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The Coastal Sámi of Norway and their rights to traditional marine livelihood

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Abstract: The coastal Sámi of Norway have, for thousands of years and long before the Norwegian state was established, relied on a wide range of marine and terrestrial resources. Due to increased public regulations over the past few decades, it has become difficult to continue their traditional livelihood, combining fishery in local seawaters with husbandry or other local industries on land. Fish quotas have been made tradable, and so to a large extent transferred outside the local communities. This article presents a short historical background, and discusses two legal documents from the 18th century, which are relevant for coastal fishery rights in northernmost Norway. The first is the Lapp Codicil of 1751, which may pertain to the coastal Sámi today when its founding principle – the preservation of the "Lappish Nation" (Sámi Nation) – is duly considered. The other document is the Land Acquisition Decree of 1775, which included a formalization of the sea-fishing rights of the inhabitants of Finnmark.

Key words: Coastal Sámi, Finnmark, ancient use, sea-fishing rights, Lapp Codicil (1751), Land Acquisition Decree (1775), UN Declaration on indigenous rights (2007).

1. Introduction

This article deals with Sámi coastal fishing rights in Finnmark, the northernmost county of Norway. The trace archaeological evidence tells us that Finnmark has been inhabited for 10,000 to 11,000 years. The Sámi are the oldest known ethnic

group in the area today, with a history that dates back at least 2,000–3,000 years. Marine resources have formed the most important basis of their livelihood during this entire time. One of the oldest written sources, the narrative of the North-Norwegian chieftain Ottar, includes a description of the Sámi. Chieftain Ottar sailed from the Tromsø area to the White Sea at the end of the 9th century. He later told King Alfred of England that he had seen no inhabitants, other than Sámi fishermen and hunters on the Arctic coastline of Finnmark and the Kola peninsula.[1]

During those 10,000 to 11,000 years of settlement, up until the last couple of decades, no one ever questioned whether people living in this area had the *right* to fish and utilize the marine resources in their local and regional waters. Several formal regulations ensured that the inhabitants of the county had the basic right to fish, and to some extent regulations based on Sámi indigenous rights[2] also had evolved.

The issue to be discussed here is whether thousands of years of fishing in the same waters, including use of the adjacent terrestrial resources, is a sufficient basis to provide for independent rights today. For example, how is the traditional livelihood combining fishery and livestock husbandry over the last few hundred years being taken into account in contemporary laws and regulations? Those traditional combinations of livelihood include coastal marine fishing for Atlantic cod (*Gadus morhua*), haddock (*Melanogrammus aeglefinus*), coalfish (*Pollachius virens*), plaice (*Pleuronectes platessa*), halibut (*Hippoglossus*), herring (*Clupeaharengus*), Atlantic salmon (*Salmo salar*), etc., and hunting for different marine mammals and terrestrial animals, freshwater fishing, berry-picking, livestock husbandry, and formerly, some small-scale keeping of reindeer as well.

Here, we specifically focus on the management of fisheries, where in fact a large proportion of the Coastal Sámi population, along with other communities in the same region, have gradually lost the *right* to make their living from traditional local and regional fish resources.[3] Fish quotas have been made tradable and thereby been transferred to outsiders with enough capital to buy them. How this has come about in recent decades is discussed in the next section.

1. NOU 1984: 18, p. 643.
2. See chs. 3 and 4.
3. The regulations are common to the rest of Norway, but their impact has been most negative in Sámi areas in the North.

2. Developments over the last three to four decades

From the end of the 1980s, in the midst of Norway's extensive positive turnaround with regard to recognizing the Sámi people and Sámi culture,[4] a great paradox unfolded: One government regulation after another denied local people both their indigenous and customary rights to live off marine-based resources which formed the basis of their settlements and culture. A few examples will here be given.

2.1 The resistance against mobile fishing gear

Resistance to the use of mobile fishing gear is one distinguishing feature of the fishing history of Finnmark.[5] Throughout the entire 20th century, one can follow the intense efforts of the fjord populations to secure local fishery resources against over-exploitation by outsiders using mobile fishing gear. In this struggle they usually faced government fishery agencies, as well as those who had financial interests in maintaining fishing with mobile fishing tools, even in the narrowest fjords.[6] That struggle continues today.

The most modern fishing fleet in the world, especially the purse seine ships from the western part of Norway with an overwhelming catch capacity, still harvests the waters outside Finnmark. Capelin is the most sought-after species in this area, and in catching the capelin many cod are taken too by these huge ships, negatively impacting those left for cod fishing by the local fishers. There have also been massive local protests against the purse seining of coalfish by big boats in the fjords in East Finnmark, but so far with little effect.

2.2 Vessel Quotas – many fjord fishers were excluded

In 1990 the authorities introduced so-called 'vessel quotas' for cod fishing – the most important fish in the coastal Sámi areas. In practice, these quotas are individually transferable and tradable today. The condition for receiving a vessel quota in 1990 was that one had to have fished a certain amount of cod during one of the years from 1987–1989. For many fjord fishermen in Finnmark, with small boats only suitable for traditional fjord fishing, such amounts were impossible to

4. In 1988 a new section on the rights of the Sámi was added to the Norwegian constitution, the Sámi Parliament was established in 1989, Norway ratified ILO-convention 169 on the rights of indigenous peoples in 1990 – the first country in the world to do so, etc.
5. For a presentation of many of the elements concerning the situation of the coastal Sámi, see Sametinget 2004.
6. See, e.g. Sagdahl, ed. 1998; Eythorsson 2008.

achieve, both due to the nature of their equipment and because the larger vessels had virtually left nothing to fish.[7]

Another reason why many people on the coast had no opportunity to catch the required amount of cod during the three qualifying years, was due to a natural disaster: the continuous invasion of harp seals into the fjords during the period 1979–1988. The cod avoided the seals and the fjords, and thus remained beyond the reach of the smaller boats.

Despite the fact that people in these coastal Sámi areas had been fishing cod for thousands of years, they were given a window of three years to compete with ocean-going vessels to qualify for a 'vessel quota.' The paucity of their "historical catch" during the qualifying three years was used as the argument to deny the Sámi and other small-scale fishers their inherited *right* to a quota, and thereby to a continued sufficient livelihood from fishing. Although it was recognized the locals could not qualify for vessel quotas given these circumstances, they were permitted instead a so-called 'maximum quota' arrangement – an open access or competition quota – where during the first years after 1990 they theoretically had the opportunity to earn an income of only a few thousand Norwegian kroner (crowns) per year.

Since then the opportunity to fish cod has improved somewhat, but most small-scale fishers who were excluded in 1990 still have no quota of their own. If they have such a quota, they have been obliged to buy it.

2.3 The king crab and salmon

Since 1990 the king crab/Kamchatka crab (*Paralithodes camtschaticus*) – a Pacific species which the Russians introduced to the coast of the Kola Peninsula in the 1960s – has undergone explosive growth in the neighbouring coastal Sámi fjords of Norway, from the Varanger Fjord and westwards.

In 2002 commercial fishing for king crab, subject to licensing, was introduced. The native species had been largely displaced by the new arrival. Even though the smallest boats were about to lose any possibility of making an income from fishing due to the king crab, the new rules effectively excluded them from obtaining crab fishing quotas. Boats shorter than 8 meters in length were automatically excluded from receiving a quota, as were those that had not fished a specific amount of cod during the two preceding years.

However, the amount of crab in the inner fjords was so large that it was almost impossible to fish the amount of cod necessary to obtain a crab fishing quota, as the nets were filled by crabs almost from the very moment they were set out.

7. See, e.g. Karlsen 1998.

When fishing with long lines, the crab either ate the bait or the fish that got stuck on the hooks. Incidentally, many of those who were denied participation in the crab fishery were the same individuals who were excluded from the vessel quota arrangement for cod in 1990.

This time, when the king crab destroyed the traditional fishing of the coastal Sámi and other local people, they were not given the opportunity to make a living from catching the introduced species that destroyed their traditional fishery. And when people in coastal Sámi communities can no longer make sufficient income from fishing to meet regulatory requirements, they are removed from the official list of registered fishermen.

Although regulations regarding king crab fishing have improved in recent years, as well as for fjord fishers with small boats in general, the basic fundamental right to fish has neither been established nor confirmed, as recommended by the Coastal Fishing Committee for Finnmark.[8]

Salmon has also traditionally been important to small-scale fishers in Finnmark. But over the past 20–30 years, the growth of the salmon farming industry has generated a dramatic reduction in the price of wild salmon, thereby shaking the foundations of the previously lucrative spring and summer sea-fishing for salmon, using traditional fishing equipment. The permitted fishing period has also been consistently shortened during this time, and salmon sea-fishing is being lost as a vital part of the mixed economy livelihood.[9] In particular, this affects the small coastal Sámi communities along the fjords in a highly negative way.

2.4 Former Sámi Policy

The policies cited above, especially with regard to small-scale fishermen in Sámi coastal and fjord areas in North-Norway (or Finnmark), have historical parallels with the former Sámi assimilation policy, which Norwegian authorities at the highest level have come to regret deeply. At the core of these policies was the more than 100-year-long process of Norwegisation,[10] which began after the mid-19th Century. The Finnmark Land Sales Act of 22 May 1902 is one of the negative highlights in that policy. The regulations of the act introduced a refusal to sell land in

8. NOU 2008: 5. Retten til fiske i havet utenfor Finnmark.
9. See e.g. Sámi University College 2010.
10. Norwegianistion – a wide range of official measures taken from the middle of the 19th Century to the second half of the 20th Century aimed at undermining Sámi language and culture, and assimilating the Sámi into the "Norwegian" population. See e.g. Niemi 1985, pp. 41–54; Jensen 1991.

Finnmark to those who did not speak or use Norwegian on a daily basis.[11] After 1989, many of the descendants of those most affected by that policy of assimilation, have yet again been denied the full *right* to live from the marine resources that exist straight off their shoreline.[12]

2.5 The Coastal Fishing Committee for Finnmark

In 2008 many of the coastal inhabitants became hopeful of recognition of their plight. The Coastal Fishing Committee for Finnmark, chaired by the honourable professor Carsten Smith, former Chief Justice of the Norwegian Supreme Court, affirmed there is an indigenous and historical right to regional small-scale fisheries in the County. The proposals of the Committee are founded on the principle that people living in the region have a *right* to fish in the nearby waters of Finnmark. According to the Committee, this right is an outcome of historical usage and the provisions of international law concerning the rights of indigenous peoples and minorities.[13] The Committee – consisting of some of the most high-ranking experts in Norway – delivered very convincing evidence for the existence of such a right. According to the recommendations of the Committee this right should be formalized in a separate act.

The Committee proposes that people living along the coast and fjords of Finnmark, when exercising their right, shall have adequate access to fish to make a decent household living without having to buy a quota. Their quota is intended to be personal, and non-tradable. The right is to be independent of fishery regulation, although sustainable usage has to be taken into account. Furthermore, if it is necessary to limit the fishery, coastal Sámi fishing activity has the prerogative. Another important element is that people living along a fjord should have a stronger fishing right there than others.

The Committee also proposed a new institution to facilitate a degree of regional self-government within the fisheries of Finnmark. This new institution, Finnmark Fisheries Authority (*Finnmark fiskeriforvaltning*) should have a board consisting

11. From 1958 the government agency in charge of the state-owned land estates (Direktoratet for statens skoger), no longer announced the language clause. A new land sales act in 1965, section 6, formally abolished the clause (Sandvik 1997, p. 594). The act mentioned is *Lov om statens umatrikulerte grunn i Finnmark fylke*, March 12th 1965.
12. It should be emphasized that the examples cited here are not a general characterization of Norwegian policy in regard to the Sámi people and Sámi culture, which today in general is of a supportive nature, but rather act as a reminder to central decision-makers to recognize the extent to which regulation, especially within the fisheries, is still negatively impacting and weakening the culture of the coastal Sámi.
13. NOU 2008: 5 Retten til fiske i havet utenfor Finnmark, p. 407.

of six members – three appointed by the county council of Finnmark, and three by the Sámi Parliament.

2.6 Resistance to indigenous and regional Rights

Most municipalities in Finnmark, the county council of Finnmark, and the Sámi Parliament and other institutions, approved the main principle stated by the Coastal Fishing Committee: that people in Finnmark have a legal *right* to fish in the fjords and along the coast of Finnmark.

However, resistance has been substantial towards changing the pattern of tradable quotas established over the last 20 years, specifically not wanting to return fishing rights back to the coastal Sámi and other local communities. For that reason the proposals from the Coastal Fishing Committee for Finnmark have been heavily opposed by vested interests. Some government bodies and significant organizations like the Association of Norwegian Fishermen, have been making strong efforts to cement the current situation by adhering to the principle that there are no fishing rights other than those established in the present system of tradable quotas. Hearings held after the report from the Coastal Fishing Committee was delivered showed that many agencies and organizations want the prevailing system to continue. Their common claim has been that neither indigenous rights nor immemorial usage allow the Sámi or other inhabitants of Finnmark an independent, civil right to fish.

One of the most remarkable events of the hearings occurred in fact months after the hearings had ended, when the Attorney General – the main juridical advisor of the Government – made a statement which totally rejected the juridical conclusions of the Committee:[14] Essentially he claimed that neither international law concerning indigenous peoples, nor immemorial usage, had any relevance. And one of the most astonishing and unfortunate claims by the Attorney General was that there are no special circumstances in Finnmark which could possibly legitimate the proposals from the Committee.[15]

But the reality is that both the jurisdictional and legal history of Finnmark contains many elements which should signal the highest sensitivity and regard in these matters, especially when Norway is dealing with minority and indigenous rights. One particular and significant fact is that Finnmark is the most recent ter-

14. Regjeringsadvokaten [The Attorney General], NOU 2008: *5 Retten til fiske i havet utenfor Finnmark – Høyring*, 9 March 2009, see http://www.nrk.no/contentfile/file/1.6532835!regjeringsadvokatenfinnmarkfisk.pdf (accessed10 November 2011).

15. Professor Carsten Smith has since thoroughly commented and refuted the criticism from the Attorney General. See Smith 2010, pp. 4–27.

ritory to be a part of the Norwegian sovereign state. Some fjord districts have in fact been a part of Norway for less than two hundred years, with their own possible legal arrangements before the actual districts became a part of Norway. These circumstances would have been appropriate to consider *before* concluding that no other arrangements were to be taken into account. Specifically the Attorney General overlooked the fact that the East Sámi in South Varanger had exclusive rights to fish salmon in the sea before that district ever became a part of Norway in 1826.[16] Neither did the Attorney General inform the Government about the Lapp Codicil or the Land Acquisition Decree for Finnmark of 1775. (We will return to those acts in other sections.)

The reluctance to admit that the coastal Sámi as an indigenous population, have inalienable rights to make their living off the traditional marine resources is not a new phenomenon. For some time it has been argued that the Sámi way of fishing is not sufficiently 'indigenous' to receive protection under Norway's legal obligation to protect minorities and indigenous peoples. The prestigious Marine Resources Law Committee of 2003 is an illustrative example. This committee was also asked to consider Norway's political and legal obligations according to international law, regarding *indigenous and local* rights.[17] When it came to the connection between historical usage and rights, the committee concluded that

> … international law does not give inhabitants of Sámi areas any particular historical rights to fish.

The majority of the Committee also found that there were no

> … grounds for introducing a rule in the new marine resources law about recognizing particular historical fishing rights for the Sámi, or that the law establishes special conditions for such rights.[18]

The main reasoning of the Marine Resources Law Committee for the non-existence of indigenous rights was that:

> The Sámi people in Norway …, unlike indigenous peoples elsewhere, do not maintain a so-called traditional way of fishing, but participate with modern fishing boats and modern, efficient tools.[19]

16. Cf. Andresen 1983 and 1984.
17. NOU 2005: 10, p. 43.
18. NOU 2005: 10, p. 44.
19. It must be said that one rarely sees committees reach such thorough conclusions based on so little empirical evidence.

2.7 The Government and the Sámi Parliament

In the autumn of 2009 the Government concluded the same way as the Attorney General had advised: People in Finnmark have no right to sea-fisheries, and the fishery policy is not in opposition to international law.[20] In any event, there would still be a process concerning the proposals from the committee.[21] That made the ground for consultations between the Sámi Parliament and the Ministry of Fisheries and Coastal Affairs. The consultations were ended in May 2011. The main outcome was that there would be no new act as proposed by the Coastal Fishing Committee. But some new enactments would take place: For instance, a new section will be added to the Marine Resources Act taking into account Sámi interests when quotas are allocated. Furthermore, some additional cod (3,000 tons) will be allocated to those fishing in the so-called open access group, in defined Sámi areas in the three northernmost counties of Norway.[22] An advisory Fjord Fisheries Committee will be established for those counties. And the Finnmark Commission, which is currently clarifying private and collective land and resource claims in that county, will also be given an additional mandate to clarify claims with regard to sea-fishing places.[23] But what is also clear is that the Norwegian government still denies there is any basic Sámi or regional *right* to fisheries in northernmost Norway grounded in historical usage.

The plenary session of the Sámi Parliament dealt with the results of the consultations in June 2011.[24] A majority was in favour of accepting it, while a large minority voted for rejection. Their reasoning was that the basic historical rights were not taken into account and approved by the Government. But the majority too was very critical to the denial of basic rights within this field, and in fact regretted that the Government did not recognize either the historical dimension or international law in that respect.

The Sámi Parliament clearly stated that older acts had to be taken into account when dealing with the right to sea-fishery. In that sense the Parliament explicitly

20. Statement made by the minister of Fisheries and Coastal Affairs, 2.10.09. The article, "Helga bøyer av for stormen" at:http://www.nrk.no/nyheter/distrikt/troms_og_finnmark/1.6801164 (accessed 10 Dec 2011).
21. Politisk plattform for flertallsregjeringen 2009–2013, 07.10.11, p. 66. Website: *SoriaMoria – Regjeringen.no*
22. Many of those deprived of the opportunity to a fixed quota in 1990 are to be found within this group.
23. Cf. press release from the Ministry of Fisheries and Coastal Affairs, *Kystfiskeutvalget for Finnmark*, 9 May 2011.
24. The Sámi Parliament of Norway, plenary case SP 27/2011. Retten til fiske i sjøsamiske områder, 7–10 June 2011.

identified the Lapp Codicil of 1751 and the Land Acquisition Decree of 1775. Additionally, it asserted that historical evidence had to be considered in light of section 37 of the UN Declaration on indigenous rights (2007).

It is no wonder that the Sámi Parliament highlighted the importance of the Lapp Codicil. The Jokkmokk Declaration, 24 February 2005, adopted by all three Sámi parliaments in Finland, Norway and Sweden in a common plenary meeting, makes many references to the Codicil as a vital guideline for the policies of today. In the preamble it states that the Lapp Codicil recognizes the Sámi as a people with a right to form their future. Furthermore, it claims that the right of the Sámi to the use of land and waters was secured by the Codicil, and extensive internal self-determination instruments were admitted. According to the common plenary meeting, this is all consistent with current international law.

It is also clearly stated in section 2 of the Declaration that conservation, strengthening, and further development of Sámi culture, especially traditional Sámi livelihoods like reindeer-herding, hunting and fishing, and other nature-based livelihoods, depend on the recognition and effective safeguarding by the national states of the historical rights of the Sámi to land, waters and natural resources, as was mandated previously in 1751.

Additionally, Sámi fisheries are given special mention in section 22. The importance of the fisheries-dependent livelihood to Sámi culture is strongly emphasized there, and it is also pointed out that many Sámi fishers have lost their *right* to fish. Therefore the national states have an obligation to make enactments on the right of the Sámi to participate in sea fisheries and the use of other marine resources. And the Sámi have the right to participate in the management of those resources as well.

3. The Lapp Codicil (1751) and Land Acquisition Decree (1775): Still a basis for the legal rights of the coastal Sámi and others in Finnmark?

Next we present a short discussion of two legal documents from the 18th century, highlighted by the Sámi Parliament as acts which are considered to establish the legal basis of the sea-fisheries pursued by the coastal Sámi and the local population of Finnmark. The first one of these is the Lapp Codicil, a substantial set of regulations regarding the rights of the border-crossing Sámi, implemented in connection with the border treaty between Norway and Sweden (including Finland)

in 1751.[25] The second one is the Land Acquisition Decree for Finnmark County, given by the Danish-Norwegian king in Copenhagen in 1775.[26]

3.1 General comments on the Lapp Codicil

The main purpose of the Lapp Codicil[27] was to secure the material basis for the Sámi people. According to the Codicil, based on historic and traditional usage, when necessary Sámi were admitted full access to renewable natural resources *on both sides* of the border after paying a small fee. This usage related mainly to migratory reindeer husbandry. Grazing of reindeer was a vital part of those rights, together with hunting and fishing. To the benefit of those reindeer herders from Sweden who moved to the sea districts in Norway during the summer, sea fishing and seal hunting were also included in their right to access the natural resources.

The Codicil further established:

1. How the Sámi should choose their country of citizenship, or to which country they should belong;
2. Sámi neutrality – at least to include the border-crossing Sámi – in case of war between Denmark-Norway and Sweden (including Finland);
3. Rules for reindeer migrations, facilitated by internal Sámi administration arrangements in which the Sámi bailiff held a vital position;[28]
4. A separate, internal Sámi judicial system, "the Lapp Court," with significant competence across the border as well;
5. For certain legal cases, Sámi customary law among them, the Lapp Court was obviously an obligatory court of first resort, among other things regarding Sámi common law – although the rulings could be appealed to the ordinary public judicial system;
6. At the local or regional court level, Sámi representation was required if a Sámi person from the other country was in court. In that case, two Sámi from the person's own side should also be lay judges in the court. The Sámi

25. It must be mentioned that all of Norway was not included because the East or Skolt Sámi area south of the Varanger fjord in Finnmark did not become a part of Norway until 1826.
26. Both are mentioned in the report from the Coastal Fishing Committee for Finnmark, pp. 69–70, in NOU 2005: 8. The reference to the decree is: Lov av 27 mai 1775. Kongelig Resolution ang. Jorddelingen i Finmarken samt Bopladses Udvisning og Skyldlægning sammesteds. In Norges Lover 1687–2005. Oslo 2005.
27. See act, October 27th1751. Første Codicil og Tillæg til Grense-Tractaten imellem Kongerigerne Norge og Sverrig Lapperne betreffende (Lappekodisillen). In Norges Lover 1687–2000. Oslo 2000.
28. According to section 15 of the Codicil, a Sámi bailiff (*Lappelænsmand*) should be appointed in all districts where the reindeer-herders moved across the border.

bailiff from his side could also meet in the court as counsel for the defence; and

7. The Codicil also laid down that the authorities on both sides were obligated to examine possible Sámi complaints, and follow the regulations in the Codicil in the most careful manner.

In 1751 Norway was formally an administrative part of Denmark. More than 60 years later, in 1814, Norway attained its (internal) sovereignty, but from then on being subordinate to the Swedish king concerning, among other issues, foreign policy. At around the same time, Finland was separated from Sweden in 1809, and turned into a grand duchy under the Russian Czar. Despite the changes in sovereignty, the Lapp Codicil formally was in force on the border between Finland and Norway until 1852.[29] Concerning the border between Norway and Sweden, the Codicil was fully functioning until 1883. Then it was replaced by the so called "Common Lapp Act" of 2 June 1883 that had the same wording both in Sweden and Norway (hence the name "common"), which regulated border-crossing reindeer husbandry. During the 20th Century reindeer grazing conventions appeared, following on to the Lapp Codicil and "Common Lapp Act," with the Codicil remaining as the underlying foundation.

In the following some tentative remarks highlight why the Lapp Codicil might still be relevant for the rights of coastal Sámi today. To begin with, as previously mentioned, the Codicil in fact contained regulations regarding use of marine resources. Section 12 stated that Swedish Sámi who crossed the border had the right to hunt and fish "like Norwegian citizens." The original Danish wording reads like this:

> "Hvor Fred-Lyste Kobbe-Veider og Fugle-Vær findespaa den Norske Side, for hvilke visse Undersaatteraarlig Skat betale, skal det under saadan Straf, som den Norske Lov for Norske Undersaatter tilholder, være de Svenske Lapper forbuden, noget-Skiøtterie sammesteds at bruge eller paa anden Maade Skade at giøre; Paa alle andre Steder bliver dennemsaadant. og alt andet Skiøtterie og Fiskerie, lige med Norske Undersaattertilladt; Likesom de Norske Lapper ogsaa have samme Frihed i Lapmarkenpaa den Svenske Side."
>
> "Where there are protected hunting grounds for seal and bird nesting cliffs on the Norwegian side, for which certain subjects are paying annual taxes, it shall be prohibited for the Swedish Lapps, under such punishment as is provided by Norwegian subjects, to hunt or in any other way cause damage. In all other places they shall be entitled to such hunting and all other hunting and fishing in the same way as

29. Pedersen 2008, pp. 158–508.

> Norwegian subjects; and the Norwegian Lapps shall also have the same freedom on the Lapp lands on the Swedish side."

This meant that for a small additional fee, the Swedish Sámi had an (unlimited) right to fish in the sea as well as to hunt, among other species seal, and most probably even the right to collect eggs and down from birds as well. The only exception from the right to hunt seals, and collect eggs and down, were preservation regulations and leasehold estates.[30]

There is also clear evidence that in the northernmost part of the border area, not only the reindeer-herding Sámi, but also other Sámi from Sweden/Finlandeven before and after 1809, took full advantage of the opportunity to fish in the sea. This industry was in fact a very important part of the livelihoods of the Swedish, and later Finnish, non-reindeer-herding Sámi from the northernmost parishes of Utsjoki and Inari.[31]

3.2 The aim of the Codicil

Until recently the main thrust in the literature on this subject has been that the Lapp Codicil only aimed to secure the rights of reindeer-herding Sámi. However, there are significant reasons for challenging the unconditional assertion of that position. The issue then becomes: How do regulations from 1751 relate to coastal Sámi today? Some tentative elements are presented here.

To understand how the position of the coastal Sámi today could possibly relate to this legal framework from 1751, it may be fruitful to look at the theoretical, judicial, and political basis for the creation of the Codicil in the first place. Taking that into consideration, it is interesting to read the Danish-Norwegian king's instructions to his border commissary in 1749, in which the notion of the "Lappish" or Sámi nation is central. According to those instructions, the border commissary and his Swedish colleague were to examine everything which had to do with the "Lappish Nation" (*Lappiske Nation*), on both sides of the border, and strive to establish a sensible and permanent arrangement "to the best of this Nation."[32]

The legal advisors to the Danish king, Hielmstierne and Stampe, who wrote the instructions in 1749, thereby forming an important part of the theoretical basis for the Codicil from the Danish-Norwegian side, based their valuations on what to them were well-known legal principles: All nations had the right to a future.

30. The fee is decided in section 13.
31. Cf. Pedersen 2008, ch. 2.11, 3.13, 5.3.
32. April 18th 1749. See Taranger 1904, 27.

Ole Feldbæk writes about the main ideology concerning this matter around the middle of the 18th Century: that all human beings were brothers, and that the native country was where you were living as a loyal subject, regardless of where you were born, or which was your language.[33]

For such high-minded reasons, the basis for the existence of the Sámi people had to be secured. The principle of equality between nations and peoples dominated the ideas of the Enlightenment and of natural law at that time.[34] The preparatory work of the Codicil grew out of these beliefs, and emphasizes the importance of "the conservation of the Lapp Nation." It is not unreasonable to interpret this to mean conservation of the entire Sámi population – among them the coastal Sámi.

Researchers who have been dealing with the origin of the 1751 treaty, not least of whom is Ove Bjarnar, are of the opinion that the intention of the Codicil was not to define any new status for the Sámi – neither juridically, nor founded on the real situation. The Codicil covered the Sámi as a nation, and must therefore, as a political manifestation, be regarded as universal.[35]

Given this assumption is correct – that the Codicil originally intended to secure the rights of the entire Sámi people in Norway and Sweden (Finland), one important question arises: Why is that not more clearly expressed in the individual sections of the Codicil, in which the coastal Sámi are not mentioned at all?

The explanation might be no more complicated than geography. Along most of the new border between Norway and Sweden (Finland), the situation at that time was that it was only the reindeer-herding Sámi who needed to cross the border to make their living.[36] In the Codicil it was therefore important to regulate the reindeer herders' way of life in particular. That, in turn, may later have led to the perception of the Codicil as being a legal basis for reindeer husbandry only.

But the Codicil also contains measures concerning target groups other than reindeer-herders, namely section 28, which guarantees trading rights in Norway for all inhabitants in the northernmost district in Sweden.

> Indbyggerne udiUtziocki, som nu ved Grendsens Forening ere blevne privative Svenske Undersaatter, skulle i alle Maader, Handelen betreffende, saavel med Landets Producter, som med de Vahre, der bringes til Landet, blive behandlede lige med de Kongelige Norske Undersaatter der i Landet; og lige med dem nyde,

33. Feldbæk 1991, p. 111.
34. About this ideology: See, e.g. Anners 1983, pp. 189 ff.
35. Bjarnar 1989, p. 75.
36. The only exception might be the salmon fishery in the Tana River, which for approximately 200 kilometres formed the border between Norway and Sweden (Finland). There the Sámi salmon fishers had many common arrangements both before and after 1751. Cf. Pedersen 2008.

saavel den nærværende, som den herefte rudgivende Octroy og anden Handelens Indretning got ad; saa at, hvad de til de Norske Kiøbmænd overbringe, skal dennem efter Octroyen blive betalt, og i ligemaade skal dennem efter OctroyensPriis overlades, hvad de sig ville tilhandle, dog skal Compagniet ey være forbunden til, at give disse Svenske Undersaatter den Credit, som det i visse Tilfælde, i følge Octroyen, maagive de Norske.

The inhabitants of Utsiocki, who now, following the agreement about the frontier, have become subjects under Swedish ecclesiastical and civil jurisdiction, must in all matters related to trade, including both the products of the country and goods being brought into the country, be treated in the same way as the Norwegian royal subjects in the area and benefit equally with them by the Royal Letter of Trade Privilege, both as existing and as given in the future, and other arrangements established to further trade, so that they shall be paid according to the Royal Letter of Trade Privilege for what they deliver to the Norwegian merchants and so they shall be given what they want to purchase at the price of the Royal Letter of Trade Privilege, but the Trading Company shall nevertheless not be obliged to grant to these Swedish subjects the credit that they in certain circumstances are to give to the Norwegian subjects according to the Royal Letter of Trade Privilege.

This section states that the *inhabitants* (in practice, almost only Sámi) of the northeastern part of Sweden, in Utsjoki (and Inari),[37] were to be guaranteed permanent trade rights on the Norwegian side. This means that for the actual district, the Codicil, also concerning commercial affairs, ensured that the Sámi population on the Swedish side should not be disadvantaged by the demarcation of the border. This is completely in line with the principle of preserving the "Lapp Nation," as laid down in the preparatory work of the Codicil.

There are also examples after 1751 showing that many provisions of the Codicil in this geographical area were applied according to interpretation by analogy, in favour of different Sámi groups, and different Sámi livelihoods. One example is that despite the border drawn in 1751, non-reindeer-herding Sámi from the Swedish side still kept summer residences on the Norwegian side along Deatnu, the Tana River Valley, and they were treated in part in accordance with regulations of the Codicil.[38] Later on we observe that when disagreements appeared regarding the citizenship affiliation of some river Sámi families in the same district a few years after 1751, the ordinances of the Codicil were invoked.[39] Non-reindeer-herding Sámi from both sides of the border jointly engaged in salmon fishing in the Tana

37. After 1809 this was the northernmost part of Finland.
38. Pedersen 2008, pp. 110 ff, 365 ff.
39. Pedersen 2008, pp. 112–125.

River. Within sources on salmon fishery we also find examples showing that the provisions of the Codicil were applied.

During a dispute on salmon fishing between Norwegian Sámi from Karasjok and Swedish Sámi from Utsjoki, in the Tana river valley, a Swedish judge was even dismissed at the beginning of the 19th Century because he had not acted fully in line with regulations of the Codicil, section 23, in summoning Sámi jury members from the Norwegian side to the Swedish court proceedings in Utsjoki.[40]

In the Kautokeino district, in the latter part of the 18th Century, the Codicil was used to clarify the right to cross-border lake-fisheries for non-nomadic persons.[41]

Finnish and Norwegian officials also acted fully in the spirit of 1751, to "preserve the (entire) Sámi nation," when they tabled a modernized draft codicil in the early 1830s.[42] There the most important resource rights regulations of 1751 were retained, but the new draft also explicitly included the industries of all different Sámi groups in the area. That included, among others, salmon fishery in the Tana River, and codification of the right of the Finnish non-reindeer-herding Sámi to sea fisheries. The draft was obviously reflecting the opinion of Norwegian authorities until the 1830s that such a right existed, also according to the Codicil.[43]

Based on the above-mentioned interpretation by analogy of the Codicil regarding Sámi groups other than reindeer-herders, the author cautiously ventures to suggest the following:

If the livelihoods of the coastal Sámi had been affected by the drawing of the border, taking into account the principles from which the Codicil was sprung – ensuring the future of the Sámi people – *then* it is hard to imagine that the Danish-Norwegian authorities of 1751 would have considered the future of the coastal Sámi any less significant than the future of the reindeer-herding Sámi. As suggested, the reason why the coastal Sámi were not mentioned specifically in the Lapp Codicil may be that they did not need to cross the border in order to preserve their traditional livelihood.

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40. Pedersen 2008, pp. 132–152. This is a very comprehensive case where the Norwegian Sámi of Karasjok had accused their counterparts 150 kilometers downstream on the Swedish side of illegal salmon fishing, allowing them almost no catch at all. Danish-Norwegian authorities claimed that this violated the border treaty, and also that it initially should have been handled according to the provisions of the Lapp court (in the Codicil section 22). The case was regarded as so important that it was brought up to the level of the kings of both countries.
41. Pedersen 2008, pp. 85 ff.
42. About that: Palmstierna 1932, pp. 247 ff., Pedersen 2008, pp. 263 ff.
43. There was never any doubt among Norwegian authorities that reindeer-herding Sámi held such a right.

This means that even though most sections in the Lapp Codicil relate to reindeer husbandry, the Codicil, anyway – based on its aim and ideology of preserving the "Lapp Nation" – might form part of the basis for clarifying the basic legal *rights* of the coastal Sámi to utilize the marine resources in their traditional, proximal waters. Because the Codicil is still recognized as a source of law in Norway, it becomes even more relevant to take a closer look at whether it may have any influence on the evaluation of coastal Sámi *rights* to sea-fisheries.

Incidentally, the starting point in 2012 is the same as it was in 1751. As in that time, today's government wishes to preserve Sámi culture. Nowadays, it has also been recognized that a material basis is imperative in realizing this goal, while this same recognition also took place in 1751. At that time the authorities even went so far in securing the material basis for the Sámi people that they made an exception from the primary objective of demarcating a border. They even permitted citizens of another country to use resources within their own borders in a form of reciprocity. Ordinarily the primary purpose of drawing borders at all has been to keep others out and preserve one's own territory.

That exception was granted for the Sámi, who followed their reindeer herds along ancient migratory routes according to the seasons, irrespective of man-made borders. The reindeer travelled inland during the winter, and pastured on grass along the sea in the summer. Consequently the Sámi earned their living using land and resources on both sides of the border. The reindeer-herding Sámi have benefited from this freedom to migrate with their animals up until today. The most recent legislative example is the draft of a new reindeer grazing convention between Norway and Sweden in 2009,[44] which is explicitly based on the legal precedent from 1751.

The question remains whether it is possible to draw a legal timeline from 1751 to the present which could help preserve the basis of existence for the coastal Sámi today. Toward that end, it is appropriate to mention what took place during the spring of 2005 in the relationship between Norway and Sweden. Negotiations to reach a consensus on a new reindeer grazing convention had not been finalized within the allotted time, and Norway then proposed that the negotiations be prolonged. Sweden did not agree, and stated instead that from May 1st that year, the Lapp Codicil was to function as the operative regulation of border-crossing for reindeer herding between the two countries.[45]

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44. See regjeringen.no / Landbruks- og matdepartementet "Reinbeitekonvensjon på høring" at http://www.regjeringen.no/nb/dep/lmd/aktuelt/nyheter/2010/Juli-10/reinbeitekonvensjon-pa-horing.html?id=611274 (accessed 10 Dec 2011).

45. Regeringens skrivelse 2004/05:79. Upphörande av 1972 års svensk-norska renbeteskonvention. 3 February 2005.

If Norway had then unconditionally agreed with the Swedish viewpoint that the Codicil was fully operative, *then* reindeer-herding Sámi on both sides of the border would have had the right to also use other natural resources when they crossed the border with their herds. That could have implications for illustrating the rights concerning sea fisheries. The reasoning is that if Swedish reindeer herders in 2005 had obtained access to pastures along the sea and fjords in Norway, then they, according to the regulations of 1751, would also have the *right* to fish in the sea.

Nevertheless, the coastal Sámi and others in the same areas would not have retained such a right according to the current fishing regulations, despite the fact that they obviously did have such a right in 1751 when the Lapp Codicil was decided. That paradox should be challenging with regard to legal, ethical and moral questions, and illustrates the need to explore and clarify the legal status of the fishery rights of the coastal Sámi according to the Lapp Codicil from 1751.[46] The issue has been addressed by Øyvind Ravna, who quite recently has put forward a very relevant discussion concerning whether the Lapp Codicil will have any influence on the outcome of the proposals from the Coastal Fishing Committee for Finnmark.[47]

4. The Land Acquisition Decree of 1775

Another interesting older measure concerning sea-fishing rights of the inhabitants of Finnmark was given by the king in Copenhagen in 1775. This was the so-called Land Acquisition Decree,[48] which for the first time made it possible to register private land in the County. That decree or act also contained regulations on sea fishing, salmon fishing in the big rivers, use of the forest, and other matters. It was a relatively detailed directive to Fjeldsted, the County Governor of Finnmark, to which he himself had delivered one of the most important contributions.[49]

4.1 The Decree – safeguarding the Basis of Settlement in Finnmark

Regarding conditions concerning people's livelihoods, Sverre Tønnesen claims that the intent of the decree was not to secure rights for the state, but rather it was part of a policy in which the state tried to bear less responsibility for Finnmark.

46. It must be emphasized that the Lapp Codicil covers not only Finnmark, but the area from Mid-Norway and northwards.
47. Ravna 2010, pp. 405.
48. See Lov av 27 mai 1775. Kongelig Resolution ang. Jorddelingen i Finmarken samt Bopladses Udvisning og Skyldlægning sammesteds. In Norges Lover 1687–2005. Oslo 2005.
49. Tønnesen 1979, pp. 135 ff.

The inhabitants themselves were to "… have the most secure foundation possible to make their living from what the earth gave them."[50] Besides, no one should lose any rights that they already possess, and the people of Finnmark were to be granted additional rights.[51] The intent and willingness to formalize existing rights is therefore clearly visible in many sections of the resolution. For instance, the principle of land acquisition was in fact that locals should be allotted the land where they were already settled *without any payment or fees*.

The regulations also confirmed that traditional use and customs should continue. Section 4 of the decree, which regulates access to birch forests, dictates those rights should belong to the local communities in which the forests are located:

> Hvor Birkeskov findes, bestemmes den til visse Bygder, som dertil ere trengende, dog at disse Bygders Beboere ikke egenraadig handle med Skoven, men hva de behøve, have de betimelig at rekvirere hos Amtmanden, som dem det fornødne lader utdvise.
>
> Where there are birch forests, they are assigned to certain communities who need them, although the inhabitants of the communities may not use them freely, but acquire what they need from the bailiff, who will grant the necessary amount.

Section 5 stated that the king, in addition to reserving the rights to the pine and spruce forests for himself, also had certain rights to seal hunting, egg and down gathering, etc. in some unsettled areas. However, when these places became inhabited, the bailiff was to make suggestions as to how both the new settlers and the king could benefit from these natural resources.[52] This means that Section 5 also included a proximity or commonage land principle: Those who lived in an area should have the opportunity to benefit from the natural resources within the proximity. Therefore the royal leaseholds had to be reconsidered in such places.

4.2 Finnmark – a Colony

To put the year 1775 into proper historical context, a few points need to be detailed. Finnmark had already been a Sámi area for thousands of years when Norwegian settlement on the coast occurred in the 13th and 14th Centuries. The Danish-Norwegian state obtained sole jurisdiction over the main parts of the coast and fjord areas of Finnmark for the first time in 1613. The Sámi area of inner Finnmark became Danish-Norwegian in 1751 (after the above-mentioned border treaty was

50. Tønnesen 1979, p. 134.
51. Tønnesen 1979, pp. 133 ff.
52. Tønnesen 1979, p. 137.

signed), and what is now South Varanger became a part of Norway only as late as 1826.[53]

Considering the Land Acquisition Decree, Sverre Tønnesen has pointed out the importance of grasping what type of idea the legislators had about the conditions in Finnmark, and what they were trying to achieve. One important element to be taken into account is that Finnmark in fact was governed as a colony at that time. In addition there had been a long-standing decline in the Norwegian population in the County, and the government felt a responsibility to do something about that development. For instance, criminals from the southern districts of the realm were deported to Finnmark, and a trade monopoly was also established.[54] Another element is that for approximately 100 years, various reports had been written and different measures taken to counteract the decrease of the ethnic Norwegian population along the coast of Finnmark – as a consequence of lower fish prices from the end of the 1500s.[55] Even so, the efforts had little or no effect, and the number of Norwegians continued to decline. It was obvious to the authorities that other methods were needed to stop this downward trend.

4.3 Combining Fishing and Farming – vital Elements of Employment

County Governor Collet of Finnmark (1751–57) was very aware of the decline of the Norwegian population, and was one of those who began the work which led to the Land Acquisition Decree in 1775. His opinion was that the land in Finnmark should be surveyed, mapped, taxed and then distributed among the population. Such an arrangement would provide more security for their use of the land. He also touched upon the connection between sea-fishing and farming. Where farming was likely to succeed, more land should be distributed than at "… sharp places by the ocean, where fish is abundant."[56] In other words, everyone should be secured the most suitable and appropriate livelihood.

When County Governor Fjeldsted wrote his memorandum in 1775, which is the most central preparatory work for the Land Acquisition Decree, he also strongly emphasized the significance of fisheries in connection with the challenges in Finnmark, and stated that: "The first priority is to unite farming and fishing as

53. About the new borders, see e.g. Johnsen 1923, pp. 129 ff, 150 ff, 236 ff.
54. Helland II 1906, p. 67; Tronstad 1981, p. 27; Collet 1757, p. 60.
55. Pedersen 1994, pp. 38 ff. On the other hand, the Sámi population was increasing during that same period.
56. Collet 1757, p. 91. About Collet: See Finne-Grønn 1926, pp. 113 ff.

much as this land will allow."[57] In other words, Fjeldsted meant that the fishermen in Finnmark also needed stable opportunities for farming in order to secure their financial foundation. Otto Jebens, who has dealt with the matter too, is of the opinion that the Decree was supposed to "… give a stable basis for farming and thereby support the fisheries in the coastal and fjord areas of Finnmark." [58]

Three years after 1775, the importance of farming as a supplement to fishing became even clearer. In the trade regulation of August 20th 1778, a farming obligation was introduced, and a punishment was issued if this obligation was not followed up. In section 41 it was specifically stated that in those places where land had already been distributed, the priests would be fined 10 *Riksdaler* if they wedded bachelors who could not show a "Land-Grant-Letter," or a proof of title from the County for a field or a place which could be cleared for settlement "… where newlyweds can settle down and have a farm in addition to fishing." This meant that, according to the authorities, every family was supposed to have a farming supplement to fishery. [59]

4.4 Section 6 – taking into account ancient Use by Local Villagers

Considering the importance of fishing for the people of Finnmark, it is natural that the decree had specific provisions concerning that industry. These appeared in section 6 which deals with various natural resources, including rights for fishing in the sea. That provision from 1775 is still in force as Norwegian statutory law.[60] According to Tønnesen, this section was the most extensive ratification of a common practice, both for the particular communities and for the general population as a whole.[61] The section reads as follows:

> De Herligheder, som hidindtil have været tilfælles for hele Bygder eller Almuen i almindelighed, være sig Fiskeri i Havet og de store Elve, samt Landings-Steder og deslige, forblive fremdeles til saadan almindeligBrug.
>
> The goods which have so far been common to whole districts or to the general population, be they fish in the sea or the big rivers, as well as docking places and the like, will remain available for general use.[62]

57. Quoted after Jebens 1999, p. 349.
58. Jebens 1999, p. 350.
59. Schou 1795, p. 97.
60. Cf. Jebens, 2007, p. 266.
61. Tønnesen 1979, p. 137.
62. See Lov av 27 mai 1775. Kongelig Resolution ang. Jorddelingen i Finmarken samt Bopladses Udvisning og Skyldlægning sammesteds. In Norges Lover 1687–2005. Oslo 2005.

According to Jebens, the specific uses mentioned in this section are only examples of the common rights in question. His view is that section 6 "… aims to maintain all existing rights for the population, whether they were common rights for particular districts or public rights of access." [63]

In order to obtain a better understanding of the content of the regulations in section 6 pertaining to sea fishing, natural questions then arise: What was the actual use in 1775? What kind of rights was S. 6 designed to protect? Were they public access rights, which meant free competition for marine resources, including those coming to Finnmark to fish, or were they a form of local or regional right to sea fishing?

One approach to these questions is to use the same method as Tønnesen did when he analyzed what the section meant for salmon fishing in the so-called "big rivers" in Finnmark, also mentioned in §6.[64] But to answer that properly it is necessary to have a closer look at section 3 of the decree. There it was laid down that the fishing rights in "small rivers" and lakes followed the ordinary principles used in Norway: The person with ownership of the land down to the shoreline also owned the fishing rights in the water outside his property. A highly interesting question therefore is why that legal principle was set aside when it came to the big rivers.

Dealing with these matters, Tønnesen asked two basic questions concerning big rivers: *How* fishing had been organized up until 1775, and *Who* did the fishing? In his discussion, Tønnesen concluded that the reason why private ownership did not include exclusive salmon-fishing rights outside one's own, privately-allotted land along the big rivers – at least Alta and Tana – was the desire to continue the common fishing arrangements that had proved so useful on these rivers. his meant that traditional customary usage was protected, and that private ownership of land was not allowed to destroy arrangements and fishing methods that had functioned well and benefited the river communities.[65]

In conclusion, the inhabitants in these river valleys were entitled to a *common* right to salmon fishing.

63. Jebens1999, p. 352.

64. Tønnesen 1979, pp. 240 ff.

65. Tønnesen1979, pp. 240 ff. The significance of S.6 for the Tana River is also discussed in Pedersen 1986, pp. 30 ff., 120 ff.

4.5 The Land Acquisition Decree – ensuring Fishing Rights as a Prerogative for the Inhabitants of Finnmark

To understand the content of section 6 in relation to sea fishing, we have to ask exactly the same questions as Tønnesen did concerning the big rivers: *How* had sea fishing been organized up until 1775, and *Who* did the fishing?

The situation in 1775 was that fishing activity by outsiders, Norwegian fishermen sailing north to Finnmark, and Russians coming from the White Sea district, was strictly limited; that is, the population living in Finnmark had priority.[66] Obviously, the same priority also applied to the Sámi from the northernmost part of Sweden who moved to the fjords and the coast during the spring and summer, and fished in the sea according to the regulations of the Lapp Codicil from 1751.[67]

When we take into account what the general purpose of the Land Acquisition Decree was – to ensure the rights of the people of Finnmark – and section 6 even states that fishing in the sea was to continue in the same manner as before, we can at least suggest that this was a protection and codification of traditional usage, and of the existing (legal) sea-fishery regime. That regime prioritized those living in the county.

Then another question arises: Were the fishery privileges intended to serve everybody living in Finnmark equally, or were they privileges for particular districts or communities?

In a legal-historical account from 2004, Per Christiansen and Jørn Øyrehagen Sunde discuss what was meant by the formulation on fishing in section 6. In their opinion, the Land Acquisition Decree ensured the sea-fishing privileges of the local communities.[68] In another article, Øyrehagen Sunde writes that regulations for Lofoten, both in 1772 and 1786, were built on the premise that the fishing villages controlled their own marine territories. Concerning Finnmark he also writes:

> Furthermore, in the Land Acquisition Decree of 1775 it was stated that no changes would be made to the unique fishing privileges of the local communities when the land in Finnmark became available for purchase from the king, a rule which has not yet been annulled.[69]

On the other hand, Peter Ørebech is of the opinion that the text can be understood without further interpretation to mean that sea fishing should be a common right

66. See Bull 2011.
67. See Pedersen 2008, ch. 3.3.
68. Christiansen/Sunde 2004, p. 9.
69. Sunde 2006, p. 390. (The land was originally allotted without any fee to the king.)

for the people of Finnmark as a whole.[70] The Christiansen and Øyrehagen Sunde opinion, that the fishing privileges of the local *communities* were secured, is also fully understandable, based on the fishing structure existing at that time. Some districts even had officially registered private fishing grounds to set long lines,[71] and the main pattern was local fishing in the proximate waters of the local communities – in other words, section 6 was a codification of actual practice.

There are in fact also elements indicating that the lawmaker has been taking into account existing *individual* fishing rights as an accessory to the new estates. That indication is to be found in the directives for the land surveyor, section 9e. There he is instructed, when surveying a new estate, also to describe which other material benefits were belonging to it, among other things, fishery in *salt* or fresh water.[72]

It is also certainly clear that the term "general population" in the Land Acquisition Decree section 6, did not refer to people outside of Finnmark. Persons from outside the County did not have access to marine resources for general use wherever they wished. That right was reserved for the people who lived in the County. Those who came from outside had to yield to the interests of the population of Finnmark.

That principle was strongly reaffirmed only a few years later, by a trade regulation of 20 August 1778, which even posed a general ban on outsiders fishing in the fjords. From that time on – for a given period – fishermen from outside Finnmark had no access to the fjords at all.[73] This further confirms that the term "general population" as mentioned in S. 6 in no way was meant to include people living outside of Finnmark.

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70. Letter to the editors of several northern Norwegian newspapers: "Kaste perler for svin" (Casting pearls for swine), dated 12 January 2004. He actually writes about Finnmark and Troms, but the two northernmost districts in Nordlandenes County were not a part of Finmarken County until 1787 (Cf. Jf. Bottolfsen 1990, p. 29). This is one of the reasons why the Land Acquisition Decree is only relevant for the present day Finnmark County.
71. Niemi 1983, p. 23.
72. Danish text, section 9e: "De Herligheder som henhøre til Pladsen, som Fiskerie enten i salt eller fersk Vand, Skovland, Landingsstæder, Rettighed til Drivtømmer,Eg eller Dunvær, Kaabbe eller Oter-Veide, Rensmosse med fleere, anføres under Pladsens Beskrivelse." "The easement that belongs to place, as fisheries either in salt or fresh water, woodland, landing places [for boats], right to driftwood, eggs or down, seal or otter trapping places, reindeer lichen, etc., should appear in the site's description." Cf. Tønnesen 1979, p. 395.
73. Cf. Forordning om den Finnmarkske Taxt og Handel, 20 August 1778, Section 32, excerpt: "… paa Indfjordene maa de ikke opholde dem, eller sætte Garn, hvor landets allmue har sine Linesætninger." English translation: "… they shall not be entitled to come into the fjords, or put their nets where the locals have their long-line localities." See Schou 1795, p. 93.

It seems obvious that if in 1775 the king had used the term "general population" in section 6 of the Land Acquisition Decree to mean the waters in Finnmark should be equally accessible to all fishermen in Denmark-Norway, it would have made no sense to create regulations which were completely against that principle only three years later.

To conclude: Section 6 was not meant to allow general permission for everyone to fish wherever and however they wanted, but rather to uphold legal protection for the fishing privileges of the people of Finnmark as a whole, or most likely for local communities in their traditional waters. To provide a sustainable economy and proper living conditions in this northernmost part of the Danish realm, the local and regional resources had to be reserved first and foremost for those who lived in the area. Additionally, it also looks as if the sea-fishing regulations and privileges of 1775 settled in section 6 were in recognition of, and codification to preserve, the actual customary fishery rights as pursued by the people of Finnmark at that time.

5. Concluding remarks

Section 6 is the only measure from the Royal Decree of 1775 still in force as Norwegian statutory law. The author of this article is well aware of the fact that subsequent legislation has contained elements which many today claim to have overturned the provisions from 1775. But still it is in force, stating that people living in Finnmark have the prerogative to fish in the marine waters outside their County.

The provisions and main objective of the Lapp Codicil of 1751 – securing the future of the Sámi nation – cannot be ignored. In line with Norway's high standards on human and indigenous rights, it would be more than appropriate to conduct an evaluation of how the Lapp Codicil pertains to the sea-fishing rights of the coastal Sámi today.

Concerning such an evaluation related to the *rights* of the coastal Sámi to preserve their ancient right to fish in the sea in their traditional waters, the United Nations Declaration on the Rights of Indigenous Peoples is also pertinent.[74] The Declaration outlines the obligations of the states to secure the rights of indigenous peoples according to earlier agreements. One important concretization is to be found in Article 37:

> 1. Indigenous peoples have the right to the recognition, observance and enforcement of Treaties, Agreements and Other Constructive Arrangements concluded

74. Adopted by the General Assembly on 13 September 2007.

> with States or their successors and to have States honour and respect such Treaties, Agreements and other Constructive Arrangements.
>
> 2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

It could be objected that this article *formally* (only) covers treaties *between* states and indigenous peoples. But article 37 is more comprehensive than that, something which is quite obvious when looking at the preparatory work for the UN Declaration on Indigenous rights. During that process, a few reports were submitted on *Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations*, by the special rapporteur, Mr. Miguel Alfonso Martinez. In his first progress report from 1993, he also focused on the Lapp Codicil. According to the information he had available, the Codicil "… did not grant the Sami any new rights but attempted to secure existing rights on both sides of the frontier." Further, with reference to the Sámi Parliament, he recalled some of the main elements of the Codicil – among others the right of the Sámi, in accordance with old tradition, to cross the borders with their reindeer, to use land and shores on the same terms as the citizens of the neighbouring country, including the right to fish and hunt, and neutrality in case of war, etc.[75] In his final report, concerning bilateral and multilateral treaties binding non-indigenous powers, but affecting indigenous peoples as third parties, he writes that more time had been needed to go deeper into the subject.

In any event, the rapporteur had no doubt about the relevance of the Codicil:

> Nonetheless, clearly at least one instrument already considered in the first progress report … continues to be relevant, namely the so-called Lapp codicil of the 1751 border treaty between Sweden/Finland and Norway/Denmark. This codicil has never been abrogated and continues to be the object of legal interpretation regarding Saami rights within the context of bilateral (Sweden/Norway) negotiations.[76]

Furthermore he emphasized the role of the Sámi Parliaments both in Norway and Sweden:

> "… especially in Norway where it seems to have a stronger impact than in Sweden – and their potential contribution to the interpretation of the codicil."

75. Martinez 1993, p. 60, sections 367–369.

76. That was a common opinion about 20 years ago when Martinez wrote his first report, but as shown above, a new clarification today must include broader perspectives concerning the rights of the Sámi people as a whole.

And concerning the ten treaties affecting indigenous peoples as third parties, which he had examined, and whether they might continue to be relevant:

> … insofar as they remain in force and that Indigenous peoples already have – or may have in the future – a participation in the implementation of their provisions, apart from the Lapp codicil, several others would warrant further scrutiny …[77]

It simply means that in the opinion of the special rapporteur, the indigenous people, in this case the Sámi, have a formal role concerning the implementation of the Codicil. At the very least these remarks represent a call for Norwegian authorities, in cooperation with the Sámi Parliament, to make an inquiry as to whether regulations from the Lapp Codicil of 1751 are relevant to the coastal Sámi today – aiming in fact as they obviously intended, to preserve the entire Sámi nation.[78]

Concerning the decree from 1775, later legislation, the first taking place in 1830, has principally put all inhabitants of Norway on equal footing in terms of sea fisheries in Finnmark.[79] Still, section 6 of the Decree from 1775 has never been set aside. And as shown above, the most apparent meaning of it was to secure the sea-fishing rights of the local sea-based communities in Finnmark at that time.

In that connection, Otto Jebens writes that even though fishermen from everywhere in Norway were granted equal access in 1830, the lawmakers had no motive to change the conditions in which special rights were based on property law. His presumption therefore is that the act of 1830 did not alter special rights based on local legal grounds.[80] He also mentions Article 105 of the Constitution, which ensures that compensation be paid when private property is expropriated, and that the principle mentioned is also valid in matters relating to ancient rights of use. He even claims that all legal provisions which seriously diminish the opportunity for the holders of the right to enjoy their rights, would be to contravene the provisions of Article 105 of the Norwegian Constitution. Conclusively he states that there are strong reasons to assume that the right to sea fisheries on the local level in Finnmark still remains the same as it was in 1775.[81]

Following on from this statement by Otto Jebens, one then must ask: Are the coastal Sámi fully included or covered by the new Norwegian Sámi policy settled in the Constitution, section 110 A, and other acts, conventions and international instruments aimed at securing a safe future for the Sámi culture in Norway? The

77. Martinez 1997, sections 47–49, 52.
78. That could also be a part of the process going on right now, to form a Nordic Sámi Convention.
79. Act: Lov om Fiskerierne i Finmarken eller Vest- og Øst-Finmarkens Fogderier. 13 September 1830. In Vogt 1838, pp. 228 ff. See also Bull 2011, pp. 31 ff.
80. Jebens 2007, p. 264.
81. Jebens 2007, p. 267.

importance of addressing and clarifying this question for the coastal Sámi is now more than obvious, as a consequence of what came up, or more accurately what did not come up, in the consultations held after the report from the Coastal Fishing Committee was published.

In his capacity as advisor to the Government, the Attorney General has remained completely silent on the significance of the Lapp Codicil, the Land Acquisition Decree, and the United Nations Declaration on the Rights of Indigenous Peoples.

But in the final analysis, the ultimate responsibility for all aspects of this matter belongs to the Norwegian Government, and in last instance, the Parliament of Norway. Any misstep or omission concerning this complex issue, with its many powerful stakeholders, could seriously jeopardize Norway´s international credibility concerning the safeguarding of indigenous rights. On the other hand, proactive and positive leadership can set the standard for other nations, and ensure Norway's excellent reputation well into the future.

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Прибрежные саами Норвегии и право на традиционный образ жизни

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Аннотация

Жизнеобеспечение прибрежных саамов Норвегии в течение тысяч лет, задолго до основания Норвежского государства, было основано на использовании широкого спектра морских и наземных ресурсов. В силу государственного регулирования за последние десятилетия стало трудно продолжать вести традиционный образ жизни в сочетании с выловом рыбы в прибрежных морских водах и ведением хозяйства или других видов деятельности. Квоты на вылов рыбы теперь стали предметом торга, и тем самым в значительной степени находятся в руках других – проживающих за пределами местных поселков. В данной статье представлено краткое историческое описание и обсуждаются две старинные правовые основы права на прибрежный промысел в губернии Финнмарк - самого северного округа в Норвегии. Первый документ – т.н. кодисиль лапланцев, или саами, принятый в 1751 г., который можно с определенной натяжкой использовать при определении правовых интересов прибрежных саами, с учетом основополагающих принципов сохранения «лопарей» (народа саами). Другой документ – это Указ о приобретении земли 1775 г., в который вошли определения прав морского рыболовства права жителей, проживающих в губернии Финнмарк.

Ключевые слова:

Прибрежные саами, Финнмарк, использование с давних времен, право на вылов рыбы в море, кодисиль лапланцев (1751), Указ о приобретении земли (1775), Декларация ООН по правам коренных народов.