

# A Geographical, Historical and Legal Perspective on the Right to Fishery in Norwegian Tidal Waters

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## **Abstract**

Hugo Grotius proclaimed freedom of the seas in 1609, and this natural law principle was interpreted to include freedom of tidal fishing. His act represented a far more political than juridical claim. Exclusive fishery rights can be documented all around the North Sea basin, and even in Roman law theory in the High and Late Middle Ages were such rights given protection. In Norway in 1728 an effort to free tidal fishery to anyone by law was ignored in the main, and the centuries-old custom of exclusive rights to tidal fishing prevailed. Although after 1857 exclusive tidal fishery rights have been gradually abandoned in Norway, they were protected by the Norwegian Supreme Court in 1894 and as late as 1985, and again recently with the Norwegian Official Report 2008: 5, where a claim was made to protect tidal fishery rights by law in the county of Finnmark.

**Key words:** Mare liberum, tidal fishery, tidal fishery rights, customary law, law and economics.

## 1. Exclusive tidal fishery rights in Norwegian written law, legal literature, legal practice and preparatory works

After Norway became independent in 1814, and a Norwegian parliament was constituted as lawmaker the same year, one of the first laws passed in 1816 concerned the fishery in Lofoten. Both this law and that concerning the fishery in Finnmark of 1830<sup>1</sup> demonstrate that the concept of exclusive right to tidal fishery was central to public regulation of the fishery.<sup>2</sup> Exclusive right became the core of the fishery policy of the absolute Danish-Norwegian king from 1790,<sup>3</sup> after a failed effort to make all fishing, except salmon fishing with land-based fishing gear, free to anyone in 1728: “Enhver fisker den Fisk Havet giver af sig, hvor den falder” – anyone can fish in the sea, wherever there are fish to be fished.<sup>4</sup> But not until a new law on fishery in Lofoten in 1857 was fishing actually made free to everyone. Even still the principle of free access to fish only applied to this particular fishing ground, although gradually it became the general norm for all Norwegian waters through further legislation and/or usage. However, the principle of free fishery ran contrary to the ancient custom of exclusive tidal fishery rights found all along the Norwegian coast. As late as 1851 discussion continued whether the best way to regulate tidal fishery would be to map and sort out sea-based rights as was done with land-based rights.<sup>5</sup> It was the cost of such an operation, rather than principles of law, that decided the introduction of free tidal fishing as the ruling principle of law in 1857.

Exclusive tidal fishery rights remained a topic for debate in the legal literature even after the passing of the 1857 law. In the first published treatise on Norwegian property law from 1867, Professor Fredrik Brandt stated:

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1. Lov, angaaende Fiskeriet i Lofoden, of 1.7.1816 §§ 6 and 7, and Fiskerierne i Finmarken eller Vest- og Øst-Finmarkens Fogderier, of 13.9.1830, especially § 10. See as well Storthings Forhandling 1857 p. 24.
  2. In common law exclusive fishery in navigable rivers and the sea is termed “several fishery,” see Paterson 1863 p. 50. This terminology is embedded in common law discourse, and it is difficult both to apply the terminology and at the same time escape the discourse, which is not especially relevant in a Norwegian context.
  3. Forordning angaaende Silde- og Torskefiskeriet i Fosens Fogderie, of 21.12.1792, 1–1.
  4. Reskript angaaende at Hummer-Fiskeriet er Enhver tilladt, of 23.4.1728.
  5. The NNA: Arkivet for Indredepartementet, D, Torskefiskerierne Lofoten, Lofoten 1850–1874, 10, Legg D 1850–55: Lofotlovgivningen, Diverse eldre dok. 1854 og 55, Letter of 29.6.1851. See as well in the same archive: Fiskerikommissjonen av 1891, Diverse, XVI–1a-1d, Legg: Kommisjonen av 1891, Diverse, letter of 27.1.1852, comments to § 8.

“Paa mange Stæder, især i det inderste af Fjordene, ansees endog med Hjemmel af gammel Brug Grundejeren, tildels ogsaa Andre, eneberettigede til Fiskeri med alle Andres Udelukkelse.”<sup>6</sup>

In many places, especially in fjord arms, exclusive fishery rights are legally based on traditional usage by those possessing the surrounding land, but also at times by persons without property claims on the land.

This observation was repeated in the editions from 1878 and 1892,<sup>7</sup> and by Professor and later Supreme Court justice Herman Scheel in his lectures on Norwegian property law, published in two editions between 1901 and 1912.<sup>8</sup> The existence of exclusive rights to tidal fishery was also observed by W.S. Dahl in Norges Landnæringsret from 1882,<sup>9</sup> by Arnold Ræstad in Kongens strømme from 1912,<sup>10</sup> and by Henry Nærstad in Eiendomsretten til vannområder from 1938,<sup>11</sup> not to mention such rights have been a theme in non-legal literature as well.<sup>12</sup> In preparation for the Fisheries Case between Norway and the United Kingdom in 1951, Professor Knut Robberstad wrote two short surveys on Norwegian supremacy to fishery in Norwegian tidal waters, but documented as well the existence of exclusive rights to fishery.<sup>13</sup> The English counterpart did not question the existence of such rights:

“no doubt in certain cases, where the fishing population was numerous, fishers from particular localities tended by custom and mutual arrangements to resort habitually to the same fishing grounds.”<sup>14</sup>

The existence of exclusive tidal fishery rights was even used in the reasoning of the International Court of Justice in the Hague:

“Along the coast are situated comparatively shallow banks, veritable under-water terraces which constitute fishing grounds where fish are particularly abundant;

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6. Brandt 1867 p. 446.

7. Brandt 1878 pp. 420–421, and Brandt 1892 p. 433.

8. Scheel 1901 p. 492, and Scheel 1912 p. 492.

9. Dahl 1882 p. 236.

10. Ræstad 1912 pp.159–160.

11. Nærstad 1939 p. 201.

12. See e.g. Solheim 1940 p. 120, Hovda 1948 pp. 51–66, Fjørtoft 1950 pp. 46–49, Fjørtoft 1951 pp. 259–264, Rabben 1982 pp. 26–29.

13. Fisheries Case (1)1952 pp. 244–250, and (3) 1952 pp. 35–58.

14. Fisheries Case (2) 1952 pp. 319, see as well pp. 321 and 605.

these grounds were known to Norwegian fishermen and exploited by them from time immemorial,”<sup>15</sup>

and

“the court considers that, although it is not always clear to what specific areas they apply, the historical data produced in support of this contention by the Norwegian Government lend some weight to the idea of the survival of traditional rights reserved to the inhabitants of the kingdom over fishing grounds.”<sup>16</sup>

Robberstad summed up his studies on exclusive fishery rights in an article in 1978,<sup>17</sup> and later the historical background of such rights was well documented in works by Arnved Nedkvitne,<sup>18</sup> Peter Ørebech,<sup>19</sup> Nils Kolle,<sup>20</sup> Kirsti Strøm Bull,<sup>21</sup> and Otto Jebens,<sup>22</sup> as well as the author of this article.<sup>23</sup>

Exclusive tidal fishery rights have been dealt with and protected by Norwegian courts, even though this subject is far from thoroughly studied. The law of 1728<sup>24</sup> stating tidal fishery was free to everyone was based on a decision by the absolute king to redo a court ruling from a jurisdiction south of Bergen from 1725 protecting such rights.<sup>25</sup> Rasmus Rægevig has shown how a court in the south of Norway dealt with such cases in the 1730s, and partly gave protection to exclusive tidal fishery rights.<sup>26</sup> And the author of this article has published a study of how exclusive tidal fishery rights were dealt with in a jurisdiction north of Bergen from the mid 1600s until the beginning of the 1800s. Still, it is overwhelmingly the local courts that have dealt with the issue. But we know that Herredagen, functioning as the

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15. Fisheries Case, judgement of 18 XII 51, p. 127.

16. Fisheries Case, judgement of 18 XII 51, p. 142.

17. Robberstad 1978 pp. 185–187.

18. Nedkvitne 1988 pp. 506–509.

19. See e.g. Ørebech Oslo 1998 pp. 118–119, and Ørebech 2007 pp. 345–364.

20. Kolle 1998 pp. 341–352.

21. Bull 2005 pp. 9–16, and Bull 2008.

22. Jebens 2007 pp. 259–282.

23. Sunde 2006 pp. 341–412, also published in Sunde 2007 pp. 244–292. A modified version of the article is published in Sunde 2006 pp. 4–36. And Sunde 2009 pp. 7–37.

24. Reskript angaaende at Hummer-Fiskeriet er Enhver tilladt, of 23.4.1728.

25. The SAS: Arkivet for sorenskrivaren for Karmsund og Hesby, Rettsprotokoll 1725–1728 pp. 19b–22a. The case concerned lobster catching, but by dealing with all kinds of fishery the law of 1728 makes evident that lobster catching was neither seen nor treated any differently from other kinds of harvesting at sea.

26. Rægevig 1975 pp. 65–70. The fishery at stake was for lobster.

Norwegian Supreme Court between 1568 and 1661, ruled out exclusive tidal fishery rights in 1625.<sup>27</sup> Overhoffretten, the Norwegian Supreme Court between 1666 and 1797, rendered protection to such rights in 1723.<sup>28</sup> The Danish-Norwegian supreme court between 1661 and 1814 upheld a decision from 1723 in their ruling on the case in 1726.<sup>29</sup> In 1894 the Norwegian Supreme Court dealt with a dispute on fishery rights on two shallow banks in an approximately 220 meter wide and 11 meter deep strait by Sandvika in a sea arm of the Oslo fjord. Two of the judges concluded that the shallow banks were part of the properties on land on each side, and hence that the tidal fishery was exclusive, while three judges only wanted to resolve the dispute and leave the question of exclusivity open.<sup>30</sup> The Supreme Court dealt with the question again in 1985, when a claim for compensation for the loss of exclusive tidal fishery rights was made. By the smallest possible majority the Supreme Court ruled in favour of the plaintiff, but both majority and minority were quite uncertain how to place such rights in the system of property rights.<sup>31</sup>

In the aftermath of the Supreme Court decision from 1985, tidal fishery rights have been dealt with in Norwegian Official Reports, written as first preparation for new legislation, in 1986, 1988, 1993 and 2005.<sup>32</sup> But no claim has been made that such rights ought to effect Norwegian policies concerning tidal fishery before the Norwegian Official Report 2008: 5: Retten til fiske i havet utenfor Finnmark, that being The fishery rights in the Finnmark tidal waters. This report is one of a series drafted in preparation for changes in the recognition of Sami rights. A gradual change in legal policies concerning the Sami was triggered by Norwegian ratification of the ILO convention no. 169 of 1989, concerning indigenous and tribal peoples in independent countries. After serious consideration of documented historical and present-day tidal fishery rights, and the obligations of Norway ratifying ILO convention no. 169, the report concludes that tidal fishery rights must

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27. Norske Herredags-Dombøge 1966 pp. 239–251, and Norske Herredags-Dombøger 1929 pp. 13–15. An important part of the fishery at stake was for herring, but the case deals with all kinds of fishery.

28. The NNA: Arkivet for Overhoffretten, Avsichtsprotokoll Overhoffretten 1723 p. 8a.

29. The SAB: Arkivet for sorenskriveren i Nordhordland, Rettsprotokoll Nordhordland 1731–33 p. 28a. The case deals with all kinds of fishery.

30. Rt. 1894 p. 168. The fishery at stake was mainly for salmon, but the case concerns all net fishery.

31. Rt. 1985 p. 247. The fishery at stake was for cod.

32. NOU 1986: 6 pp. 43–46, NOU 1988: 16 pp. 55–56, NOU 1993: 54 pp. 120–122, and in NOU 2005: 10 p. 100.

be respected for all inhabitants of the northernmost region of Norway, and forms the basis of fishery policies concerning Finnmark.<sup>33</sup>

The conclusion of the report is based on public hearings in local fishing communities in Finnmark, and a historical study performed mainly by Professor Kristi Strøm Bull on exclusive fishery rights in this region of Norway. No further documentation ought to be necessary on this subject, although the report does not contain any study of the character of customary rights to exclusive tidal fishery.

## 2. Exclusive rights to tidal fishery around the North Sea basin and in medieval Roman law theory

Exclusive rights to tidal fishery are not odd local customs found every here and there along the Norwegian coast. These rights were granted along the entire coastline and around the North Sea basin as well. Even though no complete study has been done, it is still possible to document the existence, though not necessarily the extent and character, of tidal fishery rights in this region of Europe. Fishery rights in Norwegian waters are examined in depth next, via a tour around the basin beginning in Iceland and moving counter-clockwise to end in Denmark.

In one of the manuscripts of *Landnámabók*, The book of settlement, it is stated that Turid the Sound-Filler made landmarks, *méd*, for a fishing ground in *Isafjörður* bay, and demanded a sheep or a cow in taxes from each man in *Isafjörður* for the use of it.<sup>34</sup> This manuscript was written by Hauk Erlendsson, an Icelandic-Norwegian knight and member of the King's Council, who served as an appeal court judge first in Oslo and later in Bergen between 1299 and 1322. Hauk Erlendsson was one of the most experienced and skilled lawyers in Norway in his day, and he obviously took it for granted that the right to tidal fishery could be taken and held as a property right in early Icelandic history. In the Icelandic law *Grágás*, in force until 1273, and *Jónsbók* of 1281, and still part of Icelandic law today, fishery was deemed exclusive from the shore and to a depth of 20 meshes at low tide, an area called *netlaga*, the net-zone.<sup>35</sup> At least to a depth of 2.9 meters,<sup>36</sup> fishing off the shore remained exclusive to the landowner. Taking into account

33. NOU 2008: 5 pp. 375–378, and 411 §§ 2 and 3.

34. *Landnámabok – etter Hauksbók* 2002 p. 101. See as well *The book of settlements* 1972 pp. 69–70.

35. Hastrup 1990 pp. 68–69, and Grétarsson 2008 pp. 15–16.

36. According to and Helgi Áss Grétarsson 20 meshes was between 2.862 and 6.85 metres.

Icelandic underwater topography, fishery became exclusive a fair distance from land and not just the immediate foreshore.

On Shetland, governed by Norwegian law until 1611, we find documentation of exclusive fishery rights from the 17th century onwards. For instance in 1609 John and Andro Mowat transferred the Papa estate, but withheld “the fishings in Veaskerie,”<sup>37</sup> that henceforward was treated as a separate property object. The fishery at Vee Skerries was haff fishery, which is fishery at open sea. And in 1822 Samuel Hibbert observed that:

“Not much above a century ago, the fishery for ling and cod was prosecuted much nearer shore than it is now, and fishing places designated Raiths, were pointed out by certain land-marks called Maiths [Norwegian: *méd*], so that everyone knew his own raith, and any undue encroachment upon it was considered no less illegal and actionable, than if it had been upon landed inclosure.”<sup>38</sup>

Orkney was a part of the Norwegian realm together with Shetland till 1468/69, and we find tidal fishery rights here as well. In 1618 the inhabitants of five Scottish villages, all situated on the Firth of Forth,<sup>39</sup> claimed that:

“thay being demandit yf thay or the nychtbouris of thair townis wer in use to fishe about the ile of Fara pertening to the king of Denmark, thay grantit that the nyghtbouris of thair townis hanted the said fisheing, and that thay were drevin thairto upoun necessitie and by the violence and oppressioun of the Hollandaris.”<sup>40</sup>

Hence the right to fish on the Orkney Island of Fara was held by the inhabitants of these five Scottish villages as a privilege granted them by the Danish king, with “Danish” being the usual reference to anything Norwegian or Danish after the two kingdoms united in 1537. Such rights were not unknown in Scotland either, but Scotland never formed part of the Norwegian realm despite colonies on Scottish soil in the Early Middle Ages. For instance, the monastery at the Isle of May at the mouth of the Firth of Forth was given exclusive fishery rights during the reign of King David I between 1124 and 1153.<sup>41</sup> In his *Treatise on the Fishery Laws of the United Kingdom* from 1863, James Paterson states:

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37. Shetland Documents 1580–1 611 1994, no. 482.

38. Hibbert 1822 p. 508.

39. The villages were Crail, Anstruther, Pittenweem, Musselburgh and Fisherrow.

40. The Register of the Privy Council of Scotland 1894 p. 329.

41. Fulton 1976 p. 59.

“As to floating fish other than salmon, though the Crown has sometimes granted the white sea fishings, the validity of such grant has never yet been judicially recognised, and has generally been doubted.”<sup>42</sup>

King David I was obviously not the only king to grant exclusive fishing rights, but as some point out, the validity of such rights was legally questioned except for salmon fishery.

Paterson finds that several fisheries, defined as “the exclusive right to fishing in a certain place,” are found in England in both navigable rivers and the sea,<sup>43</sup> mostly in sea arms. Such rights might be established by grant, prescription, or custom,<sup>44</sup> and might apply to individuals as well as villages. And if a

“party claiming a several fishery in the sea or navigable river finds his right invaded, (...) may bring an action of trespass against the individual trespasser.”<sup>45</sup>

Paterson writes on law in action and not on legal history, but he implies that such rights are ancient, and in one of the cases he finds that the right at stake was claimed based on a grant by Henry II, who reigned over England between 1154 and 1189.<sup>46</sup> The legal framework in which Paterson places such a right might be traced back to medieval Roman law, a topic soon to be discussed here.

If we now move on to Denmark, we find for instance that both the clergy and nobility gradually acquired exclusive rights to tidal fishery fronting their properties.<sup>47</sup> In 1536 the Danish nobility received confirmation of the right to tidal fishery granted by King Hans, Danish and Norwegian king between 1483 and 1513. Such exclusive rights were still exercised in Limfjorden in southern Denmark in 1740, where landowners went to court and were granted legal protection for fishery rights outside the land they owned on shore. But as was the case in Norway in 1728, the court ruling triggered a law stating:

“Udi Limfiorden overalt, hvor det ikke allerede ere særdeles indrettede Fiske-Steder, hvoraf til Os skattes og skyldes, skal det herefter være alle og enhver iden

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42. Paterson 1863 p. 167.

43. Paterson 1863 p. 50. See also pp. 1–2 and 19–20, and Christian 1809: p. 39 note 22 in relation to Blackstone 1809 pp. 38–39.

44. Paterson 1863 pp. 17–20 and 103–105.

45. Paterson 1863 pp. 115–116.

46. Paterson 1863 p. 105 note 1.

47. Peder Kofod Anchers samlede juridiske Skrifter 1809 pp. 328–332.



Forskjæl tilladt, at bruge og nyde frie Fiskerie indtil begge Land, saavidt Sandet og Vandet gaær.<sup>48</sup>

Fishery is free to anyone everywhere in Limfjorden, where there are no especially taxed fishing grounds, and this includes usage of both shore and waters.

It must be noted that the King did not abolish taxed tidal fishery rights. The same is the case in the 1728 law for Norway, a matter we will return to later.

What we have seen so far from this tour around the North Sea basin is that exclusive tidal fishery rights did exist. But were they just a North-Germanic custom? This may have been the case, but its long-term survival was probably also supported by the development of Roman law theory in the High and Late Middle Ages. Richard Perruso emphasizes a most crucial point when he states:

“Natural law commentators derived their principles from the doctrine of *res communes*, while the medieval jurists derived theirs from other doctrines of property law, such as *servitutes* and *prescription*.<sup>49</sup>

So while Hugo Grotius and other natural law theorists in the Early Modern Period made a claim for *mare liberum* with references to Roman law, this was not so for medieval jurists, mainly due to the fact that Grotius and his successors wrote from a public law perspective, while medieval jurists maintained a private law perspective. And the latter view on Roman law gave quite different results. First, the emperor could acquire *juridictio*, which is the right to legally regulate and tax usage of the sea, by prescription. When first acquired, this right could be granted to private persons. Second, ownership of the sea could also be acquired either by grant from the emperor, even though it remains unexplained how he could grant ownership when he could only acquire jurisdiction, or by prescription. Both arguments were applied by the Venetians and the Genoese for rights they exercised over their tidal waters.<sup>50</sup> Private persons could not acquire tidal rights by prescription according to medieval Roman law theory. But

“commentators, however, who believed that rights to the sea could not be acquired by prescription of 30 years were often willing to allow such rights to be acquired by custom. For example, Angelus said that despite Ulpian’s rule, if someone had fished alone for a number of years and prohibited others from doing so, and the

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48. Forordning angaaende Fiskerie udi Limfjorden, of 2.1.1740.

49. Perruso 2002 p. 85.

50. Perruso 2002 pp. 82–83.

populace knew and did not object or prohibit him, then he could be said to have acquired the right to exclude others through the tacit consent of the population.”<sup>51</sup>

The lengthy endurance of exclusive tidal fishery rights was due mainly to customary law, but also through the support of Roman law theory in the Middle Ages. It is this legal framework that Paterson applied when dealing with tidal fishery rights in England. This further indicates that a survey of the existence of such rights in other European regions, such as the Adriatic Sea and perhaps the entire Mediterranean, could yield similar results to the study of the North Sea basin – that such rights existed is hard to imagine in the post-Grotius paradigm of the law of the seas. The extent of exclusive fishery rights in the past may be suggested by a closer look at the history of exclusive fishery rights in Norwegian tidal waters.

### **3. When and where do we find exclusive tidal fishery rights in Norwegian waters?**

It can be argued that exclusive tidal fishery rights were acknowledged in the Frostating Compilation, a law book for the middle and north of Norway written around 1260, and in the Code of the Norwegian Realm of 1274.<sup>52</sup> Even though the argument can be made,<sup>53</sup> it still remains nothing but assumption. However, medieval documents do indicate the existence of exclusive tidal fishery rights. Let us begin a second journey in this article in Uskedalen, at the edge of the Hardangerfjord, where a right to fish salmon was sold as a separate property right in 1314.<sup>54</sup> Next we move to 1386 when Munkeliv monastery in Bergen received a grant on the Ramsholmen farm with its ancient fishery right – “sæll latre og fiski oc ollum androm luthom og lunnendom som til þan holma liggir edhir till lighth hafuir frå forno,” seal grounds and fishery and all other rights that is or have been designed to the islet from ancient times.<sup>55</sup> In the 1430s the oldest preserved land registry for the Norwegian archbishopric was created. It contains several referen-

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51. Perruso 2002 p. 83.

52. The Frostating Compilation XVI-2, and the Code of the Norwegian Realm VII-61. Lindquist 1994 pp. 54 and 58.

53. See the discussion in NOU 1988: 16 p. 55.

54. Diplomatarium Norvegicum 1874 no. 47 (21.2.1314).

55. Diplomatarium Norvegicum 1886 no. 116 (19.9.1386).

ces to fishery rights,<sup>56</sup> and the Rødsand farm was said to have a right to fish at Sortland in Lofoten.<sup>57</sup> Traveling further in time but not in geography, we find a topographical description of Lofoten from 1591 stating that indwellers at Helleland had a right to fish at Brandsholmen.<sup>58</sup>

The examples end here and we focus on two crucial points mentioned above. First, are these examples of the existence of fishery rights, or of exclusive fishery rights? That is – would these rights prevail if they were contested? Second, are these rights examples of local or maybe even regional customs, but not a far-reaching custom found in all Norwegian coastal areas?

When it comes to exclusivity of fishery rights, we return to the purchase of a right to fish salmon in 1314. Let us imagine that this fishery right was not exclusive. Who would buy the right to a fishery that was free to anyone? It would be like buying a piece of air. Let us now turn to the land registry from the 1430s. In this registry all land and rights possessed by the Norwegian archbishop were registered, together with the annual rent paid by the tenants. When a right to fish in Lofoten is listed on Rødsand, it is because the tenants of this farm paid rent for this right together with rent for the land. Rent for a fishery that was free to anyone could not be rightfully demanded, and certainly would not have been paid, especially in the 1430s when there was more land available for rent than tenants in Norway. Let us at this point also keep in mind that in 1740 the King abolished all fishery rights in Limfjorden, except those taxed. Anything else would have been intolerably unjust unless the tax burden were equally lightened, because one can neither rightfully nor successfully tax an individual for a common right.

But is it possible that the right to exclusive tidal fishery was restricted to a local or regional custom? The question is relevant simply because there are no surveys performed on this issue for the whole of Norway, just as there are no thorough studies done on the North Sea basin, nor any other region of Europe. But let us undertake a third tour.

We know from the Supreme Court ruling in 1894 that a first-level court in Akershus in eastern Norway found it unquestionable that the fishery on two shal-

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56. Aslak Bolts jordebok 1997 p. 62B (Kleivan), 106B (Rokstad), 118B (Folland and Eikkilsøya), 149B (Øysund), 160B (Jerstad), and 163B (Stave).

57. Aslak Bolts jordebok 1997 p. 165B (Rødstad), see as well p. 106B (Rokstad), 149B (Øysund) and 163B (Stave).

58. Historisk-topografiske Skrifter om Norge og norske Landsdele 1895 p. 186.

low banks in an approximately 220 meter wide and 11 meter deep strait on the inner part of the Oslo fjord could be exclusive. The appeal court in Oslo found such exclusivity impossible, while two judges in the Supreme Court supported the claim for exclusive fishery and three would not make a stand. We also know that in Agder, in the very south of Norway, such rights were observed by the Norwegian governor in the 1720s,<sup>59</sup> and dealt with by the courts in the 1730s.<sup>60</sup> Exclusive fishery rights were given protection by a court in Rogaland in 1725, in a case that triggered the law of 1728, and the fishery in the sea arm of Yrkefjorden was registered as royal property until it was transferred by auction to new owners in 1729.<sup>61</sup> We will soon return to tidal fishery rights in Hordaland, but we have reports of such rights from Sogn og Fjordane in the 18th century<sup>62</sup> and from Sunnmøre in the 18th until the 21st century.<sup>63</sup> We know them from Trøndelag from the court case in 1625 until the law of 1792, and from Nordland from the land register from the 1430s until the aftermath of the law of 1857.<sup>64</sup> In Troms we know the existence of exclusive fishery rights from the Supreme Court ruling of 1985, and in Finnmark we know them from the 17th century and onwards.<sup>65</sup>

Documented exclusive rights to tidal fishery are found from the very south to the very north of Norway. One may object that the documentation does not concern the same kind of fishery, nor does it date back to the same time periods. On the other hand it may be claimed that this indicates the extent of the custom – the documentation shows that a wide range of fisheries in different time periods were exclusive. The claim is further strengthened by a final examination here of exclusive tidal fishery rights, this time in a single Norwegian coastal jurisdiction between 1642 and 1802.

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59. The NNA: Danske Kanselli, Norske innlegg av 23. april 1728: Governor Ditlev Wibes survey of 10.4.1728.

60. Rægevik 1975.

61. Nedkvitne 1988 p. 508.

62. Nedkvitne 1988 pp. 507–508, and Kolle 1998 p. 347.

63. See e.g. Strøm 1997 p. 157, and Strøm 2001 p. 22.

64. See e.g. The NNA: Arkivet for Indredepartementet, Fiskerikommisjonen av 1891, Diverse, XVI–1a-1d, Legg: Kommisjonen av 1891, Diverse, letter of 27.1.1852, comments to § 8.

65. See Bull 2008.

## 4. The character of exclusive tidal fishery rights in Norwegian waters

As stated above, there has been no thorough study of exclusive fishery rights in Norwegian waters. The only study done on the treatment of tidal fishery rights was in the jurisdiction Nordhordland surrounding the city of Bergen on the west coast of Norway, from 1642 to 1802.<sup>66</sup> Given we know that rights to tidal fishery were found all along the Norwegian coast from the south to the very north, and that a case from Nordhordland concerning such rights was treated by Overhoffretten in 1723 and the Supreme Court in 1726 without raising any debate on the subject being a legal right, then a study of tidal fishery rights in Nordhordland might be sufficiently representative to shed light on, though not completely illuminate, the character of such rights in Norway in general.

The first law explicitly dealing with tidal fishery rights at all in Norway is the law of 1728, which made tidal fishery free to anyone. But there was one exception:

“Enhver fisker den Fisk Havet giver af sig, hvor den falder, undtagen Lax, som søger visse Steder, hvilke staae i aparte Skat og Skyld, for det Slags fiskerie.”<sup>67</sup>

Anyone can fish in the sea, wherever there are fish to be fished, except salmon, which comes to certain places that are taxed for this kind of fishery.

Taxed salmon fishery was not free to anyone, but remained the exclusive right of those who paid for this kind of fishery. What we see here is a balancing between two natural law principles: freedom of the seas and the right to property.<sup>68</sup>

In Nordhordland when fishery in such salmon bays was legally banned by the owner, all fishery was banned, and not just the fishery for salmon.<sup>69</sup> An even stronger indication of the extent to which the law was neglected is that in 1731 a legal ban was published in court on fishery of lobster fronting the land of a vicar, with special reference to those basing a right to fish on the principle of free tidal fishery as stated in the law of 1728.<sup>70</sup> The fact is that not once was the law of 1728

66. Sunde 2009.

67. Reskript angaaende at Hummer-Fiskeriet er Enhver tilladt, av 23.4.1728.

68. But a balancing done through politics, free of high principles, lurking in the background.

69. The SAB: Arkivet for sorenskriveren i Nordhordland, Rettsprotokoll Nordhordland 1728–31 p. 108a, Rettsprotokoll Nordhordland 1733–36 pp. 131a and 248a.

70. The SAB: Arkivet for sorenskriveren i Nordhordland, Rettsprotokoll Nordhordland 1728–31 p. 272b.

mentioned in court in Nordhordland, but instead exclusive fishery rights for salmon, mackerel, herring, lobster, and indeed all kinds of fish were given protection as if the law had never existed.

In Norway tidal fishery rights were in the main no different from fishery rights in rivers and lakes – an exclusive property object. And the fundamental question is not why tidal fishery rights were exclusive, but why land and sea, and fish in fresh and tidal waters, were treated differently. This question was actually posed by the Norwegian governor Jens Bjelke in a court case in 1625 concerning who could fish outside his manor farm Austrått in Trøndelag. The case was treated first by the appeal court in Frostating in 1623, where the appeal court judge and his co-judges simply could not agree on a verdict,<sup>71</sup> and then went on to Herredagen in 1625. Jens Bjelke had studied law in Rostock, Leipzig and Leiden, and argued: “ey dog widendis huadt større frihedt dendt fisch haffde i siøen end anden slags fisch,”<sup>72</sup> why is the fish in the sea more free than other fish [that live in rivers and lakes].

This was an appropriate question, as reflected in a court case from 1733 arising from a dispute between two farmers about the border between their lands. Many witnesses were heard and they all stated that the borderline went from the shallow bank to a pine at the shore, from there to a hill, and so on. When the border was settled, the judges made landmarks to prevent new disputes on the subject. And the first thing they did was to get into a boat and row out to the shallow bank where a landmark was lowered down into the water at the highest peak:

“begav Vj [retten] Os at lodde hvor Fluen eller Skierret laa højest i Vandet og befandtes dend av Være højest et lidet støkke Norden for een liden Høj ved Søen og Sonden for den omvidnede Høj Saaten kaldet og blef paa samme sted hvor Skierret Var højest sat Kiendetægn.<sup>73</sup>

We [the judges] then went to find the highest peak at the shallow bank and found it north of a small hill by the sea and south of the, by the witnesses spoken of, Høj Saaten, and a landmark was put at the highest peak of the skerry.”

It should be noted that all witnesses referred to “Fluen,” meaning shallow bank. The judge alone refers to “Skierret,” but he uses skerry as a synonym for a shallow bank.

71. Sunde 2006 pp. 363–364.

72. Norske Herredags-Dombøger 1966 p. 242.

73. The SAB: Arkivet for sorenskriveren i Nordhordland, Rettsprotokoll Nordhordland 1731–33 p. 126a. See as well Rt. 1894 p. 169.

In a case from 1718 it is impossible to know whether skerry refers to a skerry above the tidal mark or a shallow bank below, but the case shows that the right to fish outside one's land was a right taken seriously by the court. In the 1718 case a fishery right was disputed, and it was settled by giving one neighbor the right to fish north of the southern-most rock on a skerry, while the other was given the right to fish south of the same rock.<sup>74</sup> Both neighbors would then fish at what was referred to as "Landets Fortog" – the waters outside a land property. In a truce from 1759 it is clearly stated that the neighbors had a right to jointly use a property on both land and sea,<sup>75</sup> which meant sea outside their entire property, including outside homestead, fields, grassed fields, swamps, forest areas, or even just rocky hills. A court case from 1731 states the right to fish extends beyond fences between fields and non-cultivated land,<sup>76</sup> and in 1738 the fishing grounds "Slumpen" and "Golte Sundet" are explicitly said to be outside non-cultivated land.<sup>77</sup> In a truce from 1735 the farmers at two neighboring farms settled a dispute on the right to fish salmon by agreeing they all jointly could fish anywhere for any fish they liked along the entirety of both farms.<sup>78</sup>

A difficult question to address is how far exclusive tidal fishing rights outside a property on land would stretch into the sea. A fjord would often be divided in practice between property owners on each side, just as is done with lakes in Norway. Such was probably the case in 1737 when Michel Schage in court legally banned fishery by the Barholmen, Kyrkjeholmen, Stekholmen and Skogesundet islets, and de facto made claims on the fishery on his entire side of the Raunefjorden sea arm. But at times such rights had to be limited. An interesting case began in 1665 and ended with a truce in 1712.<sup>79</sup> In this case farmers on the area between the mainland and the Sotra and Litlesotra islands put out nets outside their land.

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74. The SAB: Arkivet for sorenskriveren i Nordhordland, Rettsprotokoll Nordhordland 1715–19 p. 166b.

75. The SAB: Arkivet for sorenskriveren i Nordhordland, Rettsprotokoll Nordhordland 1736–42 p. 121a.

76. The SAB: Arkivet for sorenskriveren i Nordhordland, Rettsprotokoll Nordhordland 1728–31 p. 251b.

77. The SAB: Arkivet for sorenskriveren i Nordhordland, Rettsprotokoll Nordhordland 1736–42 p. 120a.

78. The SAB: Arkivet for sorenskriveren i Nordhordland, Rettsprotokoll Nordhordland 1731–35 p. 248a.

79. The SAB: Arkivet for sorenskriveren i Nordhordland, Rettsprotokoll Nordhordland 1665 pp. 30b-31a, and Arkivet for Gulating lagmannsrett, Lagtingsprotokoll Bergen 1702–08 pp. 30b-31b.

But since the straits at stake were quite narrow, they closed them off with their nets. This prevented cod from swimming through every spring, and hence deprived those living in the fjords of the possibility of fishing cod. In court they argued it was their right to fish as they liked outside their land – they had just “brugt Toskegarn paa deris egen Grund,” used nets to catch cod on their own property.<sup>80</sup> But in the truce they agreed they would not put out nets further than approximately 55 meters from shore. This did not indicate how far the right to fish could stretch into the sea, but only how far back it could be pulled in this strait when tidal fishery rights came into conflict with one another. It might also be noted that the farmers in a neighboring fjord applied the same reasoning concerning the right to fish outside their land in a fjord, and hence closed it off by nets more than 480 meters long.<sup>81</sup> Again it was found unlawful.

We have now seen that tidal fishery was exclusive to the landowner, but the exact size of this sea belt of exclusive fishery is uncertain. In addition, exclusivity did not confer the right to exclude those fishing for food, only those performing commercial fishery. In 1735 we hear of a man who fished outside the land of a neighboring farm as a twelve-year-old, which obviously had been perfectly lawful. And in a legal banning of fishery from 1777 it is stated that no one is to put out herring nets that come into conflict with the interests of the owner,<sup>82</sup> which probably implied that fishing for “Kaage Fisk,” fish you cook to eat yourself, was allowed. Some places were designated for public fishery and any attempt to exclude anyone was punishable. For instance in 1750 we hear that Glesvær is “et Almindeligt fiskepladtz,” a fishery common, used by those who could not afford a net, those who came from other places, and anyone when the weather was too bad for fishery at open sea.<sup>83</sup> Outside this belt of exclusive commercial fishery, fishery was only exclusive at certain fishing grounds. Such fishing grounds could be shallow banks or underwater

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80. The SAB: Arkivet for sorenskriveren i Nordhordland,, Rettsprotokoll Nordhordland 1712–15 fs. 8a.

81. The SAB: Arkivet for sorenskriveren i Nordhordland, Rettsprotokoll Nordhordland 1748–53 pp. 61b-62a.

82. The SAB: Arkivet for sorenskriveren i Nordhordland, Rettsprotokoll Nordhordland 1771–78 p. 354a.

83. The SAB: Arkivet for sorenskriveren i Nordhordland, Rettsprotokoll Nordhordland 1748–53 p. 159a.



channels located by the use of *méd*, a technique of cross-referencing with the help of landmarks, and hence within sight of land.<sup>84</sup>

Fishery was then found far out at sea. For instance in 1750 we hear that those living at Børrillen north of Bergen claimed a fishery right near some islets lying one-and-a-half nautical miles over open sea from their homestead.<sup>85</sup> And in 1732 we find included in the taxation base for the farm Varøen south of Bergen three fishing grounds named “Muhlen,” “Varøe Noven,” and “Scharholmen,” lying a half, one-and-a-half, and two nautical miles from the homestead.<sup>86</sup> Such fishing grounds were often close to points, islets and skerries, which could serve as navigational aids, a place to fasten your net, and a place to retreat to in case of bad weather. But at times such fishing grounds would just be out at open sea. We know that at Sunnmøre fishers would go out as far as twelve miles from land to their fishing grounds.<sup>87</sup> Fishing grounds far out at sea would often belong to entire villages rather than individuals.<sup>88</sup>

We might imagine that exclusive rights to tidal fishery would normally have belonged to the land close by, just as fishery in rivers and lakes rested in the hands of the owner of the surrounding land. But exclusive right to tidal fishery was to a much larger extent an object of gift, inheritance, purchase, and prescription, and was therefore often separated from property on land. For instance we see that in 1730 a farm was rented out, but the owner withheld the right to fish and rented that out separately.<sup>89</sup> In 1736 the right to fish salmon was sold separately and hence split from the farm Hilleland.<sup>90</sup> In 1738 we learn that one quarter of the right to fish at two fishing grounds was given away by two sisters to their third sister.<sup>91</sup>

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84. See as an example Sundmørsfiskeren lommebok 1925.

85. The SAB: Arkivet for sorenskriveren i Nordhordland, Rettsprotokoll Nordhordland 1748–53 p. 105a.

86. The SAB: Arkivet for sorenskriveren i Nordhordland, Rettsprotokoll Nordhordland 1731–33 pp. 19a–19b.

87. Molberg 1781 pp. 374–375, and Strøm 2001 pp. 22–23. It is uncertain what is meant by twelve miles in this case, but it was so far out at sea that the alpine mountains on the shore would look like the feet of a pot.

88. See *Historisk-topografiske Skrifter* 1895 p. 185, Strøm 1997 p. 157, and Rabben 1982 p. 26.

89. The SAB: Arkivet for sorenskriveren i Nordhordland, Rettsprotokoll Nordhordland 1743–48 pp. 194b–195a.

90. The SAB: Arkivet for sorenskriveren i Nordhordland, Rettsprotokoll Nordhordland 1733–36 pp. 357b–358a.

91. The SAB: Arkivet for sorenskriveren i Nordhordland, Rettsprotokoll Nordhordland 1736–42 p. 120a.

And in 1731, 1732 and 1760 we find evidence of prescription being discussed in relation to exclusive tidal fishery rights.<sup>92</sup>

That fishery rights were treated as a common commodity comes as no surprise when their value is taken into account. In 1742 we learn that a large salmon was sold for 2 marks and 15 shillings. That year 64 salmon were caught at the farm Haugland. Assuming these were large salmon, this meant an income of 30 dollars and 4 marks, enough to buy approximately seven cows. This example illustrates why fishery was such a lucrative investment, and why exclusive fishery rights were so important to the fishing population – either for simple survival but also sometimes to make significant profit. As the court put it in both 1731 and 1732: It would be impossible to make a living in the rough coastal regions without access to and/or a right to fishery.<sup>93</sup> As was said of farmer Peer Helle in 1760 when someone was found fishing in a bay below his homestead: They could just as well steal food from his house as fish on his fishing ground.<sup>94</sup>

## 5. Conclusion

How have exclusive tidal fishery rights become such a widespread custom? Let us answer the question by looking at Norway where such rights have been most thoroughly studied.

Historically there were few and quite small cities in Norway, and in many regions farm land was scarce. As the population grew, holdings were divided into smaller and smaller units, and farming could support less and less of the population. Inland a small-scale farmer or tenant could make a livelihood if he held extensive grassing or hunting rights in the mountains, or rights to fishery in rivers and/or lakes. In coastal regions tidal fishery was equally important, and many small-scale farmers or tenants would own or rent small pieces of agricultural land and sustain their families mainly by fishing. They could even enjoy a fairly good livelihood if the bay or fishing-ground contained mackerel, herring or salmon to be fished.

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92. The SAB: Arkivet for sorenskriveren i Nordhordland, Rettsprotokoll Nordhordland 1728–31 pp. 251b and 279b, Rettsprotokoll Nordhordland 1731–33 pp. 65a–65b, and Rettsprotokoll Nordhordland 1754–60 p. 354b.

93. The SAB: Arkivet for sorenskriveren i Nordhordland, Rettsprotokoll Nordhordland 1728–31 p. 251b, and Rettsprotokoll Nordhordland 1731–33 p. 279a.

94. The SAB: Arkivet for sorenskriveren i Nordhordland, Rettsprotokoll Nordhordland 1754–60 pp. 380b–381a.

But fishery was also important as an investment. The owner of the bay or fishing-ground would often be a local but wealthy entrepreneur, or a city-dweller who invested profit from trade. In a country with little productive agricultural land, and with few and small cities offering limited investment potential, profit was directed at different kinds of natural resources like fishery, timber, waterfalls, and hunting rights. The owner of a bay or fishing-ground may have invested a large sum expecting a rich fishery harvest and correspondingly high rent from the tenant actually performing the fishing.

Because fishery could sustain those with little or no agricultural land and was a lucrative investment, such rights needed legal protection. If fishery were made free to anyone, the small-scale farmer or tenant would starve and the proprietor would lose his investment. That is why such rights became exclusive by custom, and why the law of 1728 had virtually no effect. Nor probably would have the law of 1857, if technological development had not made local and regional tidal fishery less crucial. But in places where these local and regional tidal fisheries continued to be important, they also remained an exclusive right, as some of the judges in the Norwegian Supreme Court found was the case in Oslofjorden in 1894 and in Kåfjorden in 1985.

The question dealt with in Norwegian Public Report 2008: 5 is not whether to reintroduce exclusive tidal fishery rights in Finnmark, but whether such surviving rights ought to be respected. These rights are now few in comparison to the historical situation, when a compact patchwork of tidal fishery rights outside settlements existed along the Finnmark coast.<sup>95</sup>

This article has shown that *mare liberum*, as interpreted after being introduced by Grotius, is not a universal principle of law, and actually contradicts centuries-old Norwegian customary law. It suggests that exclusive tidal fishery rights were found all around the North Sea basin, and further study may reveal such practice may have been commonplace in other European regions as well.

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## **Географическая, историческая и юридическая перспективы в отношении права на рыболовство в норвежских прибрежных водах**

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### **Резюме**

Хьюго Гроциус объявил о Свободном море в 1609, и этим принципом естественного права руководствуются и поныне в отношении свободы периодического рыболовства. Это требование носило скорее политический, чем юридический характер. Можно констатировать, что тогда существовали исключительные права на рыболовство в бассейне Северного моря, и даже в теории Римского права в эпоху Возрождения и позднего Средневековья таким правам была предоставлена защита. В Норвегии все усилия по защите рыболовства, свободного от всех ограничений, согласно закону от 1728, были

тщетными, и поэтому старые обычаи сезонного рыболовства, являющегося вопросом правоведческих наук, преобладали. После 1857 года право на свободное сезонное рыболовство в Норвегии было постепенно упразднено. Тем не менее, норвежский Верховный Суд уже в 1894 году выступил с защитой таких прав, но только в 1985 году была внесена поправка, опубликованная в норвежском Официальном Юридическом Вестнике 2008: 5, нацеленная на защиту прав в сфере рыболовства согласно положениям закона об области Финнмарк.

Ключевые слова: Открытое море, сезонное рыболовство, права на сезонное рыболовство, общепринятый закон, закон и экономика