

***Mare Nullius* or *Mare Suum*? Using Ethnography to Debate Rights to Marine Resources in Coastal Sámi Communities of Troms**

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Abstract

While legal progress on indigenous land claims has recently been fostered around the globe, sea claims still lag behind. Since the beginning of colonization, the doctrine of *mare nullius* declared seas vacant of indigenous tenure or authority and led to the establishment of sovereign State jurisdiction over offshore areas, and more recently to the characterization of the living resources in these waters as accessible for each State's citizens. In Norway, colonialism was not characterized by transoceanic settlement. The concept of establishing sovereignty in offshore areas attached to the land, however, had the same basis as the European colonies in America or Oceania. In this context, the acknowledgment of the marine living resources in the waters attached to the land as common goods for all Norwegian citizens adversely affected the Coastal Sámi indigenous peoples, who exclusively and since time immemorial managed the wild marine living resources based on customary systems of marine tenure. Additionally, due to increased regulations over the past few decades, it has become difficult for the Coastal Sámi to continue their traditional way of living. Still, legislation and recommendations on indigenous participation in marine resource management exist and derive from both Norwegian and international law. However, despite the established legal framework, Coastal Sámi participation in marine resource management is often questioned. It has been argued that the most appropriate way to ensure indigenous inclusion in marine resource management is to look at the reverse side of the coin, exploring indigenous tenure, legal traditions and knowledge, and accommodate them within State law. This project aims, through ethnographic fieldwork and literature analysis, to discuss the current status of Coastal Sámi fisheries in the communities of Troms County, and illustrate local conceptions of marine resource management among the project participants.

1 Introductory Remarks

The Coastal Sámi (or Sea-Sámi)¹ have historically inhabited the coastal fjord areas of Northern Norway, with the majority of them living in Finnmark and Troms (*Finnmárku* and *Romsa* respectively in Northern Sámi) Counties.² Settlements in these areas date back approximately 10,000 years, while the origins of the Sámi people can be traced to an era when the first distinct ethnic groups in Northern Fennoscandia³ emerged.⁴ The Coastal Sámi have traditionally relied on subsistence activities such as fishing, hunting, farming and gathering.⁵ As a result of the Norwegianization process⁶ which lasted more than 100 years, the Coastal Sámi culture has been negatively impacted.⁷ Next to that, during the last three decades it has become rather difficult for the Coastal Sámi to continue their traditional livelihood, combining fisheries in the local fjords and other activities in the land.⁸ The dawning of this reality was the ecological crisis in Barents' cod stocks that led to profound changes in the State's fisheries policy which strongly impacted small-scale fisheries.⁹

To date, legislation for indigenous participation in resource management processes, as well as provisions that ensure cultural and property rights for the Coastal Sámi exist and are grounded in both Norwegian and international law.¹⁰ However, Norway's policy with regards to Sámi fisheries has been strongly questioned both by scholars¹¹ and international human rights bodies.¹² One effective way to secure indigenous and

¹ *Sjøsamer* in Norwegian.

² Angelika Lätsch, 'Coastal Sami revitalization and rights claims in Finnmark (North Norway) - two aspects of one issue? Preliminary observations from the field' (2012) 18 *Fávllis. Innblikk i et forskningsprosjekt om lokal fjordkunnskap* 60, 63.

³ Fennoscandia (Finnish: Fennoskandia; Swedish: Fennoskandien; Norwegian: Fennoskandia; Russian: Фенноскандия *Fennoskandiya*) or the Fennoscandian Peninsula is defined as the geographical peninsula comprising the Scandinavian Peninsula, Finland, Karelia, and the Kola Peninsula. The northern parts of Fennoscandia belong to the Sápmi, the cultural region traditionally inhabited by the Sámi people; see Charlotte Damm and Lars Forsberg, 'Contacts in Northern Fennoscandia' in Vicki Cummings and others (eds), *The Oxford Handbook of the Archaeology and Anthropology of Hunter-Gatherers* (Oxford University Press 2014) 838.

⁴ Steinar Pedersen, 'The Coastal Sámi of Norway and their rights to traditional marine livelihood' (2012) 3(1) *Arctic Review on Law and Politics* 51, 51-52.

⁵ Lars I Hansen, 'Sámi Fisheries in the Pre-modern Era: Household Sustenance and Market Relations' (2006) 23(1) *Acta Borealia* 56, 59.

⁶ Norwegianization is defined by Steinar Pedersen as 'the 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 Pedersen (n 4) 55.

⁷ Lätsch (n 2) 60-61.

⁸ Pedersen (n 4) 53-54.

⁹ See section 3.4

¹⁰ For an analysis of the cultural, property and procedural rights of the Sámi people to fisheries; see Susann Funderud Skogvang, 'Local community right to fish: A Sámi perspective' in Christina Allard and Susann Funderud Skogvang (eds), *Indigenous Rights in Scandinavia* (Routledge UK 2017) 127-140.

¹¹ *ibid* 127; Carsten Smith, 'Fisheries in coastal Sámi areas: Geopolitical concerns?' (2014) 5(1) *Arctic Review on Law and Politics* 4, 9.

¹² See, for instance, UN Committee on the Elimination of Racial Discrimination, 'Concluding observations on the combined twenty-third and twenty-fourth periodic reports of Norway' (2019) UN Doc CERD/C/NOR/CO/23-24,

local participation and inclusion in models of ocean planning and marine resource management is to explore indigenous systems of tenure, traditional knowledge and legal orders,¹³ and integrate them into the national legal order.¹⁴

Accordingly, this project attempts, through a case study from Troms County in Northern Norway, to discuss the current status of Coastal Sámi fisheries in the region and conceptualize a local understanding of marine resource management. For this purpose, aside from doctrinal analysis which is widely used in projects relevant to law and resource management, ethnographic research tools were used as additional methods of inquiry, guided by literature that stems from the field of indigenous studies. Fieldwork in Troms was considered a necessary part of this endeavor. The author interviewed Coastal Sámi individuals to ascertain their level of awareness regarding their Indigenous rights vis-à-vis the Norwegian State. In addition to the interviews, participant observation in Coastal Sámi marine activities attempted to shed light on a Sámi system of customary marine tenure as well as the legal traditions embedded in it. The theoretical framework of this study, the project's background, and the results of the fieldwork are elaborated in the sections that follow.

paras 21(d), 22(e); UNCHR 'Report of the Special Rapporteur on the rights of indigenous peoples' (2011) UN Doc A/HRC/18/35/Add.2 para 81; UN Economic and Social Council 'Permanent Forum on Indigenous Issues' (2010) UN Doc E/2010/43-E/C.19/2010/15, para 118.

¹³ Val Napoleon defines indigenous legal orders as "*law that is embedded in social, political, economic, and spiritual institutions of indigenous peoples,*" distinguishing them from state-centered legal systems; see Val Napoleon, 'Thinking About Indigenous Legal Orders' in René Provost and Colleen Sheppard (eds), *Dialogues on Human Rights and Legal Pluralism* (Springer Dordrecht 2013) 231.

¹⁴ Georgia Lloyd-Smith, *An Ocean of Opportunity: Co-Governance in Marine Protected Areas in Canada* (West Coast Environmental Law 2017) 3; Michael Christie, 'Generative and 'Ground-Up' Research in Aboriginal Australia' (2013) 13 *Learning Communities* 3, 3-4; Kenneth Ruddle and others, 'Marine Resources Management in the Context of Customary Tenure' (1992) 7(4) *Marine Resource Economics* 249, 249-273; Skogvang (n 10) 140.

2 Theoretical Framework

Western societies have historically been structured on the principle that only recognized Nation-States are subjects of international law,¹⁵ while individuals are subjects of rights, particularly rights related to the concept of private property¹⁶ leaving indigenous conceptions of law out of this dichotomy.¹⁷ In these terms, the occupation of indigenous territories constituted a legitimate means of acquisition of sovereignty, wherein indigenous territories were treated as *terra nullius*;¹⁸ similarly, the waters attached to them were treated as *mare nullius*.¹⁹ Since the establishment of the United Nations Convention on the Law of the Sea (UNCLOS) in 1982²⁰ an extensive international legal framework concerning the world's oceans and marine resources has been formulated, including numerous national, regional and local agreements. While, international law prioritizes addressing and regulating relations among States, the crystallization of State sovereignty²¹ over territorial seas²² and internal waters²³ provided by UNCLOS significantly affected the lives of indigenous and local coastal communities, securing States' right to exclusively control these areas²⁴ for protective purposes²⁵ and for the exploitation of natural resources.²⁶ In UNCLOS there is no concrete definition provided for marine living resource management. However, based on UNCLOS, States have established their own fisheries policies and regulated the management of the marine living resources

¹⁵ The Peace of Westphalia (1648), which ended the Thirty Years' War is considered the dawning of modern international law and fostered the concept of State Sovereignty; see Andreas Osiander, 'Sovereignty, International Relations, and the Westphalian Myth' (2001) 55(2) *International Organization* 251, 251-287; Jonas Perrin, 'Legal Pluralism as a Method of Interpretation: A Methodological Approach to Decolonising Indigenous Peoples' Land Rights under International Law' (2017) XV(26) *Universitas* 23, 26.

¹⁶ Arturo Escobar, 'Latin America at a Crossroads' (2010) 24(1) *Cultural Studies* 1, 34;

¹⁷ James S Anaya, *Indigenous Peoples in International Law* (Oxford University Press 2004) 20.

¹⁸ *ibid* 29;

¹⁹ Monica E Mulrennan and Colin H Scott, 'Mare Nullius: Indigenous Rights in Saltwater Environments' (2000) 31(1) *Development and Change* 681, 682.

²⁰ Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

²¹ Sovereignty can be defined as the authority to govern a State or a State that is self-governing; See 'Sovereignty' (*Webster's New World Law Dictionary*, 2010) <<http://law.yourdictionary.com/sovereignty>> accessed 14 August 2019.

²² Territorial sea is defined by UNCLOS as the belt of coastal waters, extending at most 12 nautical miles (22.2 km; 13.8 mi) from the baseline (usually the average low-water mark) of a coastal State; see UNCLOS (n 20) art 3.

²³ *ibid* art 2 para 1; for the case study of the Coastal Sámi who have been traditionally fishing predominantly inside the fjords, which Norway considers its internal waters, the crystallization of the State's sovereignty over internal waters is more pertinent.

²⁴ Including the air space over it as well as the seabed and subsoil; *ibid* art 2 para 2.

²⁵ Part XII of UNCLOS is expressly dedicated to the protection and preservation of the marine environment.

²⁶ UNCLOS (n 20) art 192 and 193; the desire of coastal States to project sovereignty from lands towards the sea has been demonstrated in historical disputes long before the establishment of UNCLOS; see, for instance, the Bering Fur Seals Arbitration; *Bering Sea (Fur Seal) Arbitration (1893)* 1 Moore Intl Arbitrations 755.

accordingly.²⁷ In Norway, this is based on article 1 of the Marine Resource Act²⁸ which provides that the scope of marine living resource management is to ‘ensure sustainable²⁹ and economically profitable management of wild living marine resources³⁰ and genetic material derived from them, and to promote employment and settlement in coastal communities.’³¹

Indeed, according to international law, States also have obligations towards indigenous peoples,³² in relation to rights to fish and procedural aspects related to the management of fisheries and traditional knowledge.³³ In this context, indigenous and local participation in marine resource management is currently strongly encouraged.³⁴ However, formalizing indigenous participation is at times insufficient to challenge existing power structures that inhibit indigenous stakeholders from defending their interests in natural resources against those of more powerful State or private actors.³⁵ Participatory rights in Western models of marine resource management have come into existence after settlers established sovereignty over the marine space, usurping the existing indigenous forms of management of marine living resources.³⁶ In order to ensure efficient indigenous and local participation in marine resource management, States need to acknowledge indigenous systems of marine tenure³⁷ and accommodate them within state law.³⁸ The Food and Agriculture Organization of the United Nations argues that participation of small-scale fishing

²⁷ Nele Matz-Lück and Johannes Fuchs, ‘Marine Living Resources’ in Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2017) 493-494; Jon L Jacobson, ‘Managing Marine Living Resources in the Twenty-First Century: The New Level of Ocean Governance?’ in Myron H Nordquist and John N Moore (eds), *Entry into Force of the Law of the Sea Convention* (Martinus Nijhoff Publishers 1994) 311.

²⁸ Lov 2008-06-06 nr 37: Lov om forvaltning av viltlevande marine ressurser (havressurslova).

²⁹ *ibid*, s 7(g); in terms of sustainable management, amongst other principles, the maintenance of the material basis for Sámi culture is also provided in the Marine Resource Act.

³⁰ While UNCLOS does not define living resources, Norwegian domestic law does. According to Section 3 of the Marine Resources Act, wild living resources include ‘fish, marine mammals that spend part or all of their life cycle in the sea, plants and other marine organisms that live in the sea or on or under the seabed and that are not privately owned’.

³¹ Havressurslova (n 28) s 1.

³² See, for instance, Rio Declaration on Environment and Development (adopted June 14, 1992) 31 ILM 874 (Agenda 21) principle 22; Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD) art. 8(j) and 17 para 2.

³³ Skogvang (n 10).

³⁴ Yen-Chiang Chang, *Ocean Governance: A Way Forward* (Springer 2012) 32, 39-40; Robert Costanza, ‘The ecological, economic and social importance of the oceans’ (1999) 31 *Ecological Economics* 199.

³⁵ Tessa Minter and others, ‘Limits to Indigenous Participation: The Agta and the Northern Sierra Madre Natural Park, the Philippines’ (2014) 42(5) *Hum Ecol* 769, 770.

³⁶ *ibid* 777.

³⁷ According to the Food and Agriculture Organization of the United Nations, small-scale fishing communities need to have secure tenure rights to the resources that form the basis for their social and cultural well-being, their livelihoods and their sustainable development; see The Food and Agriculture Organization of the United Nations, *Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication* (FAO Office of Knowledge Exchange, Research and Extension 2015) 5 <www.fao.org/3/a-i4356en.pdf> accessed 14 August 2019.

³⁸ There are certain places where indigenous tenure systems have been acknowledged and integrated within the State’s fisheries policy; examples of such policies are prominent in Melanesia; see Ruddle and others (n 14) 266.

communities, including indigenous peoples should be active, free, effective, meaningful, informed, and strongly grounded in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).³⁹ In doing so it suggests that co-management systems should be deployed, incorporating characteristics that explicitly enable the propagation of indigenous traditions, knowledge and practices concerning the management of marine resources within a system that has been dominated by a Sovereign State.⁴⁰ While the Norwegian government has stated that its Sámi policy is aligned with the goals of UNDRIP,⁴¹ in practice indigenous and local participation in the existing resource management processes has been minimal.⁴²

Interestingly, indigenous peoples do not usually differentiate between land, coast and seas as separate estates, but conceive them as complementary domains, part of an environmental whole to which humans are connected and of which they are a part.⁴³ Starting from that point, it is worth mentioning that in Northern Sámi (*davvisámegiella*), the most common of all Sámi languages,⁴⁴ both overall and among this project's participants, there is no traditional word equivalent to the term 'marine resource management', at least in the sense in which it is used in Western legal systems. The term *ressursahálddašeammi* is the contemporary Sámi term for 'resource management', however, etymologically it originates from the Norwegian word *ressursforvaltning* which means the same.⁴⁵ A traditional Sámi understanding for natural resource management could stem from the dichotomy that Barbara Helen Miller sketches through her research with Coastal Sámi communities in the municipality of Porsanger in Finnmark County.⁴⁶ She explains that traditionally, in the Sámi ontological world, two different terms refer to nature: *luondu* and *meahcci*.⁴⁷ The first is used to describe human nature, the nature of a landscape, or the nature of the sea.⁴⁸ The term *meahcci*

³⁹ FAO (n 37) para 3.6; Declaration on the Rights of Indigenous Peoples (adopted 2 October 2007), UNGA Res 61/295 (UNDRIP).

⁴⁰ FAO (n 37) paras 5.15 and 5.18; see also Melissa Nursey-Bray and Chris Jakobsson, 'Which way? The contribution of Indigenous marine governance' (2014) 6(1) Australian Journal of Maritime and Ocean Affairs 27, 29; Miguel González, 'Governance and governability: indigenous small-scale fisheries and autonomy in coastal Nicaragua' (2018) 17 Maritime Studies 263, 271.

⁴¹ Kommunal- og moderniseringsdepartementet, *Report on Convention no 169 concerning indigenous and tribal peoples – 2008* (Oslo 2008) <<https://www.regjeringen.no/no/tema/urfolk-og-minoriteter/urfolkryddemappe/report-on-convention-no-169-concerning-i/id548646/>> accessed 14 August 2019.

⁴² Jan Å Riseth, 'Can Traditional Knowledge Play a Significant Role in Nature Management? Reflections on Institutional Challenges for the Sami in Norway' in Jelena Porsanger and Gunvor Guttorm (eds), *Working with Traditional Knowledge: Communities, Institutions, Information Systems, Law and Ethics. Writings from the Árbiediehtu Project on Sami Traditional Knowledge* (Nordisk samisk institutt 2011) 154.

⁴³ Nursey-Bray and Jakobsson (n 40) 27; Ruddle and others (n 14) 251; Mulrennan and Scott (n 19); these sources do not refer specifically to Sámi people. However, one of the project's Coastal Sámi participants made statements in line with the concept that these sources describe.

⁴⁴ David M Eberhard and others, 'North Saami' (*Ethnologue*, 2019) <www.ethnologue.com/18/language/sme/> accessed 14 August 2019.

⁴⁵ 'Ressursforvaltning' (*Neahttagisámit*) <<http://sanit.oahpa.no/nob/sme/>> accessed 14 August 2019.

⁴⁶ Barbara H Miller, 'Dynamics of Naming: Examples from Porsanger' in Barbara H Miller (ed), *Idioms of Sámi Health and Healing* (University of Alberta Press 2015).

⁴⁷ *ibid* 79.

⁴⁸ *ibid*.

defines the resources that nature includes, as well as the materials used for sustenance.⁴⁹ Taking into account the two different conceptions of resource management, between the State's understanding relevant to 'sustainable and economically profitable management' and the Sámi's conception of 'use for sustenance', this article is developed within the conceptual framework of legal pluralism.⁵⁰ By focusing on illustrating a Coastal Sámi perspective of marine resource management from the bottom-up, the participants of this project were asked to freely define their personal conception of the 'marine space' and determine the 'management of its resources' in a way that they consider appropriate and suitable for their personal views and their own values. The results of this endeavor are illustrated in the sections that follow.

⁴⁹ *ibid.*

⁵⁰ 'Legal pluralism refers to the idea that in any one geographical space defined by the conventional boundaries of a nation state, there is more than one law or legal system'; see Margaret Davies, 'Legal Pluralism' in Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2012).

3 Access to Marine Living Resources in Coastal Sámi Communities: From Exclusivity to Participation, and from Participation to Indigenous Claims

The fundamental principle for the management of the marine living resources in Norway⁵¹ is that marine resources and territories can be accessed by for every resident equally.⁵² However, this policy has not always been aligned with the traditional understanding of the local populations of the Northern Norwegian fjords. This section provides the background of this project through a retrospective view of the evolution of the concept of ‘marine resource management’ in Coastal Sámi communities from the precolonial years to present, sketching also the legal and political framework under which Coastal Sámi currently participate in decision-making processes concerning the marine space and the management of its resources. Initially, a traditional concept of exclusive access to marine resources based on customary tenure⁵³ is described, as well as its evolution over the course of time in relation to State’s regulations. The recent discourse on the recognition of Sámi rights to fisheries is also presented along with the primary issues facing the Coastal Sámi communities in Northern Norway.

3.1 A Traditional Understanding of Marine Resource Management

Although indigenous homelands and seas present noticeable physiographic and environmental contrasts, there is none the less a strong basis for instructive comparison among coastal indigenous communities across the world.⁵⁴ They have deep cultural attachments to the coastal and marine environment.⁵⁵ They also have historical involvement in the commercial utilization of faunal resources that continues to this day, managing the marine space in a way defined by local tenure systems based on their traditions and knowledge.⁵⁶ Similarly, the Coastal Sámi people have been historically attached to the coastal and marine environment, traditionally relying on subsistence activities at the local level.⁵⁷ According to Ivar Bjørklund,

⁵¹ The term ‘common pool’ is widely used by scholars to declare the free access to marine resources; in these terms no individual, group, or community could claim exclusivity over marine resources; see Svein Jentoft, ‘Governing tenure in Norwegian and Sámi small-scale fisheries: from common pool to common property?’ (2013) 1 Land Tenure Journal 91, 94.

⁵² *ibid* 92.

⁵³ Philip D Townsley and others, ‘Customary Marine Tenure in the South Pacific : the uses and challenges of mapping’ (1997) 30 PLA Notes 36, 36.

⁵⁴ Mulrennan and Scott (n 19) 683;

⁵⁵ *ibid*.

⁵⁶ González (n 40) 265; Gregory Bennett, ‘Customary marine tenure and contemporary resource management in Solomon Islands’ (Proceedings of the 12th International Coral Reef Symposium, Cairns, July 2012) <www.icrs2012.com/proceedings/manuscripts/ICRS2012_22A_3.pdf> accessed 14 August 2019; David Hyndman, ‘Sea tenure and the management of living marine resources in Papua New Guinea’ (1993) 16(4) Pacific Studies 99, 99-114.

⁵⁷ Hansen (n 5) 59.

studies in the 1920s and 1930s showed how coastal peoples on Spildra in Kvænangen fjord and in neighboring communities of Troms County were still using an ancient marine tenure system based on traditional ecological knowledge such as sea currents, climatic factors, fish migration, spawning grounds and habitation.⁵⁸ Most of these fishers were Coastal Sámi, who were the majority of the population in the Northern Norwegian fjords at the time.⁵⁹ This system that the inhabitants of Kvænangen had developed was the *mea*⁶⁰ (*vihtat* in Northern Sámi).⁶¹ There were two purposes of *mea*: it was used as a topographic coordinator for the local fishers in order to navigate in the fjord and determine the exact spot to fish;⁶² it was also used to regulate specific fishing areas for each household, delimiting the individual area for access to marine resources and navigation in the fjord.⁶³ Therefore, in addition to the topographic and navigational value that *mea* offers, a legal dimension can be identified since the delimitation of individual areas for exclusive use of marine resources can be interpreted as an indigenous tradition that reveals law and indicates the establishment of a sense of ownership over marine resources.⁶⁴ It has been generally accepted that tenure systems around the world define and regulate how people, communities and others gain access to natural resources.⁶⁵ The perception of exclusivity over the marine living resources for the inhabitants of the coastal communities cannot be translated into contemporary property concepts, but reveals a local and indigenous understanding of access to resources consolidated through centuries of continuous use.⁶⁶ Bjørklund further mentions that breaches of this system by fishing in a territory used by other households meant the stigmatization of the fisher within the community.⁶⁷ Similarly the fact that the local fishers were morally sanctioned for breaches of these coordinates is difficult to place within the contemporary understanding of breaches of property rights.

⁵⁸ Ivar Bjørklund, 'Property in common, common property or private property: Norwegian fishery management in a Sami coastal area' (1991) 3(1) North Atlantic Studies 41, 43.

⁵⁹ *ibid* 42; Hansen (n 5) 59.

⁶⁰ In the Norwegian language *mea* refers to a specific *me* which is the general term that loosely translates to landmark.

⁶¹ The term can be also referred to as *vihtan* in other regions; see Ivar Bjørklund and Einar Eythórsson, *Fiske, fangst og tradisjonell kunnskap i indre Varanger* (Tromsø museum - Universitetsmuseet 2010) 117.

⁶² Bjørklund (n 58) 44.

⁶³ *ibid*.

⁶⁴ Bjørklund (n 58) 43.

⁶⁵ FAO, *Voluntary Guidelines on the Responsible Governance of Tenure: At a glance* (FAO Office of Knowledge Exchange, Research and Extension 2012) <www.fao.org/3/a-i3016e.pdf> accessed 14 August 2019.

⁶⁶ Sandra Pannell, 'Homo Nullius or 'Where Have All the People Gone'? Refiguring Marine Management and Conservation Approaches' (1996) 7(1) The Australian Journal of Anthropology 21, 25.

⁶⁷ Bjørklund (n 58) 44.

3.2 Early Stages of Colonialism in Sápmi

From the seventeenth century onward, the establishment of sovereignty over lands and seas and the creation of sovereign States, progressively eclipsed customary marine rights among local and indigenous populations.⁶⁸ This process was further extended throughout the world through the process of colonization.⁶⁹ According to Sharp, the free access to navigate the high seas for imperial endeavors and the need to exclude others from coastal waters gradually eroded the pre-existing indigenous systems of marine tenure.⁷⁰ In the case of Norway, colonialism was not a transoceanic endeavor. However, the concept of establishing sovereignty in offshore areas attached to the land had the same basis; that is to say the assumption that the sea bordering the fjords was *Mare Nullius*,⁷¹ and that the State could disregard the pre-existing populations in these areas and their legal traditions. Through the establishment of sovereignty over the marine space, the marine resources of that space became equally accessible to any citizen of Norway, as a common good of the State's population.⁷² Since at least 1830,⁷³ the 'common access' principle has been explicitly established in State law.⁷⁴ This principle is still pertinent to marine living resources,⁷⁵ overlapping with the traditional conception of exclusive use of marine resources for the local population, which for many years prevailed in the fjords.⁷⁶ This principle means that nobody can claim exclusive rights over marine resources, or deny others from enjoying them.⁷⁷ The 'common access' concept was gradually consolidated, supplanting traditional forms of marine tenure.⁷⁸ However, for a long time this was not an issue for the Coastal Sámi nor the other local fishers as there was an abundance of available fish stocks.⁷⁹

⁶⁸ Townsley and others (n 53).

⁶⁹ Nonie Sharp, *Reimagining Sea Space in History and Contemporary Life: Pulling Up Some Old Anchors* (North Australia Research Unit 1996) 12.

⁷⁰ *ibid*; see also Townsley and others (n 53).

⁷¹ Mulrennan and Scott (n 19) 681.

⁷² Bjørklund (n 58) 44.

⁷³ The Act of 1830 in principle put all inhabitants of Norway on equal footing in terms of sea fisheries in Finnmark; see *Lov om Fiskerierne i Finmarken eller Vest- og Øst-Finmarkens Fogderier* av 13 September 1830.

⁷⁴ '*Allemannsrett*' is the Norwegian legal term, literally translating to 'universal right'; Peter Ørebeck, *Om allemannsrettigheter* (Osmundssons forl. Oslo 1991).

⁷⁵ Peter Ørebeck, 'Hvem eier fisket i de hålogalandske ytre allmenninger?' (2006) 45(6) *Lov og Rett* 345, 360.

⁷⁶ Bjørklund (n 58) 44.

⁷⁷ Jentoft (n 51) 92.

⁷⁸ For instance, in the 1750s Coastal Sámi fishers often complained to State authorities that Sámi reindeer herders were fishing in their fjords, showing that there was a clear perception of exclusivity over the marine resources they exploited; see Bjørklund (n 58) 43.

⁷⁹ Else G Broderstad and Einar Eythórsson, 'Resilient communities? Collapse and recovery of a social-ecological system in Arctic Norway' (2014) 19(3) *Ecology and Society* <www.ecologyandsociety.org/vol19/iss3/art1/> accessed 14 August 2019.

3.3 Coastal Sámi Fisheries in the 20th Century

Since the end of the 19th century, industrial development led to the advent of advanced fishing technologies and an increased number of participants in the fisheries sector, influencing Norway's fisheries management policy.⁸⁰ As Bjørg Evjen observed, a large percentage of the Coastal Sámi population participated in these industrialization processes.⁸¹ Since that time, and throughout the entire 20th century, intense efforts by the people living in the fjords took place in order to protect local fishery resources from over-exploitation by outsiders using mobile fishing gear.⁸² However, local systems of marine resource management were not strongly impacted until the end of World War II, when industrial development in fisheries intensified in Norway,⁸³ and small-scale fisheries were gradually marginalized, being perceived as old-fashioned and less profitable.⁸⁴ Next to that, the Norwegianization policy (*fornorskingspolitikk* in Norwegian)⁸⁵ that the Sámi had already been subject to since the 19th century⁸⁶ undermined the Sámi characteristics in coastal communities, rendering the Coastal Sámi invisible as a distinct group in many regions.⁸⁷ In this era there was a social stigma attached to the Sámi identity,⁸⁸ which was associated with backwardness and poverty, diametrically opposed to the Norwegian identity.⁸⁹ In the years following World War II, the majority of the Sámi population continued to live in coastal areas.⁹⁰ However, as Eythórsson and Bjørklund describe, the stigma associated with the Sámi identity led many Coastal Sámi individuals to give in to the Norwegian assimilation policy and in the post-war census classify themselves as Norwegians.⁹¹ The same taboos around the Sámi identity also existed within the Norwegian Fishermen's

⁸⁰ Camilla Brattland, 'Mapping Rights in Coastal Sami Seascapes' (2010) 1(1) *Arctic Review on Law and Politics* 28, 37.

⁸¹ Bjørg Evjen, 'A Sea-Sámi's story. From fishing-farmer to miner, from "Sea-Sámi" to "Norwegian"?' (Forum Conference: Aspects of Migration and Urbanization, Tromsø 2007) 43-44.

⁸² Pedersen (n 4) 53.

⁸³ Camilla Brattland, 'A cybernetic future for small-scale fisheries' (2014) 13(18) *Maritime Studies* 1, 3.

⁸⁴ Bjørklund (n 58) 44.

⁸⁵ Susann Funderud Skogvang, 'fornorskingspolitikk', *Store Norske Leksikon* (2018) <<https://snl.no/fornorskingspolitikk>> accessed 14 August 2019.

⁸⁶ The policy of Norwegianization, took place between 1850 up to roughly 1980; Henry Minde, 'Assimilation of the Sami - Implementation and Consequences' (2005) 3(1) *gáldu čála – journal of indigenous peoples rights* 1, 6.

⁸⁷ Einar Eythórsson, 'The Coastal Sami: a 'Pariah Caste' of the Norwegian Fisheries? A Reflection on Ethnicity and Power in Norwegian Resource Management' in Svein Jentoft and others (eds), *Indigenous Peoples Resource Management and Global Rights* (Eburon Publishers Delft 2003) 151.

⁸⁸ Harald Eidheim describes the issues of ethnic identity in Norway after WWII; Sámi identity was strongly associated with social stigma or taboo stereotypes; see Harald Eidheim, 'When ethnic identity is a social stigma' in Thomas Hylland Eriksen (ed), *Sosialantropologiske grunntekster* (Ad Notam Gyldendal 1996) 281-291.

⁸⁹ Eythórsson (n 87) 151.

⁹⁰ Oystein Steinlien, 'The Sami Law: A Change of Norwegian Government Policy Toward the Sami Minority?' (1989) 9(1) *Canadian Journal of Native Studies* 1, 6.

⁹¹ Eythórsson (n 87) 152, referring to Ivar Bjørklund, *Fjordfolket i Kvænangen : fra samisk samfunn til norsk utkant 1550-1980* (Tromsø Universitetsforlaget 1985).

Association,⁹² which gained significant importance at this time as the main legitimate representative of all fishers irrespective of scale and geography; the Sámi voice within the Norwegian Fishermen's Association was marginalized.⁹³

However, in conjunction with the suppression of the Coastal Sámi as a distinct cultural group in Northern Norwegian fjords, the State recognized in 1951 the fact that the local inhabitants of Finnmark County (including also some fjords of Troms and Nordland Counties) had a traditional right to fish in the sea, based on customary use.⁹⁴ This was further reinforced by the *Fisheries Case* of 1951 (*Great Britain vs. Norway*).⁹⁵ In the *Fisheries Case*, Norway claimed before the International Court of Justice (ICJ) that the use of Norway's coastal waters was particularly important for the inhabitants of the Northern coastal regions, who had the exclusive right to use the marine resources in this area due to their customary use.⁹⁶ In preparation for the Fisheries Case, Professor Knut Robberstad wrote two legal memoranda asserting Norway's sovereignty over marine resources in Norwegian tidal waters, also documenting the existence of exclusive rights to fisheries for the local coastal populations.⁹⁷ He further described how local courts in Norway made rulings reinforcing fishers' customary exclusive use over fishing grounds as far back as the 1600s until the beginning of 1900s.⁹⁸ Therefore, as the *Fisheries Case* demonstrated, even if the Coastal Sámi culture came to obscurity in the middle of the 20th century, there was an obvious willingness by the State to recognize historical fishing rights among the populations of Northern Norway, whether they were ethnically Norwegian or Sámi fishers.

3.4 Recent Developments in Marine Resource Management in Norway

As a result of the abundance of marine living resources in the waters of the Northern fjords of Norway,⁹⁹ there were relatively few conflicts between the interests of State authorities and local small-scale fisheries concerning access to marine living resources until the late 1980s.¹⁰⁰ This changed due to an ecological crisis

⁹² *Norges Fiskarlag* in Norwegian; An English translation is available at <www.fiskarlaget.no/index.php/english>.

⁹³ Eythórsson (n 87).

⁹⁴ Brattland (n 80) 38.

⁹⁵ *Fisheries (United Kingdom v Norway)* (Judgment) [1951] ICJ Rep 116 <www.icj-cij.org/en/case/5>.

⁹⁶ The Fisheries Case emerged when the United Kingdom sued Norway before the ICJ, asking to rule on the validity of the methods Norway used to delimit its baselines and by extension its territorial sea and sovereignty over fisheries under international law. The Court decided in favor of Norway, arguing that their method of delimitation was consistent with international law.

⁹⁷ Jørn Øyrehaugen Sunde, 'A Geographical, Historical and Legal Perspective on the Right to Fishery in Norwegian Tidal Waters' (2010) 1(1) *Arctic Review on Law and Politics* 108, 110.

⁹⁸ Brattland (n 80) 38.

⁹⁹ Broderstad and Eythórsson (n 79).

¹⁰⁰ Indeed, since the 1950's the local coastal populations of the Northern fjords often protested against the trawlers which had begun to fish in the fjords; Bjørklund (n 58) 41; Brattland (n 80) 37; Kirsti Strøm Bull, *Kystfisket i Finnmark: en rettshistorie* (Oslo: Universitetsforlaget 2011).

in the Barents' cod stocks¹⁰¹ leading the State to implement radical amendments in the national fisheries' policy.¹⁰² The keystone of these policy changes was the introduction of the individual-vessel quota system in 1990, pursuant to which individual transferable quotas follow the vessel when it is sold.¹⁰³ This system favored those fishers with a certain level of income from fisheries in the years preceding the introduction of the system.¹⁰⁴ The consequence of this regulation was the concentration of quotas on fewer vessels, and marked the beginning of a privatization process in the fishing sector.¹⁰⁵ It had a particularly negative impact on the small-scale fisheries of Northern Norway, including the Sámi¹⁰⁶ fishers who characterized this scheme as a violation of their historic and collective right to livelihood and culture.¹⁰⁷ Since then, very few Sámi fishers have qualified for an individual-vessel quota, while the majority has been relegated to the insecure and far less attractive competitive quota.¹⁰⁸

In parallel, the development of aquaculture, which emerged in Northern Norway in the 1980s, posed further challenges to the local and Coastal Sámi fishers.¹⁰⁹ Serious controversies arose due to the development of aquaculture projects within traditional fishing grounds used by the Coastal Sámi,¹¹⁰ as well as concerns related to pollution and ecological threads.¹¹¹ While these developments are inclined towards privatizing the use of marine resources and restricting public access, Article 2 of the current Marine Resources Act continues to reaffirm the principle that the wild living resources belong to the Norwegian society as a whole, giving the Ministry of Fisheries the authority for the sustainable management of this system.¹¹²

¹⁰¹ For a detailed ecological analysis of the cod crisis; see Svein Jentoft, 'Dangling Lines: The Fisheries Crisis and the Future of Coastal Communities: The Norwegian Experience' (1995) 25(2-3) *The Ecologist* 127.

¹⁰² Anita Maurstad, 'To fish or not to fish: Small-scale fishing and changing regulations of the cod fishery in northern Norway' (2000) 59(1) *Human Organization* 37; Brattland (n 80) 32; Broderstad and Eythórsson (n 79); Jentoft (n 51) 94.

¹⁰³ Pedersen (n 4) 53.

¹⁰⁴ Brattland (n 80) 32

¹⁰⁵ Jentoft (n 51) 94.

¹⁰⁶ Brattland (n 80) 32.

¹⁰⁷ Jentoft (n 51) 94.

¹⁰⁸ *ibid* 98; Svein Jentoft and Siri Ulfsdatter Søreng, 'Securing Sustainable Sámi Small-Scale Fisheries in Norway: Implementing the Guidelines' in Svein Jentoft and others (eds), *The Small-Scale Fisheries Guidelines* (Springer 2017) 268.

¹⁰⁹ Bjørklund (n 58) 45.

¹¹⁰ Dorothee Schreiber and Camilla Brattland, 'Comparing indigenous relations with aquaculture in Norway and Canada' in Bjørn Hersoug and others (eds), *Intensive aquaculture and sustainable regional development in the Arctic region – from controversy to dialogue (AquaLog)* (Nofima AS 2017) <<https://brage.bibsys.no/xmlui/handle/11250/2452534>> accessed 14 August 2019.

¹¹¹ The Sámi Parliament, in an open statement in June 2018, highlighted the main dangers that aquafarming has posed to traditional resource management and questioned the standards for development of salmon farming, mentioning major challenges such as salmon lice, fish farm escapes and the risk of salmon diseases to infect wild salmon in rivers located near fish farms; Sámediggi, 'NASCO - Opening statement by the Sámi Parliament of Norway' (12 June 2018) 17/2143 – 10.

¹¹² According to Article 7 of the Marine Resource Act, seven core principles are necessary to ensure sustainable management of wild living marine resources; see Havressurslova (n 28) s 7(a-g).

3.5 Sámi Rights to Fisheries in the Modern Era

At the same time as the cod crisis the new Sámi Parliament began advocating for Coastal Sámi and local small-scale fisheries.¹¹³ This period also saw Norway become the first state to ratify ILO Convention No. 169 on Indigenous and Tribal Peoples.¹¹⁴ As part of the ratification process, the Storting (Norway's Parliament), acknowledged the Sámi people as an indigenous people of Norway in accordance with the statement of coverage of the Convention.¹¹⁵ Under these circumstances the Sámi Parliament soon gained status as a legitimate voice of small-scale fishers¹¹⁶ and joined national interest groups such as the Norwegian Fishermen's Association.¹¹⁷ Additionally, the ratification of ILO 169 provided the framework which eventually led to the Consultation Agreement between the Sámi Parliament and the Norwegian government in 2006¹¹⁸ and led to the Sámi Parliament having significantly greater influence on legislative amendments compared to the past.¹¹⁹

A watershed moment in the debate for Coastal Sámi rights was the report of the Coastal Fisheries Commission (CFC),¹²⁰ on the situation of Sámi fisher. It concluded that Sámi fishing rights are distinct indigenous rights, gained through customary use and exercised since time immemorial.¹²¹ The CFC also pointed out that the ILO 169 Convention secures Sámi rights to natural resources as a basis for the conservation of Sámi culture, as well as that Article 27 of the UN International Covenant on Civil and

¹¹³ Broderstad and Eythórsson (n 79).

¹¹⁴ Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 Jun 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO No. 169); For the list of ratifications see 'Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)' (*Information System on International Labour Standards*) <www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314> accessed 14 August 2019.

¹¹⁵ Birgitte Feiring and Programme to Promote ILO Convention No. 169, *Indigenous & Tribal People's Rights in Practice - A Guide to ILO Convention No. 169* (International Labour Standards Department 2009) 19.

¹¹⁶ For instance, in the early 1990s the Sámi Parliament and an expert group tasked with investigating Sámi fishery rights proposed a 'Sámi fisheries zone' in the northern parts of Norway; this proposal was ignored by the Ministry of Fisheries; Brattland (n 80) 29.

¹¹⁷ Camilla Brattland, 'Coastal Sami communities and the Material Basis for Sami Culture' in Randi Nygård and Karolin Tampere (eds), *The Wild Living Marine Resources Belong to Society as a Whole* (Ensayo#4 2017) 355.

¹¹⁸ Kommunal- og moderniseringsdepartementet, 'Avtale om prosedyrer for konsultasjoner mellom statlige myndigheter og Sametinget' (2005); the Consultation Agreement is part of the fulfillment of ILO Convention No. 169, mandating a state obligation to consult indigenous peoples. An English translation is available at <www.regjeringen.no/en/topics/indigenous-peoples-and-minorities/Sami-people/midtspalte/PROCEDURES-FOR-CONSULTATIONS-BETWEEN-STA/id450743/>

¹¹⁹ Brattland (n 117) 355.

¹²⁰ The Coastal Fisheries Commission was appointed by the Norwegian government in order to investigate coastal fisheries in Finnmark County and to suggest new law proposals as well as discuss how they would relate to existing fisheries management practice; Jentoft (n 51) 101; Smith (n 11) 5; Valmaine Toki, 'Indigenous Peoples' Fisheries Rights – A comparative perspective between Maori and the Sami' (2010) 1(1) *Arctic Review on Law and Politics* 54, 55.

¹²¹ Brattland (n 80) 34.

Political Rights (ICCPR)¹²² is applicable to the Sámi as a minority.¹²³ The Commission argued that a quota should be free of charge, personal and not tradable, and therefore could be enjoyed by every Sámi fisher.¹²⁴ Accordingly, the CFC proposed an Act and regulations that would provide for the recognition of a general right to fish for a reasonable livelihood to all residents in coastal Finnmark, whether as a main occupation, or as a part time source of income.¹²⁵ This recommendation was repeatedly ignored by the Ministry of Fisheries¹²⁶ but the pressure did lead the Ministry to compromise and offer an additional cod quota system within coastal regions in Sámi districts, including all of Troms County.¹²⁷

In principle, the recognition of traditional Sámi rights to fisheries should not be hard since there is law, both domestic and international, that provides for the protection of Sámi fisheries as part of the material basis of Sámi culture, and also providing the Coastal Sámi with the right to participate and be consulted.¹²⁸ The lack of progress in these negotiations indicates that the Norwegian State is hesitant to recognize historical or indigenous rights for the Coastal Sámi pertaining to the use of the fjords and the living resources within them, and does not interpret the traditional use of marine resources as a part of the material basis of the Sámi culture.¹²⁹ By contrast the Coastal Sámi continue to argue that new co-management agreements are necessary in order to formalize fishing tenure rights, and operationalize Coastal Sámi self-determination.¹³⁰

¹²² *ibid* 32; See International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

¹²³ Article 27 of ICCPR have several times been used by Sami people before the Human Rights Committee, aiming to secure the Sami right to culture; see, for instance, *Ilmari Lansman et al. vs. Finland*, HRC Communication No. 511/1992. <http://www.bayefsky.com/pdf/116_finland511.pdf> [17.11.2008]; *Jouni E. Lansman et al vs. Finland*, HRC Communication No. 671/1995. <<http://www1.umn.edu/humanrts/undocs/html/VWS67158.htm>> [12.11.2008]; *Sanila-Aikio vs. Finland*, Communication No. 2668/2015, CCPR/C/124/D/2668/2015 (2019) <https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/FIN/CCPR_C_124_D_2668_2015_28169_E.pdf>; *Ivan Kitok vs. Sweden*, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988) <<http://www1.umn.edu/humanrts/undocs/197-1985.html>> [18.11.2008].

¹²⁴ Jentoft (n 51) 101.

¹²⁵ Broderstad and Eythórsson (n 79);

¹²⁶ *ibid*; Brattland (n 80) 34.

¹²⁷ Fiskeri- og kystdepartementet, ‘Stortingsproposisjon 70 L (2011– 2012): Endringer i deltakerloven, havressurslova og finnmarksloven (kystfiskeutvalet)’ (16 Mars 2012).

¹²⁸ Funderud Skogvang (n 10).

¹²⁹ Jentoft (n 51) 107.

¹³⁰ See Jentoft (n 51) 107.

4 Ethnographic Research in Troms County: Questionnaire-based Interviews

In an attempt to articulate a Coastal Sámi perspective on marine resource management and ocean planning, the author conducted ethnographic fieldwork in coastal communities of Troms County. According to Chilisa, for an indigenous-oriented perspective, qualitative research appears to be the most suitable methodological approach, since it is empirical and inductive, proceeding towards theory by contrast with quantitative methods, in which theory is often used as a starting point and data then analyzed based on the initial theory.¹³¹ The strategies of inquiry used during this endeavor were semi-structured questionnaire-based interviews and observation techniques through participation in Coastal Sámi maritime activities. The results of the interviews as data collection method are sketched below, while the findings of the participant observation are presented in section 5.

4.1 Methodological Reflections

Interviews were conducted with seven Coastal Sámi fishers that reside on the island of Spildra, which is part of Kvænangen Municipality; in the communities of Svensby and Furuflaten that belong to the Municipality of Lyngen; and in the small village of Tromvik, located on the island of Kvaløya which is part of Troms Municipality, the most densely populated municipality of the County. Interviews are valuable, not only because they build a holistic overview that analyses words, reports and detailed views of interviewees, but also because they enable participants to speak on their own terms and express their own thoughts and feelings.¹³² Despite the initial plans to interview more fishers, the decision was made to limit the number of participants, because after the fifth interview it appeared that the same answers and ideas were reiterated by most of the interviewees. A questionnaire was used, as a basic guideline for sketching the views of Coastal Sámi individuals on the current legal instruments that regulate the use of the marine space adjacent to their communities, and illustrating how the current framework is perceived, as well as how the participants consider the situation should ideally be regulated. Indigenous scholars often problematize conventional interview methods, arguing that they ignore indigenous value systems and that the interviews themselves lean towards individualistic, westernized assumptions.¹³³ Taking that critique into account, the questionnaire did not use terms such as ‘indigeneity’, ‘law’ and ‘marine resource

¹³¹ Bagele Chilisa, *Indigenous Research Methodology* (SAGE Publications 2012) 78.

¹³² Hamza Alshenqeeti, ‘Interviewing as a Data Collection Method: A Critical Review’ (2014) 3(1) *English Linguistics Research* 39, 39.

¹³³ Chilisa (n 131) 204.

management' in a way developed by Western scholarship but instead included questions formulated in a simple language,¹³⁴ as an inspirational basis for an in-person dialogue that offered participants the opportunity to develop their own definitions and views on marine resource management, personal aspirations and current challenges that they see as crucial in relation to their communities.

4.2 Discussion

The questionnaire included 20 questions divided into five parts. The first two parts asked basic information on age, gender, current occupation and involvement in bodies of policy-making that affect the coastal communities of Troms County. All the interviewees mentioned that they are professionally involved in maritime activities. They have also participated in institutions in their local municipalities, ranging from political parties to local and regional fishers' associations, as well as Sámi associations. Three mentioned that they have attempted to organize local fishers into associations, in order to advocate for the coastal fishers of Northern Norway, putting Sámi culture and indigenous rights at the forefront of this struggle. The political involvement of the participants is certainly an interesting indicator of the recent discourse over indigenous and local participation in decision-making processes. In a centralized state such as Norway,¹³⁵ the political engagement of Sámi individuals, does not indicate the existence of strong political influence or pressure on the decision-making processes. The participants unanimously expressed dissatisfaction with this process claiming that their concerns are often ignored at the municipality and county level. The interviewees greeted the establishment of Sámi associations with optimism, but over time that optimism faded into disappointment.

The third part of the questionnaire was the most meaningful. Intentionally left to be general, in order to receive answers that were not influenced by the author's personal opinion, it included questions such as 'what does sea mean for you' or 'how do you think that the marine living resources should be managed' allowing the participants to develop their own understanding of marine resource management. In their responses the participants first described how they conceive the idea of management of the marine space and its resources. They mentioned that the ocean is extremely important for them having not only economic but also cultural and spiritual value, as it is connected with language, identity and culture. They also explained how the Sámi culture has been lost in many coastal regions, but traditional knowledge has survived in maritime activities. From the participants' statements three main elements of marine resource management can be observed which, despite the array of different political and economic perspectives held

¹³⁴ The language used in the questionnaires was English, additionally Norwegian terms were included for certain State legal instruments.

¹³⁵ Lars-Erik Borge, 'Local government in Denmark, Norway and Sweden' in Antti Moisio (ed), *Local Public Sector in Transition: A Nordic Perspective* (Government Institute for Economic Research 2010) 95-121.

by the interviewees, seem to be cohesively understood. The first element is the imperative to preserve the ocean for future generations. The Coastal Sámi that contributed to this project believe that the ocean should be treated in a responsible way, in order to give the opportunity to sustain the next generations. This idea illustrates a precautionary approach in the understanding of marine resource management that requires a more than careful treatment of the ocean, in order to avoid and mitigate potential harm from human activities that are already underway or planned for the future.¹³⁶ For the project participants marine resource management involves principles of inter-generational and intra-generational equity which will secure that future generations will have access to the same opportunities as the present fishers.¹³⁷ The second core element derived from the interviewees' responses is the importance of the conservation of small-scale fisheries for the Coastal Sámi. The participants noted that fishing is the principal means of living for them and an activity that distinguishes them from the rest of the Sámi population.¹³⁸ Therefore, an optimal framework of marine resource management should secure the right to fishing for local small-scale fishers. The third idea that the participants of the interviews expressed is the need to protect the fjords from outsiders. Nowadays, fish quotas have been made tradable and subsequently have been transferred to outsiders with sufficient capital.¹³⁹ Outsiders in relation to the Coastal Sámi communities could include large-scale industries, aquafarming operators, centralized state authorities, and private or public actors that exercise policy or commercial activities within the fjords. The prospect of these outsiders encroaching on local communities was seen as undesirable among all the interviewees, as their presence could interfere with traditional marine activities.

The fourth part of the questionnaire shed light on the main challenges that confront the participants across the different fjords of Troms County. Aquaculture was almost unanimously identified by the interviewees as the main issue that negatively affects their livelihoods, the environment and small-scale fisheries. Fish-farming is regarded as a very promising business for Norway, and has been flourishing since the 1980s, offering exclusive fishing rights in a specific geographic location in the fjord.¹⁴⁰ However, this industry is so profitable that very few question its legal and practical consequences for traditional fisheries in the fjords.¹⁴¹ The interviewees went on to state that aquaculture is not inherently undesirable in the fjords,

¹³⁶ See The Precautionary Principle Project, *Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management* (2005)

<www.iucn.org/sites/dev/files/marineppguidelines2005.pdf> accessed 14 August 2019.

¹³⁷ *ibid*; The Precautionary Principle Project (joint initiative of Fauna & Flora International, IUCN-The World Conservation Union, ResourceAfrica and TRAFFIC) recommends that principles of inter-generational (between people of different generations) and intra-generational (between people of the same generation) equity should be taken into consideration when applying the precautionary approach.

¹³⁸ Lättsch (n 2) 78.

¹³⁹ Pedersen (n 4) 52.

¹⁴⁰ Bjørklund (n 58) 45.

¹⁴¹ *ibid*.

since it is a rather profitable sector, but its establishment should take place under different standards and preconditions, balancing economic growth with sustainable development. The pollution created as a by-product of aquaculture was also mentioned as an important issue, since it has driven fish to migrate out of the fjords, further impacting local small-scale businesses.¹⁴² Furthermore, the project participants identified large scale-fisheries as an issue, since they gradually deplete the marine resources of the fjords, to the detriment of traditional small-scale industry. According to Jentoft, the marginalization of small-scale Sámi fisheries has been apparent within the Norwegian Fishermen's Association, which has historically favored large-scale fisheries.¹⁴³ Within the Norwegian Fishermen's Association, the power of small-scale fishers in general, and the Sámi fisheries in particular, has always been weak relative to large vessel owners.¹⁴⁴ Interestingly, the number of registered fishing vessels has been steadily declining in Troms County.¹⁴⁵ It can be inferred that this decrease is a result of ongoing changes in policy-making and administrative regulations.

Finally, the last part of the survey asked participants to consider the major domestic and international legal instruments that bind Norway including provisions relevant to indigenous peoples and marine resource management. The main Norwegian legal instruments that were mentioned in relation to marine resource management were the Nature Diversity Act,¹⁴⁶ the Marine Resources Act, the Planning and Building Act,¹⁴⁷ and the Act Concerning Protection Against Pollution and Concerning Waste (Pollution Control Act).¹⁴⁸ With regard to indigenous participation, the Procedures for Consultation between State Authorities and the Sámi Parliament, and the Consultation Agreement on Conservation¹⁴⁹ were also a subject of conversation.

In particular, the Planning and Building Act of 2008 provides for the protection of the natural basis for Sámi culture, economic activity and social life, while also ensuring procedural rights through public participation and consultation.¹⁵⁰ The Marine Resources Act¹⁵¹ and the Nature Diversity Act¹⁵² ensure that management measures should be deployed to maintain the material basis for Sámi culture. The inherent

¹⁴² See also Schreiber and Brattland (n 110).

¹⁴³ Jentoft (n 51) 108.

¹⁴⁴ *ibid.*

¹⁴⁵ The number of registered vessels decreased by a factor of six between 1980 and 2018; see 'Fartoy i merkerregisteret' (*Fiskeridirektoratet*, 7 January 2019) <www.fiskeridir.no/Yrkesfiske/Statistikk-yrkesfiske/Fiskere-fartoy-og-tillatelser/Fartoy-i-merkerregisteret> accessed 14 August 2019.

¹⁴⁶ Lov 2009-06-19 nr 100 Lov om forvaltning av naturens mangfold (naturmangfoldloven); the Convention on Biological Diversity has been implemented in Norwegian domestic legislation through the Nature Diversity Act, which explicitly affirms the right for the Sámi to participate and be heard.

¹⁴⁷ Lov 2008-06-27 nr 71 Lov om planlegging og byggesaksbehandling (Plan- og bygningsloven).

¹⁴⁸ Lov 1981-03-13 nr 06 Lov om vern mot forurensninger og om avfall (Forurensningsloven).

¹⁴⁹ Klima- og miljødepartementet, 'Avtale mellom Sametinget og Miljøverndepartementet om retningslinjer for verneplan arbeid etter naturvernloven i Sámiska områder' (2007).

¹⁵⁰ Plan- og bygningsloven (n 147) ss 3.1, 5.1

¹⁵¹ Havressurslova (n 28) ss 3.6, 3.7

¹⁵² Naturmangfoldloven (n 146) ss 1, 14, 41.

right to culture is also provided in the text of Article 108 of the Norwegian Constitution which obliges State authorities to create conditions enabling the Sámi people to preserve and develop their language, culture and way of life.¹⁵³ The recent increase in public discussion over Sámi rights to fisheries, the occasional participation in fishing associations, local media, and political involvement contributed to the knowledge of the interviewees about their right to be consulted and the ongoing debate on the material basis of Sámi culture.

In contrast to Norwegian law, the responses of the interviewees were much different when they were asked about their knowledge regarding the international legal instruments that Norway has adopted and how they affect local and indigenous communities. The discussion revolved around the CBD,¹⁵⁴ the ICCPR, the ILO 169 Convention, the Århus Convention,¹⁵⁵ and the UNDRIP. There was a lack of awareness among most of the interviewees about the majority of these instruments. Some of them had only heard about the ILO 169 Convention because it has been widely discussed in the Sámi Parliament, while two had also heard of the UNDRIP. Most of the participants agreed that the issues they currently face do not stem from the lack of legal instruments that compels the State to protect the Sámi material basis including traditional resource management, but in the interpretation of these instruments by State authorities, as well as in the lack of consultation in many cases.

4.3 Conclusions

The outcomes of the interviews could be summarized with four main conclusions. First, according to the participants, traditional small-scale fisheries and Coastal Sámi culture have been negatively impacted over the course of time. In contrast, a State-centered fisheries management regime has been consolidated, acting in favor of rapid industrial development. Secondly, the interviews showed that the participants are conscious of the ongoing regulations and debates over indigenous rights that take place in Norway, as well as of the main legal instruments that affect indigenous peoples. Third, they highlighted the need for conservation of small-scale fisheries and their desire to have input in the management of the marine resources attached to their communities, independent from centralized State instruments. Finally, in spite of the optimism conveyed by most of the participants at the end of the interviews, an overall air of

¹⁵³ Riksforsamlingen på Eidsvoll, 'Kongeriket Norges Grunnlov' (adopted 17 May 1814, most recently amended 1 June 2018) LOV-1814-05-17, art 108.

¹⁵⁴ Article 8(j) of CBD was highlighted because it secures the conservation of traditional knowledge; see CBD (n 32) art 8j.

¹⁵⁵ The Århus Convention has been implemented in Norwegian legislation through the Environmental Information Act; see Lov 2003-05-09 nr 31 Lov om rett til miljøinformasjon og deltakelse i offentlige beslutningsprosesser av betydning for miljøet (miljøinformasjonsloven).

disappointment prevailed with regard to both the State's policy and commitment to law and consultation processes.

5 Ethnographic Research in Troms County: Participant Observation in Kvænangen.¹⁵⁶

In addition to the interviews, participant observation was conducted in November 2018 in Coastal Sámi communities of Kvænangen fjord. The fieldwork included participating in small-scale fishing in Kvænangen; assisting in fish processing and selling at a local market in Burfjord; and travelling alongside the captain of a cargo ship from Burfjord to Spildra. A few days were spent in Dunvik, the main settlement on Spildra. The remarkable Coastal Sámi presence across the communities of Kvænangen, the recent conflict in Spildra between the local fishers and the seafood company Marine Harvest ASA,¹⁵⁷ and the description by Ivar Bjørklund of the traditional marine tenure system of *mea* made Kvænangen¹⁵⁸ an attractive location for this research project. While the interviews mainly confirmed what was observed in the literature described in section 3, they didn't directly refer to any legal traditions derived from the Sámi ontological world. In contrast, the results of the participant observation shed light on the remnants of an indigenous legal tradition still in place.

5.1 Methodological Reflections

'Participant observation' is a manner of observation which enables researchers to learn about the activities of a project's participants in their natural setting through observing and participating in those activities.¹⁵⁹ Therefore, participant observation as a research method requires not only observation of events but also active participation, while keeping record of what seems interesting for research purposes. It also demands awareness of the ethical implications that the method can have on the other actors.¹⁶⁰ Additionally, in terms of a relationship based on reciprocity between the researcher and the indigenous communities, the return of something in exchange for participation and data gathering is highly recommended in indigenous methodologies.¹⁶¹ In exchange for permitting participation in Coastal Sámi marine activities physical help was provided while fishing, and monetary remuneration through the leasing of accommodation owned by

¹⁵⁶ An extended analysis of this section was originally presented in A Tsiouvalas, 'From theory to practice: Tracing law through the study of Coastal Sámi marine tenure', in Giulia Parola and Margherita P Poto (eds), *Inclusion, Coexistence and Resilience: Key Lessons Learned from Indigenous Law and Methodology*, Foreword by Prof. Dr. Paulo Bessa Antunes (Multifoco Editora 2019).

¹⁵⁷ Brattland (n 117) 355.

¹⁵⁸ See section 3.1

¹⁵⁹ Barbara B Kawulich, 'Participant Observation as a Data Collection Method' (2005) 6(2) Forum: Qualitative Social Research <www.qualitative-research.net/index.php/fqs/article/view/466/996#g2> accessed 14 August 2019.

¹⁶⁰ James P Spradley, *Participant Observation* (Holt, Rinehart and Winston 1980) 21.

¹⁶¹ Kawulich (n 159); see also Anne Markiewicz, 'Closing the gap through respect, relevance, reciprocity and responsibility: issues in the evaluation of programs for Indigenous communities in Australia' (2012) 12(1) Evaluation Journal of Australasia 19, 24.

some of the project participants. Over the course of some of these activities, questions were asked, and notes were kept on information deemed to be valuable. Attention was imperative at specific times and localities in order not to influence the project's participants any more than necessary nor disrupt their activities.¹⁶² During the observation process it was considered ethically appropriate to abstain from photographing people, limiting photography to landscapes, animals and equipment.

5.2 Discussion

Across the world coastal and indigenous peoples have been managing the marine resources attached to their communities for hundreds of years, often based on systems of customary marine tenure.¹⁶³ Despite their diversified characteristics among different places, most marine tenure systems include defined geographical areas, controlled access, self-monitoring, and the enforcement of rules and regulations by local people and their traditional leaders.¹⁶⁴ In these terms, traditional and indigenous law exists in the absence of, or in addition to, State law in relation to marine resource management.¹⁶⁵ Similarly, the coastal communities of Northern Troms, as Ivar Bjørklund describes using an example from Kvænangen fjord, exclusively managed the access to marine resources in the waters attached to their communities, based on norms that derive from traditional and historical use, and intergenerational knowledge transfer.¹⁶⁶

Participant observation on Coastal Sámi fishing and cargo boats in Kvænangen fjord identified remnants of marine tenure in contemporary marine activities. The fieldwork indicated that boats belonging to local Sámi fishers are well-equipped with modern equipment, such as GPS navigation systems. However, the knowledge of *mea*, even if it is not anymore determined as *mea* (or *vihtat* since the Sámi language is not widely used in the coastal communities of Kvænangen) has been transferred through the passage of time to the project's participants. The *mea*, as an aggregate of knowledge, is still occasionally used as a topographic tool in order to determine the coordinates that will allow fishers to navigate within Kvænangen and to throw their nets.¹⁶⁷ Furthermore, the participation showed that the legal value of *mea* can be still witnessed, since the fishers of Kvænangen do not fish randomly in the fjord; they still use this knowledge in order to

¹⁶² See James P Spradley, *The Ethnographic Interview* (Holt, Rinehart and Winston 1979) 36.

¹⁶³ Townsley and others (n 53).

¹⁶⁴ Bennett (n 56).

¹⁶⁵ González (n 40) 263.

¹⁶⁶ Bjørklund (n 58) 42.

¹⁶⁷ Research has shown that marine tenure systems are still in use in other regions of Troms County apart from Kvænangen. For instance, Camilla Brattland and Reni Wright present a short ethnographic film showcasing the traditional knowledge of an old Coastal Sámi fisher who demonstrates how landmarks are used for setting gill nets in order to catch cod; see Reni Wright and Camilla Brattland, *Learning hoavda's seascape* (10:36 min), (Kunnskapsformidling and Visual Cultural Studies, Department of Archaeology and Social Anthropology University of Tromsø 2012).

determine the individual areas in which they will fish exclusively, treating the marine resources accordingly. Indeed, the participants of the project claimed that they do not know if this knowledge system had been developed by the Coastal Sámi or by Norwegian fishers. This seems to be obvious in principle, taking into account the impacts of Norwegianization on Coastal Sámi communities. Additionally, the Sámi fishers have had the same fishing rights as any other small-scale fishers in Norway until recently because the State had not traditionally differentiated its policy between Sámi and ethnic Norwegian fishers, who often live side by side in northern fjords.¹⁶⁸ In these terms, the fishers and sailors of Kvænangen have been using the knowledge of *mea* from time immemorial, determining the individual space for fishing amongst one another. Of course, this perception of access to marine resources is incompatible with the State's understanding of access to resources, provided in Section 2 of the Marine Resources Act¹⁶⁹ securing equal access to all Norwegian citizens. This incompatibility could be an indicator of the differences as to how indigenous communities and the Norwegian State still conceive resource management. Accordingly, the locals of Kvænangen, following the State's regulations, cannot prevent others from fishing in the fjord. However, in their interactions with each other, they still distribute marine resources in a traditional way. Next to that, the moral stigmatization that Bjørklund describes for breaching the coordinate system of *mea* and fishing in neighboring territories¹⁷⁰ seems to still be apparent in one way or another. For instance, the participants of the project remarked that if a fisher forgets to place a torchlight on the buoy that indicates her/his nets during the dark, which may pose danger to the engine of another fishing boat that passes over the nets without being able to see the buoy, they incur a penalty which consists of partial estrangement within the community. The moral stigmatization within the community cannot readily be placed within the contemporary understanding of property rights breaches. Someone therefore could argue that in theory the principle that the marine resources belong to all Norwegian citizens, as the Marine Resources Act states, has been implemented across the entire Norwegian coast. However, this study showed that inside Kvænangen, customary use of indigenous legal orders continues among local fishers, who remain holders of this tradition.

5.3 Conclusions

In sum, participant observation in Kvænangen indicated that indigenous law is still alive in Kvænangen fjord and co-exists with State law. The reality, though, has shown that marine tenure rights for Sámi people have not been acknowledged. Indeed, it is truly challenging how the common access principle, which stems

¹⁶⁸ Jentoft and Ulfsdatter Sørensen (n 108) 268.

¹⁶⁹ Havressurslova (n 28) s 2.

¹⁷⁰ Bjørklund (n 58) 44.

from State law, could be dovetailed to embody the Sámi practice of *mea* and the exclusivity over marine resources that it suggests. The proposed Nordic Sámi Convention explicitly calls the sovereign States of Fennoscandia to acknowledge Sámi systems of land and marine tenure,¹⁷¹ and this must extend to the acknowledgment of Coastal Sámi marine tenure. Similarly, the Food and Agriculture Organization recommends that ‘state and non-state actors should acknowledge that land, fisheries and forests have social, cultural, spiritual, economic, environmental and political value to indigenous peoples and other communities with customary tenure systems’,¹⁷² while also suggesting the recognition of exclusive use of marine resources by coastal communities.¹⁷³ Strengthening the ability of indigenous peoples to use their own legal traditions is a valuable process, since it could enhance their ability not merely to govern themselves, but to do so according to principles that reflect their own traditional values.¹⁷⁴

¹⁷¹ Article 34 of the draft Nordic Sámi Convention states ‘If the Saami, without being deemed to be the owners, occupy and have traditionally used certain land or water areas for reindeer husbandry, hunting, fishing or in other ways, they shall have the right to continue to occupy and use these areas to the same extent as before’. ‘Pohjoismainen saamelaisopimus: Suomalais-norjalais-ruotsalais-saamelaisen asiantuntijatyöryhmän 27. lokakuuta 2005 luovuttama luonnos’, Finnish Ministry of Justice Publication No. H-2183 F, 90-96; <www.regjeringen.no/globalassets/upload/aid/temadokumenter/sami/sami_samekonv_engelsk.pdf> accessed 14 August 2019.

¹⁷² FAO, *Voluntary Guidelines on the responsible Governance of tenure of land, fisheries and forests in the Context of national food security* (FAO Office of Knowledge Exchange, Research and Extension 2015) s 9.1 <www.fao.org/3/i2801e/i2801e.pdf> accessed 14 August 2019.

¹⁷³ *ibid* s 9.4

¹⁷⁴ Michael Coyle, ‘Indigenous Legal Orders in Canada – a literature review’ (2017) 92 *Law Publications* i, iv.

6 Final Remarks

Undoubtedly the situation for the Sámi people in Norway has been improving over the past 30 years, since the establishment of the Sámi Parliament and the remarkable progress in the recognition of indigenous rights at the international level. The recent statement by the Community Council of Tromsø that they will halt further aquafarming developments in the municipality¹⁷⁵ is also an indicator that state authorities acknowledge the pressing issues that coastal communities face. However, despite Norway's initiatives to reinforce indigenous rights and its commitment to implement corresponding domestic and international law mechanisms, there is still a reluctance to formalize Sámi rights to fisheries, and by extension, traditional systems of customary marine tenure. The Norwegian government remains hesitant to apply the ILO 169, the UNDRIP, or other international law instruments such as Article 27 of the ICCPR to Sámi fisheries.¹⁷⁶

This article has demonstrated that, over time, the understanding of access to marine resources and the level of Coastal Sámi participation in decision-making processes concerning marine resource management has gradually changed. Among the project participants, though, as the fieldwork indicated, a traditional understanding of marine resource management still exists. Although all of the project's participants operate within State law and the State's fisheries framework, they still preserve characteristics of a traditional conception of marine resource management, whether it originates from their Sámi or their local coastal culture. According to them, the reinforcement of small-scale fisheries is a key element for the conservation of marine resources and Sámi culture. They interviewees suggest that, in order to sustain small-scale fisheries and preserve marine resources in a way that is beneficial for the local communities, the decentralization of decision-making is imperative.

Next to the interviews, participation in Coastal Sámi activities showed that remnants of marine tenure are still practiced in a relevant way, contributing to the literature concerning Sámi tenure. Indeed, this article has shed some preliminary light on Coastal Sámi legal traditions embodied in marine tenure, through the division of the marine space for exclusive use of resources; however, there is a need for further exploration of the *mea* that this project fostered, as well as for the exploration of other potential tenure systems used by the local and indigenous communities in Northern Norway, particularly in Finnmark County, where the Coastal Sámi presence is more prominent compared to Troms. Accommodating indigenous and local systems of tenure in resource management policies is an extremely valuable project that could support not only the cultural survival of the Coastal Sámi, but also the overall goal of indigenous peoples to be in charge of the governance over their lands, waters and resources.

¹⁷⁵ Jenny Hjul, 'Tromsø in shock fish farm ban' (*Fishupdate*, 22 November 2018) <<https://www.fishupdate.com/tromso-in-shock-fish-farm-ban/>> accessed 14 August 2019.

¹⁷⁶ Jentoft (n 51) 107.

