Governing tenure in Norwegian and Sami small-scale fisheries: from common pool to common property?¹

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Abstract
Fundamental to fisheries governance in Norway is the principle that marine resources and territories are no one’s property, that everyone from the outset has equal access, and that the management responsibility therefore rests with the state as the principal steward of marine resources. In recent years, the issue of indigenous (Sami) historical rights of tenure has challenged this governance arrangement. This paper discusses how Sami rights claims have been handled politically, institutionally and legally in Norway. The recent proposal to secure Sami fisheries tenure in Finnmark County is described, to illustrate the need to communicate and deliberate on basic meta-governance principles as to what constitutes justice where tenure rights are concerned. Justice principles may align well with common property and tenure of the Sami, but such principles may also be supportive of common pool access and open access. The challenge is to find mechanisms that can reconcile conflicting principles.
1. Introduction
In Norway fishing has traditionally been governed by the ‘common pool’ principle: ocean territories and fish resources are the property of no one in particular.¹ No individual, group or community could therefore claim ownership or exclusive use rights to these assets, or deny others from enjoying them. Anyone could register, enter and create a livelihood by fishing. This principle, the affluence of fisheries resources, and low entrance costs, attracted people in large numbers to the small-scale fishery, which they typically combined with subsistence and commercial small-scale farming. Men fished in the winter while women cared for the farm and household. In the summer, when the fishery was low, the men turned their attention to family farming.

The common pool principle did not prevent the government from initiating various forms of fisheries regulations. But rather than restricting who could fish, regulations targeted gear types, such as banning trawls and seines from inshore waters and fjords as well as in certain off-shore zones. By law, outside investors were denied access to the fishery, as it was determined that only active bona fide fishers could own fishing vessels. As a result, fisheries management had a clear social profile because it supported small-scale, livelihood fishers. However, the individual vessel quota system – introduced in 1990 as an urgent response to a resource crisis in the cod fishery – changed this, given that it challenged the common pool principle. It largely abolished the open access opportunity (Hersoug, 2005). From the indigenous Sami community, the system was criticized for violating the historic, collective right to livelihood and culture. This paper is about what happened thereafter.

Although it is a sound governance principle that tenure and spatially-based resource management systems¹ always need to be designed to fit the diverse political, social and cultural context within which they are introduced (McGoodwin 1990), the governance principles and rights perceptions underpinning such arrangements may apply
everywhere. This is also the case for tenure systems such as those that were put forward for discussion regarding Sami fisheries in Norway. General lessons to be learned from the Norwegian and Sami experience will be highlighted below. A particular emphasis will be placed on the justice implications of different governance principles, such as those pertaining to fishing rights and tenure.

2. Rights-based fisheries

2.1. Property rights

In open access, non-regulated fisheries, overfishing and the tragedy of the commons are assumed to be inevitable. The remedy is a rights-based fishery which abolishes the freedom in the commons. Such rights can take many forms, ranging from individually owned transferable quotas (ITQs) to state ownership, with property rights vested in communities in the middle. Rights can also involve ocean space, as when a community has special user privileges to adjacent fishing grounds.

After a decade-long political process, commencing with the vessel quota system introduced in 1990 as a solution to the crisis in the cod fishery (cf. Jentoft, 1993), Norway now has a system where quotas follow the vessel when sold; as a consequence quotas are concentrated on fewer vessels. Vessel owners can receive their quotas for a 20–25 year time period after which they are likely to be renewed. Despite this arrangement, which many in Norway argue is tantamount to privatization, the Marine Resources Act of 2009\(^1\) states that wild living marine resources (‘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’) ‘belong to Norwegian society as a whole’ (Section 2). The law leaves it to the Ministry to
evaluate which types of management measures are necessary to ensure sustainable management of wild living marine resources’ and to appoint a Council for Regulatory Advice that can give its opinion before regulations are made. Section 19 authorizes the Ministry to establish marine protected areas, whereas Section 20 is about the ‘prohibition on harvesting with trawls and other types of gear in certain areas, inside the territorial limit around the Norwegian mainland, except when trawling for kelp, shrimps or Norway lobster.’ The Ministry may also ‘prohibit harvesting using other vessel or gear groups inside the baselines, inside lines drawn at a certain distance from the baselines or within specified positions.’ From these basic principles follows a range of regulations concerning quota management, access rights and decision-making, many of which are mandated by other laws. Their numerous details and intricacies will not be mentioned here.

2.2. Management rights

One issue, however, is of special relevance here. Marine spatial planning in Norway is mandated by the Plan and Building Act (2009) and is decentralized to the municipalities, which regulate activities in the sea out to one nautical mile beyond the baselines. Responsibility and leadership rests with the municipal assembly. However, municipalities have not been equally as active in planning for their ocean territories, which in many instances is caused by the elevated level of real conflict pertaining to aquaculture that has made spatial zoning a matter of urgency (cf. Buanes and Jentoft, 2005). Many municipalities got their act together in a rush when the government announced that they would not be considered for new aquaculture licences unless they had developed a coastal zone management plan.
It is noteworthy as a prelude to the discussion below that the Act also states that the plan shall help to ‘secure the natural foundation for Sami culture, economic activities and social life’ (paragraph 3–1). The law (paragraph 5–1) stresses a number of ‘good governance’ principles such as transparency, consistency, and participation of relevant stakeholders. Thus, on concerns pertaining to the indigenous Sami, the Sami Parliament has both a right and a duty to participate and to provide information of relevance to the planning process. (The Sami Parliament has developed a guide on how to implement the Act in Sami dominated municipalities).

2.3. Human rights

Whereas fisheries resource rights such as vessel quotas are distributed by the Norwegian government according to domestic sector law, the fishing rights that indigenous peoples such as the Sami are claiming also have a human rights foundation. In both cases, rights affect relationships. They determine what people can and cannot do to each other. Property rights are fundamentally about exclusion: reserving for oneself the stream of benefits that follows from an object under one’s ownership. Human rights, on the other hand, do the exact opposite. They state that people have some fundamental, inviolable, universal rights to begin with, and that these rights are intact regardless of what governments decide or are willing to accept. Thus, with regard to property pertaining to natural resources essential for people’s livelihoods, human rights are about the right not to be excluded (Macpherson, 1977).

In 2007, the UN General Assembly adopted a Declaration on the Rights of Indigenous Peoples. In the final Declaration, the language pertaining to rights to marine resources and sea space was watered down considerably, compared to
what was stated in the draft Declaration that had been circulating in the years prior. Nevertheless, it still contains paragraphs that are relevant to small-scale fishers regardless of ethnic status. In the drafted text, paragraph 26 read:

‘Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora, fauna and other resources which they have traditionally owned, otherwise occupied, or used.’ In the wording that was finally approved, the direct reference to the ocean was removed. The same paragraph now reads: ‘Indigenous peoples have the right to own, use, develop, and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.’

The revised language may have been seen as a necessary compromise in order to save the Declaration. It proved to be a hard bargain, with the USA, Canada, Australia and New Zealand voting against it. Nonetheless, the Declaration does contain important principles regarding indigenous peoples’ rights to livelihoods, culture, natural resources and self-determination. Although the term fishing rights was deleted in the final text it might be assumed under ‘territories and resources’. Notably, in the negotiations leading up to the Declaration, the letter s in peoples was a point of contention – because it defines the distinction between individual and collective rights. In the final text, the s stayed. The Declaration took decades of struggle by the international indigenous movement, within which the Sami of Nordic countries played an active role. In Norway, the Declaration has emboldened the Sami in raising claims pertaining to fishing rights and marine tenure. But it was the vessel quota system introduced in 1990 that first released the Sami fisheries initiative.
3. Sami fisheries rights

3.1. Fisheries and Sami culture

It was the newly established (1989) Sami Parliament that first raised the rights issue, when they realized that very few Sami fishers had qualified for an individual vessel quota, but were relegated to the far less attractive and much less secure competitive quota. At the end of the 1990s the inshore Sami cod fishery was very low, partly because of the intrusion of harp seals into the fjords of Finnmark in northern Norway, where their fishery for the most part takes place. Sami fisheries are typically small-scale, part-time, and seasonal, but a central element of a traditional, rural livelihood, which combines fishing with other natural resource extraction activities, such as small-scale farming and hunting (Jentoft, 1998). However marginal and as such unqualified for quotas, fishing is still important for maintaining Sami livelihoods. It is also integral to the material basis of Sami culture, which Norway has committed itself to securing in accordance with both domestic and international law on minority and civil rights. In fact, this assurance is written into the Norwegian Constitution. As paragraph 110a reads: ‘It rests on state authorities to create the conditions needed for the Sami people to secure their language, their culture, and their societal life.’ Could it be, the Sami Parliament asked, that Norway’s new fisheries quota system was not living up to its legal commitments?

The question was too critical and too sensitive to be left unanswered. It therefore received instant attention in 1990 when the Fisheries Ministry appointed prominent law professor Carsten Smith – and later Chief Justice – to help address the issue. His report, which was filed the same year, in many ways changed the discourse on Sami fisheries in Norway when he concluded that, according to both international and domestic law,
Norway indeed has a legal duty to sustain Sami fisheries. He considered that Sami fisheries were in a precarious state – in “a five to twelve situation” as he expressed it – that required immediate intervention. He called for positive discrimination of Sami fisheries, but rather than distinguishing between people of Sami, Norwegian and Finnish ethnicity – which with generations of intermixing is difficult in practice and would also cause conflict, in his view – he proposed that special arrangements for the Sami should target their communities. By extension these would also be beneficial to their Norwegian or Finnish residents.

The government responded by increasing the quota for Sami fishers – but later discovered that it was difficult to identify them – and opened the national advisory council for fisheries regulations to Sami representation. The more basic issue about Sami fishing territorial rights was left unanswered. Smith concluded that he assumed the common pool principle (allemannsrett) still pertained to the ocean, but that the issue required further and more thorough investigation. As of May 2011, this issue is still pending and will be returned to below.

3.2. A Sami fisheries tenure?

The ‘Smith report’, as it is commonly referred to, led to further investigation of Sami fisheries and how to account for their particular interests and problems. Two committees, one appointed by the Sami Parliament and one by the Norwegian government, discussed the possibility of establishing what they called ‘A Sami fisheries zone’, within which certain gears (trawls, seines, and long lines) would be banned, and where Sami fishers would be given certain privileges. Not unexpectedly, such a scheme met with resistance in the Norwegian community, not least from the Norwegian Fisher Association, who felt threatened by the idea of such a zone. Neither did they see the
need for special treatment of the Sami: in some instances they argued that this would be tantamount to “reverse racial discrimination”. This is in stark contrast to the Sami point of view, where the fishery rights issue is seen as correcting historical injustice and racial discrimination by a Norwegian government eager to assimilate the Sami into Norwegian society. The coastal Sami in particular suffered a loss of their identity, language and culture as a consequence.

The question of Sami marine tenure was discussed in consultations between the Sami Parliament and the Justice Committee of the Norwegian Parliament prior to the 2005 Finnmark Act. The Committee was of the opinion that the issue deserved more thorough scrutiny. To this end the government appointed a new commission with Sami and Norwegian representation in 2006, again with Carsten Smith in a prominent role as leader. Its mandate was to assess the marine inshore fisheries rights of Sami and other residents of Finnmark County, the northernmost and largest of the Norwegian counties and where most of the Sami reside. A further mandate was to examine fishing in a historical perspective, including its economic and cultural importance for the Finnmark population. Legal issues that Norway has ratified and incorporated into domestic law were to be discussed within the context of international law, in particular the International Labour Organization’s Indigenous and Tribal People’s Convention (ILO 169) and the UN’s International Covenant on Civil and Political Rights, international experiences of relevance to the issue, and domestic customary rights. The commission was asked to suggest new law proposals as well as discuss how they would relate to existing fisheries management practice. The commission (hereafter called the Coastal Fishing Commission or Commission) published its report in 2008, after carrying out an extensive consultation process including many public meetings in the relevant communities.
Within the Sami community the report was well received, and perceived as a logical continuation of the legal process that led to the above mentioned Finnmark Act. In the Norwegian community, however, the sentiment was largely negative; in particular, the fishing industry responded with harsh criticism. The leader of the Norwegian Fisher Association observed: “It is unbelievable that so many highly educated people can sit down and think up so much nonsense.”¹ He predicted a “full conflict in Norwegian fisheries if the Commission’s proposals are accepted” and expressed hope that the Norwegian Parliament would reject it. What, then, did the Commission actually propose? Here is a brief summary.¹

First, the Commission states that the Sami indeed have a historical right to fishing, and recommends that everyone who lives on the coast and in the fjords of Finnmark should be able to fish for their own consumption, to start a fishing career, and to secure an economically viable household livelihood. A quota should be free of charge, personal and non-tradable. Second, this right is supported by international law and legislation pertaining to indigenous peoples. This right exists regardless of fisheries management regulations, and coastal Sami fisheries should be the last to have their quotas cut when the fish harvest must be reduced (though considerations regarding sustainable harvest must be taken into account). Third, these rights should be formalized in terms of a separate law, which secures that those who live along a fjord have stronger protection than others who might occasionally visit the fjord to fish. However, fishers from other regions should have access to fishing grounds in Finnmark outside the fjords. Fourth, regarding management, the Commission proposed a Finnmark Fishery Agency (similar to the one that manages inland resources in accordance with the Finnmark Act) that should have the authority and capacity to regulate the fishery out to four nautical miles from the baseline in so far as size of vessels, gear usage and quotas are concerned. The
Commission argues that the state must therefore provide the resources (funding, quotas, and licences) necessary for the Agency to carry out this function.

3.3. Government response

Given that Smith in 1990 had already characterized Sami fisheries as facing extinction and therefore in need of urgent countermeasures, why did it take so long for the Coastal and Fisheries Ministry to respond? In fact, since 1990, the situation for Sami fishers has actually deteriorated substantially. According to a report commissioned by the Sami Parliament, the number of Sami fishers was drastically reduced after 1990 (Andersen, 2009). Given the tempo of this decline one may well question whether there is now much of a Sami fisheries culture left to secure. The ‘problem’ is about to solve itself. An extrapolation of current trends into the not too distant future suggests that small-scale Sami fisheries, generally recognized as a mainstay of Sami indigenous culture, are at risk of total collapse.

So why has the Norwegian government been hesitant in embracing the proposals of the Coastal Fishing Commission? This can partly be explained by the fact that in the Norwegian context it is breaking new legal ground. As mentioned, there is hitherto no history of any system of marine tenure being formalized by law in the country. Neither is there any tradition distinguishing between fishers according to residence and ethnicity. The basic perception within legal circles and within government is that marine resources and territories are owned by no one in particular. But its dithering must also be explained by political opposition in Norwegian society to the Commission’s proposal, not only among the general public but also among fishers of Norwegian ancestry and their main interest organization.
‘Positive discrimination’ along geographical and ethnic lines does not sit well with these groups. Judging from the public opinions expressed in numerous letters to newspapers in northern Norway and in Finnmark in particular, not all seem to agree that the Sami deserve special treatment to correct historical discrimination. Thus, the proposal of the Commission proved to be both legally and politically controversial. When the Commission chair, Professor Smith, presented the proposals in February 2008, the Coast and Fisheries Minister Helga Pedersen (who is herself a coastal Sami from Finnmark) repeated what her predecessor had stated before: that “in the government’s opinion, there are no special Sami rights for these areas”. ¹ This was also the view expressed by the government lawyer in the hearing, who disputed both the idea of historical Sami fisheries rights and the Commission’s claim pertaining to international law (Regjeringsadvokaten dated 9 March 2009). One of the lawyer’s arguments was that ILO 169 does not mention ocean territories.

What has the Norwegian government offered as of May 2011? A Ministry press release on 9 May 2011, ¹ following consultations with the Sami Parliament Council, announced that agreement had been reached on the following points:

A) The state commits itself to consult with the Sami Parliament on issues of particular concern to Sami fisheries.

B) All residents of Finnmark and in Sami areas in the counties of Troms and Nordland counties¹ will obtain a legal right and a quota to fish cod, saith and haddock, provided that they fish with vessels less than 11 metres.

C) A new paragraph in The Marine Resources Act will emphasise the need to consider Sami resource use and the impact on Sami local communities, when quotas are allocated.

¹
D) A committee for fjord fisheries in the three northern counties shall be established to serve as advisor to national authorities.

E) Vessels larger than 15 metres shall be banned inside the fjord line, although exceptions to this rule can be made.

F) Rights claims to fishing grounds that today can be raised in court can now be presented to the Finnmark commission.¹

What is clear after these negotiations is that the government stands firm on the issue of historical, indigenous rights pertaining to fishing; in the government’s view there are none. Here the two parties agree to disagree. The Commission’s proposal to have a separate law for Sami fisheries seems to have been rejected. The advisory committee does not have the same authority and responsibility as the co-management agency, as outlined in the Commission’s report. In the Ministry’s press release it promised that the differing views of the Sami Parliament on the indigenous rights issue would be included in the document the Ministry would prepare for the Norwegian Parliament.

3.4. Views on settlement

Whether these points of consent are to be considered minor or major, positive or negative, is in the eyes of the beholder. While Smith expressed “deep disappointment” regarding the government’s response, those within the Sami community that have rejected the agreement have talked about “betrayal”.¹ The editor of the newspaper Finnmarken invoked the ancient aphorism of Horace when she characterized the government’s answer to the Commission’s proposal as “the mountain that gave rise to a mouse.” She concluded that “the Sami Parliament has lost on the legal issue”.

According to those who endorsed the agreement on the other hand, like some local
mayors, perceptions are more positive. One mayor even characterized it as a “victory for the fjord population.”

The editor of the Sami newspaper Ságat recommended the Sami Parliament “to say a clear no to those parts of the agreement that do not acknowledge important parts of the Coast Fishery proposal.” On 17 May 2011 in the Permanent Forum on Indigenous Issues of the United Nations, the representative of the Nordic Sami Council – a Sami non-governmental organization (NGO) founded in 1956 – asked the Norwegian government to “withdraw its proposal to supplement the Marine Resources Act and instead accept the rights that Sami coastal communities have to their traditional fishing territories.” This individual also warned the Nordic Sami Parliaments against compromising with their respective governments regarding fundamental rights.

Professor Carsten Smith himself said that he had expected more: “If this is the final result, I assume that the Sami Parliament will continue working on the rights to fishing.”

The leader of the Norwegian Fisher Association has different expectations. He thinks that the agreement is “unproblematic”, and recommends the Sami Parliament to stop demanding local fisheries rights. He also expressed doubts that the Sami Parliament knows enough about Norwegian fisheries. When the Sami Parliament discussed the negotiated settlement on 6 June 2011, the Norwegian Sami Association (Norske Samers Riksforbund) had already announced that they would vote against it, but they do not have the majority of delegates. They also tried to convince other delegates to vote against it too. The Minister of Fisheries and Coastal Affairs suggested that it was important for the Sami Parliament to unite in this matter. However, the Parliament was split almost in half, with a slight majority supporting the deal. No one seemed to think that it was a good deal, but many saw it as a potentially viable second option.
Meanwhile those who spoke for the majority insisted that they had not given up on the historical rights issue, but that the deal was a step in the right direction. The President of the Sami Parliament (representing the Labour Party) who negotiated the settlement argued that it was the best they could get, and that he “had hit the wall” when raising the issue with the Ministry. The debate, which one could follow via the Internet, revealed strong emotions among the delegates. Many expressed disappointment, even bitterness. As well as disappointment at the Ministry’s attitude, they also articulated frustration that the Sami Parliament could not reach a consensus on the matter. As one delegate stated “We cannot easily correct an injustice that we commit against our own people.” There is widespread fear that by agreeing to the settlement, the Sami have weakened their position, even if the case should be brought before the United Nations. Still, the Vice-President of the Sami Parliament was optimistic: “In the struggle for coastal Sami rights, the government is at some stage deemed to lose.” After the vote, a law professor specializing on Sami fisheries suggested that the issue is too important to leave it to a political process and that it should instead be settled in court.

4. Discussion

Although interesting in and of itself, the institutional history of Norwegian fisheries, and the recent events in Norwegian/Sami relations pertaining to fisheries tenure, also shed light on issues of a general nature that others can learn from. The reader may well ask themselves what is similar or different, in this Norwegian scenario, compared to a situation they themselves are familiar with, and ask why these similarities or differences have come about. This section considers such lessons.
4.1. Common pool vs. common property

Few would challenge the view that eco-system health is fundamental to sustainable fisheries livelihoods. Thus, the Coastal Fishing Commission does not dispute the need to curb fishing pressure, but it insists on the need to consider the consequences of property rights and tenure in terms of justice. Judging from the current trend in Sami fisheries, there can be no doubt that they are on the losing side. Recent measures to compensate for this development by giving extra cod quotas (3,000 tonnes as part of the settlement described above) may have come too late and be too little in order to save Sami fisheries from extinction. It therefore seems increasingly difficult to sustain small-scale fishing as a “material basis for Sami culture” (Smith, 1990).

Still, without formalizing fishing tenure rights and operationalizing Sami self-determination in fisheries via co-management arrangements, such as that proposed by the Coastal Fishing Commission, revitalizing Sami fisheries will be more difficult. Unless the latter is achieved, tenure will hardly work as a resource management instrument either. Rights must be accompanied by governance responsibilities, decision-making authority and organizational capacity – which also need legal backing. The Finnmark Fisheries Commission thought about this when they proposed a new law to formally establish Sami tenure and co-management to exercise their historic tenure rights. Since the Norwegian government neither recognizes that such rights exists, nor sees the need for a separate law to install them, they likewise do not accept the idea of a co-management agency. From the government’s perspective an advisory arrangement will suffice.

Property rights such as tenure have symbolic value. For the Sami they are seen as integral to Sami indigenous self-determination, which for them is also a value in itself.
It is part of the global indigenous agenda, as can be seen from the UN Declaration on the Rights of Indigenous Peoples. However, it seems to be very difficult to get the ethnic Norwegian fishing population – and even some within the Sami community – active in the public debate and acknowledging this aspect. The Norwegian government shares this reluctance. Neither does it agree that ILO 169, or the UN Declaration on the Rights of Indigenous Peoples, or other international law such as Article 27 of the International Covenant on Civil and Political Rights, applies to Sami fisheries rights. Nevertheless, the Finnmark Act pertaining to Sami land tenure was enacted in 2005 and is now in the process of being implemented, albeit with some regional and local resistance. In so far as fisheries resources and marine tenure are concerned, there is more resistance. One reason is the well-established principle that marine resources and territory are no one’s property. In contrast, inland Finnmark was state property that was historically colonized (Minde, 2003). But the situation also differs in the sense that Sami reindeer pastoralists, the major inland resource users, do not have to confront a strong competitor. Compare this group to Sami fisheries, who must compete with a powerful, well-organized fishing industry, fully determined to defend its interests, principles and privileges. The Norwegian Fisher Association was never very attentive to Sami fisheries’ concerns to begin with (Eythorsson, 2003). With the quota system and the privatization of fishing rights, it has become less of a civil society organization defending the interests of the coastal population and more an interest organization bent on defending the benefits of quota holders (Mikalsen et al., 2007). If there was ever a concern for Sami interests within that organization, there is less of this in the present situation.

The proposals of the Coastal Fisheries Commission represent a different governance paradigm from the current one. If implemented they may take both the Sami fisheries
and the Norwegian fisheries governance system in a different direction: away from a centralized, corporatist system towards a regionalized, co-management model. No wonder the Norwegian Fisher Association is determined to block it and the government is rather unhappy with the Commission’s proposals. The idea of a Sami marine tenure in Finnmark is easily transferable to Sami fisheries in other parts of Norway – particularly Troms and Nordland, both major fisheries counties – and also to Norwegian fisheries as whole. If the Sami communities can claim a common property right resulting from age-old usage, so can other ethnic communities. In Norway it does not take too many decades to assert historical rights: about 50 or so years. The Sami marine claims, if they are accepted and implemented, will therefore create a precedent that might disrupt the existing governance system. In 1993, the state won a court case where the plaintiffs (two fishers) argued that the Lofoten cod fishery was based on a historical common property right, while the state defended the common pool principle. The sense of relief within the Norwegian Fisher Association at this victory was palpable. It is fair to say that when the Association disagrees with the Coastal Fishing Commission, it is at least being consistent in its approach.

4.2. Whose justice?
The case described here is obscured by the fact that different and conflicting justice principles are at play, and that the political process has not been able to reconcile them. The latter is partly caused by the ethnic divide, particularly at the grassroots level, that has poisoned the debate. The Sami clearly see the fisheries issue within the context of centuries of colonization and racial discrimination. For them, a formal recognition of their historic rights and a co-management system for terrestrial as well as for marine resources is about reparative justice – i.e. a way of correcting previous injustices. To the
Sami, positive discrimination is absolutely necessary in securing fisheries as a mainstay of their cultural heritage, and is also for them both fair and consistent with Norwegian pledges. After all, Norway was the first country in the world to ratify ILO 169, in 1990. Now the Sami insist that it is time for the government to walk the walk, and not just talk the talk.

With pressure coming from the Sami Parliament – as well as external pressure coming from the UN Declaration of the Rights of Indigenous Peoples, the UN Permanent Forum, and ILO 169 – the pressure is on the Norwegian government to deliver on its commitments. In 2010, the Special Rapporteur to the UN Human Rights Council, Dr James Anaya, recommended that Norway “finalize the process of clarifying Sami land and resource rights” and that “Norway give close consideration to the Coastal Fishing Commission and take effective measures to secure fishing rights for the Sami coastal population.” The Norwegian government apparently thinks that those commitments are now sufficiently fulfilled. But despite their internal divide, a great majority within the Sami Parliament does not seem to agree with this and thinks that there is still a way to go until the government has fulfilled its commitments according to international and domestic law.

The Norwegian Fisher Association as an interest organization is, on the other hand, largely free of such political pressure, and that includes from within its own ranks. Within the Association the power of small-scale fishers in general and the Sami in particular is weak relative to large-scale vessel owners. Thus, the Association can exert its own pressure on the government to dismiss the Coastal Fishing Commission’s proposal without meeting much resistance among its own members.

The government has a clear interest in maintaining a status quo. Given the mandate of the Coast and Fishery Ministry, its natural perspective would be fishery management
rather than indigenous rights and culture. Instead of restructuring the management system that has taken two decades to develop and calibrate, it would be inclined to look for opportunities to incorporate Sami concerns within the existing framework. Hence, the introduction of an amendment to the Sami paragraph in the Marine Resource Act, in lieu of a new fisheries law for the Sami and other Finnmark residents, as proposed by the Coastal Fishing Commission. This amounts to marginal adjustment rather than fundamental system reform.

From a justice perspective, the open access, common pool institution is certainly not without merits. Common property involves exclusion to a degree that common pool does not. Even if the current management system and the privatization process have eroded freedom of access in the Norwegian fishery, the common pool principle seems legally intact and still has considerable symbolic value, as can also be seen in the dispute regarding individually transferable quotas (Hersoug, 2005). The boundaries that follow the common property regime can be anticipated to reduce this freedom, which is necessary for a mobile fleet that is used to operating along the entire Norwegian coasts and fjords, pursuing stocks that are migrating. Not only will such mobility become more complicated, but when people fence themselves in they also risk fencing themselves out. With management rules specific to a local area, the management system as a whole gets more complex. It requires that fishers become informed about the different rules and regulations that apply where they happen to fish. Thus they run the risk of breaking rules that they do not know exist (Jentoft and Mikalsen, 2001). The criticism by the Norwegian Fisher Association of the proposals advanced by the Coastal Fishing Commission therefore makes sense from a practical fishing point of view, e.g. mobility. The Association also criticizes the proposals from a fairness perspective. Positive discrimination is still discrimination, and for most people this concept has negative
connotations. The Commission is well aware of this, which is also why it does not want its law proposal to discriminate between Sami and non-Sami in Finnmark. Instead, it wants the same rights for both groups while making residence the distinguishing criterion. Given that Sami, Norwegian and Finnish people live and fish together, and that many have mixed heritage, a distinction on ethnic lines would also not be practical. But even if this selection principle contributes to sweeten the pill for Finnmark residents, it does not necessarily have a similar effect on people outside the county. In contrast to the Sami position on fisheries tenure, for them and for the Norwegian Fisher Association, the issue is not about ‘indigeneity’ (Guenther, 2006) but territoriality and distributional justice.

5. Conclusion

Social justice is among the concerns and conditions that are basic to the effectiveness of governance (Kooiman et al., 2005); otherwise management systems would need to rely on coercion because people tend to resist – and sometimes rebel, as has happened with the Sami both historically and recently (Minde et al., 2008) – against what they perceive as unjust, either by means of ‘voice’ or ‘exit’, i.e. resisting by violating rules (Hirschman, 1970).

However, fisheries and coastal governance rarely commence with a deliberation on what constitutes social justice, what meta-principles should be central, what is negotiable and non-negotiable, and what are the social and cultural thresholds (Kooiman and Jentoft, 2009). The current political process pertaining to the Coastal Fishing Commission proposal is no exception to this rule. Here, justice principles do play an important role, albeit a very implicit one.
With a few exceptions (Coward et al., 2000; Hauck, 2008; Allison et al., 2012; Gray, 1998; and Hernes et al., 2005), fisheries scientists tend to concentrate on the instruments of management and rarely reflect on their justice implications. Marginalized coastal peoples, be they indigenous or non-indigenous, would benefit from a shift in focus. For them, common property rights and tenure are human rights and thus about social justice and therefore law. Still, it cannot be denied that community tenure may also be a useful management instrument, because it encourages collective responsibility and environmental stewardship. By contrast, common pool rights, open access and central government responsibility do not do this to the same degree.

Importantly, social justice does not relate solely to distributive outcomes. It is also an issue that relates to institutions and their governing principles, processes and procedures (Sen, 2009). Miller accordingly argues that justice “must include aspects of social relations that do not fall readily under the rubric of distribution” (1999:14–15).

Procedural justice, for instance, pertains to representation, decision-making and the right to be involved. Governing institutions and procedures must therefore be subject to similar scrutiny as property rights and distributional outcomes. Are minority and indigenous stakeholders recognized? Are their voices being heard? Among the measures that the Coastal Sami Commission is proposing is a mechanism that will strengthen the Sami authority and voice in fisheries governance. Here, the Commission is basically proposing the same solution that is now in place for the management of land and terrestrial resources in Finnmark. Notably, this is a precedent that does not seem to carry over to the fisheries, for reasons that have much to do with the distribution of power internally within the Sami community as well as externally, relative to well-organized Norwegian fisheries interests.
When different justice principles collide, some compromise must be reached. The Coastal Fishing Commission has proposals that aim to facilitate such a compromise, but there is some distance to go before consensus is reached. This requires a different political process than has hitherto been the case, one that is more interactive, more communicative, and less antagonistic. If not, then whatever the outcome may be, it is likely to be disputed by the losing party and the conflict is not likely to be resolved any time soon.

_Epilogue:_ On 4 June 2012, the Norwegian Parliament voted 106 votes to 34 against the proposal from the Coastal Fishing Commission, thus rejecting the notion that the Sami have a unique historical right to marine fishing in Finnmark that should be enacted as a separate law, and which would empower the Sami in fisheries governance.

_Bibliography_


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