense the Sami Rights Commission is actually more proactive than the Finnmark Coastal Fishing Commission on the question of mapping of property rights in salt water, but is correspondingly more unclear on public fishing rights managed by the state.

Having read both the Sami Rights Commission report and the Finnmark Coastal Fishing Commission's proposal for a “fjord right,” one may wonder exactly how many such fjords and sounds there are along the northern Norwegian coast. The question of the size and number of the contested fjords is not addressed in either report, but some fjords were investigated by the Sami Rights Commission as source material for consideration by the Commission.

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34. Op.cit.

35. Op.cit.

## 4.2 Coastal and Fjord Fisheries in Northern Troms

Bjørn Arntsen undertook a field investigation for the Sami Rights Commission of current fisheries in northern Troms, the area bordering on Finnmark, in three fjords: Ullsfjord, Kåfjord, and Kvænangen. The field research was conducted two years before the release of the Sami Rights Commission report, and represents a unique investigation of still-in-use fishing customs with a long and continuous history in these areas. Arntsen defined custom as “widespread patterns of actual existing practices in some chosen areas,” and he also focused on the understanding of locals of their rights to fish in the sea.<sup>36</sup> Regarding common patterns of use, Arntsen says the fjords were seen as common property by the local population. Some rules and regulations were decided by the locals during the most intensive cod fishing, for instance regarding where and how to put gear. Outsiders were not exactly invited into the fjords, but when they did come they were accepted on condition they fished in the same way and with the same kind of gear as the majority of the locals at the time.<sup>37</sup> To identify specific fishing grounds in use by the population, Arntsen focused on the main fishing grounds used by local fishermen in the three fjords. In the map below, Jøvikøra and Revet are shown as named places in the seascape, representing the main spawning grounds for cod regularly fished by the locals of Ullsfjord. The reference map shows northern Troms County on the border with Finnmark.

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36. NOU 2007: 14 p. 430.

37. NOU 2007: 14 p. 450.



**Figure 2** Map showing the named main fishing grounds in Ullsfjord.<sup>38</sup>

The fishing grounds identified by Arntsen were understood as collective harvesting grounds for the local population, and also included individual rights to put nets on the fishing ground. Use of the main fishing grounds was characterized by flexibility, allowing opportunity for households around the fjord to organize their harvesting practices according to shifting resource needs. Arntsen also discovered the use of the fishing grounds changed with technology and the number of boats participating in the fishery, however these changes did not alter the understanding of the collective right of access.<sup>39</sup>

Arntsen did not go into the details of each fishing ground in the fjord, but concentrated on the main patterns of use. Further investigation would be interesting, and more research definitely needed if any rights claims were raised on

38. NOU 2007: 14 p. 447.

39. NOU 2007: 14 p. 448.

these issues. Looking at the map above, however, and considering that this is only one of three fjords in northern Troms alone that was investigated, it is clear that numerous “fjord arms” may become potential objects for rights claims, and fjords with customary fishing patterns perhaps become the rule rather than the exception.

### 4.3 The Coastal Sami Seascape

After presenting the findings of the two Commissions, a knowledge gap regarding both the private and collective use of fishing grounds becomes evident, and especially the use of fishing grounds on the outer coast. Even though Hovda concentrated on large fishing grounds off the coast, they were not researched to any degree in the Sami rights reports. However, the investigation of the Sami Rights Commission can be seen as a kind of follow-up on Hovda’s work. The Finnmark Coastal Fishing Commission did not conduct the same kind of investigation, probably because they were pressed for time. The focus of the Sami Rights Commission on fjords serves to highlight the distinct geographical categories used by the Finnmark Coastal Fishing Commission, and perhaps to strengthen the association of coastal Sami culture with fjords in northern Troms and Finnmark County.

In the opinion of the author, the knowledge challenge can best be met by cooperating with local Sami communities and including local knowledge and Sami concerns as part of any research design. Experience with the on-going Fávllis research project at the University of Tromsø demonstrates this kind of cooperation can be both fruitful and thought-provoking. Through the activities of the Fávllis project, Sami names for fishing grounds offer one of multiple approaches for understanding the use of the seascape<sup>40</sup> according to local ecological knowledge. Unfortunately, space does not permit description of the project in detail. Considering the on-going documentation and research undertaken on the use of the marine landscape in coastal Sami areas, however, the author believes private and collective rights connected to fishing grounds are more widespread than currently thought. Below is a map from the Fávllis project, representing some central

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40. The term seascape is taken from Anita Maurstad, who defines it in terms of fishermen’s local knowledge: “a particular cultural seascape exists only as long as the particular knowledge about it is maintained within the user’s community,” Maurstad 2004: 290. The term is also used for the protected area category “Protected Landscape/Seascape” in the World Conservation Union’s (IUCN) protected areas and world heritage programme, see United Nations 2009.



## 5. Future Challenges

With the Finnmark Coastal Fishing Commission's popular meetings in every municipality in Finnmark, and the Sami Rights Commission's field investigations in the fjords in northern Troms, their reports have contributed to new knowledge on the customary use of coastal waters in northern Norway. Bull's historical review clearly shows the long history of group and gear conflict in Finnmark, in addition to the thorough account of the 1951 fisheries case, and Arntsen has to some extent documented current fishing patterns in northern Troms.

When it comes to new knowledge about customs and practices connected to individual and collective rights in the sea, however, some knowledge gaps remain. It is surprising that Robberstad's investigations, and the idea of private or collective fishing rights in the sea, are not more widely known in public opinion and among state managers, considering the long history of these traditions in Norway. With the Finnmark Coastal Fishing Commission and the Sami rights question, however, research on coastal Sami history has gained new attention, along with the history of fishing rights in salt water in Norway as a juridical theme. Jørn Øyrehagen Sunde states in his article "Fishing Rights in Salt Water," that private and collective fishing rights in salt water constitute a gap in Norwegian rights history, since they have been based largely on custom and not on written laws and juridical practices.<sup>42</sup> Moreover, he notes that according to ILO Convention 169, Sami customs shall have greater weight than Norwegian law in Sami rights questions.<sup>43</sup> He also points out that only occasionally has there been sufficient interest from the state apparatus to acknowledge the existence of these rights, as with the Fisheries Case of 1951. Considering the extent of current knowledge available in Norway, the author believes this attitude influences the choice of material and sources of law referenced for rights identification processes, making customary fishing rights an issue only when of interest to the state. On the other hand, any increased focus on the rights of coastal Sami in fjords may detract from the customary fishing rights of other stakeholders along the rest of the Norwegian coast.

So what kind of information and what kind of sources are there to be explored for the proposed mapping commission when such rights claims are to be investigated? It is natural to assume that place names of fishing grounds and the use of fish-

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42. Sunde 2006: 344.

43. Sunde 2006: 401.

ing grounds and fields in the coastal Sami seascape would be of great importance, as they were during the fisheries border case in 1951. The use of central spawning grounds for cod was also investigated preceding the 1985 Supreme Court case. This goes to show knowledge is available that can be used for rights identification in salt water, but with some reservations. Information about fishing grounds first depends upon the knowledge of those who use the sea, and second how available this knowledge is to researchers. In addition, familiarity with Sami cultural history, practices, and language would provide another larger pool of resources to draw on for rights investigations.

Some challenges have been outlined regarding property rights identification in salt water in Norway. Most of the literature and research on the fishing rights of indigenous peoples is currently concerned with the right to fish on fish stocks as a common resource, the power relationships, justice<sup>44</sup> and rights aspects,<sup>45</sup> and the regulatory<sup>46</sup> and sustainability issues<sup>47</sup> following from the fisheries rights issue. The individual or collective right to fish on fishing grounds or traditional fishing places has been poorly investigated up until now, with a few exceptions, but will no doubt pose just as great a challenge as mapping rights on land. These areas form a necessary part of a comprehensive fisheries rights investigation. Internationally this issue has been of interest in the context of mapping community effort on the sea in the Gulf of Maine in the USA<sup>48</sup> or to some extent in indigenous land use and occupancy projects in Canada.<sup>49</sup> In general, rights identification processes would benefit from a broader choice of sources of law, for instance by using anthropological, cultural heritage, linguistic, and other knowledge. It is hoped this will be the case in future for Sami rights in Norway.

If the Norwegian government does not reach agreement with the Sami Parliament on the recognition of Sami fishing rights, this will no doubt become an issue with the potential to affect other indigenous peoples throughout the world. The Maori today are among those who have managed to come to an agreement with their New Zealand government on fishery rights. This no doubt has helped the Sami rights process in Norway, as the Finnmark Coastal Fishing Commission

44. See, for instance, Jentoft 2008.

45. See Barsh and Henderson 2003 and Henriksen 2002.

46. See, for instance, Davis, Anthony and Jentoft, Svein 2003.

47. See for instance Jull 2003.

48. See St. Martin et al., 2007.

49. Cf. Tobias 2000.

refers to this case among others in its report.<sup>50</sup> With the latest turn of events in Norway, the Sami Parliament and the Ministry of Fisheries will have a difficult job reaching common agreement on the issue through the consultation process. On the international scene Norway's treatment of its indigenous people in the fisheries management system is little known, and will probably not make any significant difference to the image of Norwegian fisheries within international standards for sustainable and responsible fisheries. The issue could probably be discussed by the UN Permanent Forum on Indigenous Issues, but if that is the only consequence, Norway has little to lose by refusing further measures for protecting indigenous rights to harvest marine resources. What effect this will have on the struggles of indigenous peoples for recognition of their rights in other parts of the world, where conditions are very different from the Norwegian welfare state, remains an open question.

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50. Cf. the chapter by Professor Bjørn Hersoug, NOU 2008: 5 p. 289.

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## **Картографирование ситуации, связанной с реализацией прав береговых саамов**

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### **Резюме**

В статье, основанной на двух недавно изданных докладах по правам саамов, анализируется и обсуждается вопрос по проблемам исследования и управления рыболовством. Доклады Комиссии по прибрежной рыбодобыче и Комиссии по правам саамского народа являются вкладом в решение вопроса, как включить право на промышленную рыбодобычу и право на вылов рыбы коренным населением саамских поселений в норвежскую государственную систему управления рыбными ресурсами. В то же время, было предложено проведение тщательного процесса индентифицирования и картографирования реализации существующих прав на вылов рыбы, как частными лицами, так и в промышленном масштабе. В целом вопрос относительно вылова рыбы саамами и использования фьордов и прибрежных вод норвежским населением малоизучен. В статье с позиций, получивших отражение в названных докладах, с учетом исторических и современных знаний, рассматриваются проблемы прав коренного народа на рыболовство, и подходы норвежского правительства на разрешение этих проблем. Автор статьи утверждает, что необходимы дополнительные исследования по использованию морских ресурсов для того, чтобы раскрыть все правовые аспекты прибрежного рыболовства.

Ключевые слова: береговые саами, право на рыболовство коренных народов, идентификация прав, проблемы образования