

FISHING RIGHTS STRUGGLES IN NORWAY: POLITICAL OR LEGAL STRATEGIES?¹

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Introduction

The socio-cultural landscape in the Norwegian coastal zone is changing. New user-groups arise and new activities occur while traditional activities disappear – and the social and, hence, political landscape changes. This is a challenge the coast and fisheries management is constantly facing, as harvesting rights to marine resources are being reallocated through different kinds of resource management schemes, some of them recently introduced. This is a highly political process, where the result is a tendency towards privatization and transferability of fishing rights. This development has led to protests from user-groups whose fishing rights are at stake, and to activities to regain lost rights. The focus of this paper is on two initiatives to regain fishing rights that have taken place in the northern part of Norway, one initiated by a group of north Norwegian coastal fishers and the other by the Sami Parliament.

North Norway has traditionally been a fisheries dependent region, and fisheries are still an important industry even though the numbers of employees and vessels have

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dropped a great deal in recent years due to national and global fisheries development. North Norway is also a core area for Sami settlement. The Sami are an indigenous people living in Norway, Sweden, Finland and Russia. They are a minority throughout most of the area they inhabit. In North Norway there are Sami living both on the coast and inland. While reindeer herding is the traditional employment for the inland Sami, small-scale fisheries, often in combination with farming or other activities, is the traditional employment for the coastal Sami. Nowadays many Sami are employed in the general labour market, but parts of the Sami population still gain their livelihood from reindeer herding, agriculture, fishing and wilderness industries. On the coast and in the fjords, intermarriages between Norwegians, Finnish immigrants and Sami, in addition to a state-driven assimilation policy towards the Sami population, have over the last two centuries blurred ethnic boundaries. Today people of different ethnic origin live together in coastal and fjord communities and fish on the same grounds. Sami revitalization along the coast and in the fjord is however in progress, and people are now recognising their 'Saminess'. The Sami are thus a dispersed and also culturally divided ethnic group, divided between the inland settlements, where Sami culture has maintained its strength, and the more assimilated coastal settlements. But even though they enjoy full citizenship in the national society, their *de facto* position is that of an ethnic minority (Eidheim 1971: 7).

Both of the fishing rights initiatives reported in this paper concern small-scale fishers in North Norway who have had their rights reallocated as a result of the closure of the fishing commons. In both cases, their goal is to regain fishing rights for small-scale fishers, and their common opponent is the nation-state. However, whereas the non-indigenous rights struggle voices its concern through the legal system, the Sami Parliament voices concern through political channels. In the case of the latter, this choice of strategy could seem paradoxical when compared to indigenous rights struggles in other parts of the world that are often directed through the legal system. One might expect the Sami similarly to choose the legal channel, as their rights as an indigenous people have protection in international and domestic law to a degree that ethnic Norwegian fishers do not enjoy. One may well argue that it is a paradox that the Norwegian coastal fishers are directing their rights claims through the legal system as they traditionally have had an effective political channel through the Norwegian Fishers' Union, which is the leading fisheries interest organisation in Norway. Why does the Sami Parliament choose the political channel and not the legal channel? And, why do the non-indigenous activists choose the legal channel and not the political channel? These two initiatives to claim fishing rights have been parallel processes, independent of each

other. As these stakeholder groups have had little impact on the recent dominant fishing rights discourse in Norway and the allocation of fishing rights, neither of them has achieved their stated goal. A reasonable question is whether both rights struggles would have more success through collaboration, and under what conditions are they likely to collaborate?

To investigate these questions I examine the background of the two fishing rights struggles, with a particular focus on the Norwegian fisheries management system. Thereafter, I will present the two initiatives to regain fishing rights, and discuss their choice of strategies to obtain their goals, and whether there are solutions to the challenges they are both facing. I begin by presenting an analytical framework for this paper.

Analytical framework

Fisheries form a complex system that, drawing on Kooiman et al. (2005, Jentoft 2007), may be described as a relationship between a 'governing system' and a 'system to be governed'. While the former is a social system made up of management institutions with their formal legal, administrative and knowledge systems, the latter is partly natural and partly social made up by both ecosystem and a system of resource users and stakeholders and their informal legal systems. In this paper I am mainly concerned with the social part of the latter system, that is how the 'system to be governed', or more precisely the stakeholders, are relating or responding to the 'governing system' when their fishing rights are at stake.

Mitchell et al. (1997) group stakeholders according to three attributes: legitimacy, power and urgency. Those who possess all three attributes are classified as definite stakeholders, those who possess two are expectant, and those who possess only one are latent stakeholders. One may suppose that both the groups engaged in the rights struggles presented in this paper are striving to be accepted as definite stakeholders in the 'governing system'. However, for the time being, both may be described as latent stakeholders as they have not, at least until now, had any crucial influence on the fishing rights discourse at the national level. They are on the other hand more at risk of losing their stakes. With the two fishing rights struggles on the losing side, the question of social justice and equity arises, if one argues, as Kooiman et al. (2005) do, that social justice should be the basic concern of fisheries and coastal management. Hernes et al. (2005: 114) argue that social justice is not possible unless people's uniqueness is recognised and procedures are

developed to allow for their participation in decision-making processes. Therefore, it is necessary to have knowledge of *fidelity* to context, because:

A major function of any legal system is to determine the rights of individuals and groups. Many kinds of rights are recognized, and they vary considerably in how they are created, respected, modified, and enforced. Some rights, such as those created by contract, are readily modified or extinguished; others are thought of as more absolute or ‘unalienable’, generated by a status, such as citizenship, or by a conception of personhood. (Selznick 2003: 181).

Rights have hence both an institutional and a cultural dimension. This position aligns with Rose (1994: 269) who, in accordance with Hohfeld (1913), holds that rights generally, even property rights, are not really about claims to things as such. They are about the claims and obligations, or ‘jural relations’, that people have vis-à-vis other people. Rights are thus embedded in interpersonal relations. Rose, who examines how property rights are persuasive, argues:

The physical characteristics of the resource frame the kinds of actions that human beings can take toward a given resource, and these in turn form the ‘jural relations’ that people construct about their mutual uses and forbearances with respect to that resource. (Rose 1994: 269)

In the fisheries, both the ‘governing system’ and the ‘system to be governed’ consist of several social networks that are territorially and functionally rooted. These networks consist of different regulating systems or orders that influence fishers’ activities, or, as Ostrom (1990) puts it, resource users as community members are influenced and restricted by various social rules and norms. For instance, fishers’ rights are framed and limited by the resource itself, norms in local societies, fishers’ ethics and the fisheries government. The formal regulating orders that influence fisheries are hence rooted in different systems locally, nationally and internationally. However, these are not necessarily in conformity with what user groups perceive as their rights. Instead, there can be mismatches between what user groups believe are just, and what the ‘governing system’ decides is right.

Selznick holds that social support is crucial for a well-ordered legal system. His

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reasoning is that “the more integrated law is with other institutions, and with what people can accept as sensible, the easier it is to make the system work, and to deliver justice as well as law.” (Selznick 2003: 178; see also Habermas 1996). The same goes for fisheries and coastal management. Selznick holds that when a breakdown of any sort occurs, or is contemplated – in either the ‘governing system’ or the ‘system to be governed’ we may add – people become more rights-conscious (Selznick 2003: 181). Likewise do user groups in fisheries-dependent coastal and fjord communities react when they feel that their rights to fish are being threatened, and they may respond in different ways. Following Hirschman (1970, Rose 1994, Jentoft 2000a), they can choose loyalty, exit or voice. People can be loyal, which means they adapt to and follow new regulations. Or they can violate them, i.e. exit or drop out. But sometimes people also voice their contradictions, which is what the two fishing right struggles presented in this paper do. The two struggles activate certain regulating orders through respectively political channels and the legal system to realise their interests. These rights struggles do not take place in a social vacuum, but are engraved in contexts of institutional practices that, following Scott (1995), are infused by regulative, cultural and cognitive patterns. Thus, through their struggle for fishing rights, fishers and other stakeholders are involved in legal and political processes that go beyond local conditions.

Following Cowan et al. (2001), such processes should be investigated in a way that “... allows us to follow how individuals, groups, communities and states use a discourse of rights in the pursuit of particular ends, and how they become enmeshed in its logic” (Cowan et al. 2001: 21). Then, as Foucault (1972) argues, one has to focus on the dialectic between discourse and structure. This means that fishing rights discourses are formed and restricted by social structures at different levels, and while being socially constructed, they contribute to the shaping and restricting of social structures (Giddens 1984). Power is a crucial dimension, and for that reason it is necessary to investigate the relationship between fishing rights discourses and efforts to obtain discursive hegemony. This has to do with power relations inside and between discourses (Foucault 1970). As Hajer (1995) argues, since the individual is central to the role of discourses in political processes, it is important to focus on how people act. How do people seek support for their perceptions of rights, and what kinds of strategies have they in promoting these? As Rose (1994) asks, how do people make up their own minds about property, and what narratives, stories, and rhetorical devices do they use in persuading others to do the same? In particular, I investigate the rights discourses and the narratives that are being created when stakeholders voice their objections to the privatization

of marine resources.

The Norwegian fisheries management policy

In Norway, fishing in salt water is in principle free for all citizens of the country. This rule is based on the Roman law about *Mare Liberum*.² However, legal historical documentation shows us that this has not always been the situation along the Norwegian coast. In a recent paper, law professor Bull (2005) sums up several studies on this subject which demonstrate that in ancient times the rules for fishing in salt water were more similar to rules for fishing in lakes and rivers. Only people living in the local community were allowed to fish on the nearest fishing grounds. During the 18th and 19th centuries the Roman law principle of *Mare Liberum* was introduced, partly due to the introduction of more effective and mobile fishing boats and equipment, which the nation-state supported through legislation. At this time, every Norwegian citizen got the right to fish but in reality no-one was allowed to fish everywhere. Maurstad (1997, 2000), for example, shows us that there exist informal rules at the fishing grounds that regulate who are entitled to fish, similar to conditions in, for instance, Canada (Davis and Wagner 2006).³ This indicates that, contrary to legal principles, in practice some are more entitled to fishing grounds than others, a fact also supported in a Norwegian Supreme Court judgment from 1985, the ‘Kåfjord verdict’, which I will return to later.

In 1990 Norwegian fishers faced a historically new regulating order as the government introduced the vessel quota system to regulate the cod fisheries. This regulation system was based on a particular perception of how fishers act and how this in turn creates problems, much in line with Hardin’s “The tragedy of the commons” (1968). This model regarded people as individual rational actors who, when not given any limitations, seek to maximize their own interests at the

² In 1609 the Dutch jurist Hugo Grotius published *Mare Liberum*. It formulated the principle that the sea was open for all nations to trade, transport and to fish.

³ Davis and Wagner (2006: 478) present a diversity of evidence that closely documents historical, familial, and individual continuities of participation within and livelihood dependence on a small boat coastal-zone fishery associated with Chedabucto Bay and environs, situated on the Northeastern Nova Scotian Atlantic coast.

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expense of common interests. The background for the introduction of the vessel quota system was a significant decline of the cod stock.⁴ From 1984 on, there had been a “maximum quota system” for cod fisheries north of the 62nd parallel. In this system small-scale fishing vessels, which harvested with conventional gears close to the coast and in fjords, were regarded as one group. With the introduction of the vessel quota system in 1990, the fishers were for the first time regulated individually (Karlsen 1998). Whereas the maximum quota system allowed fishers access, but gave no guarantee of catch, the vessel quota system gave a limited number of boat-owners a guaranteed right to catch a certain amount of fish. Thus, from 1990, Norwegian fishers were no longer on an equal footing in regard to fishing rights, but divided into two categories, of which one was more privileged than the other (Jentoft and Karlsen 1997). The new regulation system made the right to fish an individual right, and as would later prove to be the case, also a transferable right when vessels were sold as the quota followed the boat, even though the government refused to admit this.⁵ The vessel quota system had especially negative effects on small-scale fishers who were fishing in the fjords and close to the coast, including fishers in Sami areas. Almost none of the small-scale fishers in the fjords met the criteria for receiving a vessel quota in the first allocation. Many had to give up their fishing in the face of competition from bigger vessels with financially powerful owners.⁶ The government’s intention was that the vessel quota system should be a temporary measure until the fish stock recovered, but it remained as a handy vehicle for controlling fishing effort. It became more and more embedded in the ‘governing system’, and therefore also in the ‘system to be governed’. Since 1990, the quota system has gradually become consolidated and Norway has continued along the path of privatizing the harvesting rights to marine resources (Hersoug 2005).

The vessel quota system thus became the governing system strategy for controlling fishers’ behavior not only in a time of crisis but as a permanent management

⁴ The circumstances were similar to the grave situations that Canada faced in 1992, when the overexploitation of cod resulted in the disappearance of the fish stock, and the government ordered a full stop to industrial cod fishing (Apostle et al. 1998).

⁵ The Minister of Fisheries Affairs admitted in 2002 that Norway, with certain limitations, has transferable quotas in the fisheries. (The newspaper *Fiskaren*, Monday 18 November 2002).

⁶ For further descriptions, see e.g. Jentoft and Karlsen 1997, Eythórsson 2003.

approach. In many ways, as Demsetz (1967: 350) holds, the emergence of this new property right took place in response to the wishes of the interacting persons (here the nation-state), in adjusting to new benefit-cost possibilities. Wiber argues: “In an important sense the demand for individual property rights in marine resources is a logical extension of rights-based demands by nations”. She relates this to the passing of the Law of the Sea Convention in 1982, where coastal states were allowed to acquire exclusive rights over the natural marine resources in adjacent seas up to the 200-mile limit (Exclusive Economic Zones). Thus, she argues, the Law of the Sea Convention reinforced the idea of privatization of marine resources in coastal states (Wiber 1999: 40). Selznick puts this in a wider context and argues:

Since the seventeenth century, property rights have become abstract and individualized: they have also become ahistorical, detached from the special contexts, for example of land tenure and inheritance, which limited the claims of ownership. The idea spread that ownership carries with it rights of domination, that is, the owner can do what he wants with ‘his own property’.
(Selznick 2003: 183)

However, when it comes to privatization of the rights to fish, Wiber argues, the implications are that “The rights of ‘collectives’ in fish stocks (whether provinces, or communities with special fishing histories such as Newfoundland outports, or First Nation communities), ... are always ignored in the privatization model.” (Wiber 1999: 39). In Norway, the quota regulation evoked protest especially from the north where many local communities depend on the cod fisheries and are therefore vulnerable when shifts in access rights to fisheries resources reduce their chances of survival.

Fishing rights struggles

Since the introduction of vessel quotas in the coastal fishing fleet in 1990 and the subsequent developments, the cod fisheries have been based on exclusive rights and privileges (Jentoft 2001). The following gives an account of two parallel initiatives or struggles to regain rights to coastal fisheries, which, inspired by Cowan et al. (2001), I refer to as rights struggles. One initiative is from a group of (non-indigenous) small-scale fishers and the other is initiated by the Sami Parliament.

Non-indigenous fishing rights

One initiative to regain fishing rights takes form as an action group under the name: 'People's right to the fisheries commons' (PRFC).⁷ The leader is a small-scale fisher from North Norway. On their homepage, the action group argues that the introduction of the vessel-quota system in 1990 led to the 'closing of the commons', which established the basis for, and led to, the development of purchasing and selling of quotas: "The result is that the fleet is facing economic difficulties and they call for more fish quotas ...".⁸ The action group argues that the fisheries do not need more fish quotas but less capital intensive vessels. Their solution to secure the economic basis of settlements on the coast is to remove the system of transferable quotas and let naturally adapted cost-effective vessels do the harvesting. This, the action group claims, is in accordance with the policy of the National Assembly, which has several times resolved that fish resources belong to the Norwegian people as a collective.

Traditionally small-scale fishers would have voiced their concerns through the Norwegian Fishers' Union, which is the main fisher organization in Norway. It was established in 1926 on an initiative from the government, and the union's right to be consulted across a broad range of fisheries related issues was soon established (Mikalsen et al. 2006). As the Union is incorporated in the Norwegian political system, it has functioned as a political channel for fishers to voice their concerns. The Union is a strong association that traditionally has been considered the legitimate representative of all fishers, irrespective of scale and geography (Eythórsson 2003). But as the fisheries have changed, so has the Fishers' Union, from something akin to a public interest group into what is essentially a 'trade union' pursuing the economic interests of its most powerful members (Mikalsen et al. 2006). Thus the Union does not attend to small-scale fishers' interests as it used to do, and some small-scale fishers have decided to voice their interests elsewhere. This, among other things, resulted in the establishment of the Norwegian Association of Inshore Fishermen in 1987. However, this organisation is not as strong a stakeholder in the Norwegian political landscape as the Norwegian

⁷ In Norwegian: 'Aksjon Folkets rett til fiskeriallmenningen' (<http://infoside.no/fiskeriallmenningen/>)

⁸ <http://infoside.no/fiskeriallmenningen/>

Fishers' Union; it is a *latent* or possibly an *expectant* stakeholder (Mitchell et al. 1997), and has only modest influence on the fisheries management agenda.

Thus the PRFC is trying another strategy to voice their concerns. They have decided to use the legal channel, i.e. lawsuits, claiming that the Fisheries and Coastal Ministry runs a management system that illegally excludes bona fide fishers from making a living. They encourage individual fishers who feel illegally excluded from the fisheries due to the quota regulation to bring the state to court on the basis of common usage, customary law or other fisheries legislation. The action group feels that a precedent in the fishers' favour would bring about general access where every Norwegian fisher defined as an economically active fisher would be given full fishing rights. In 2005 the PRFC raised funds to support one lawsuit. They lost this case, but appealed to a higher court. On their homepage, the action group declares: "We have no guarantee to win in the courtroom, but we have to try it as we have no other alternative. The easiest way out would be if a majority of our politicians decided that there shall be an open access to people's property, i.e. the fish in the sea."

Sami fishing rights

The Sami Parliament has taken initiative to obtain Sami fishing rights. Like the former, this is an ongoing struggle that has not yet led to any final results. However, through the recently passed 'Finnmark Act',⁹ the Norwegian Parliament finally recognised the Sami's right to participate in the management of the land in Finnmark, the northernmost county in Norway and a core area for Sami settlement. The passing of the 'Finnmark Act' is, no doubt, a great victory for the Sami rights struggle, which gained momentum in the 1980s in connection with a hydro-power development project in an area important to Sami.¹⁰ With the passing of the Finnmark Act, the ownership of former state land has been transferred to *Finnmark Property*, which is the new management institution that will administer the land.¹¹

⁹ The law was passed by the National Assembly on 8 June 2005, and came into force on 1 July 2006 (<http://www.finnmarksloven.no>).

¹⁰ This is known as the *Alta case*. For more information see Svensson 2002.

¹¹ This institution replaced the former state management institution, *Statsskog*, in July 2006. It is a kind of partnership governance consisting of a board appointed

While the Sami have gained land rights in Finnmark, their rights to marine resources are still unclear. However, the Norwegian Parliament, when it debated the Finnmark Act in 2005, demanded that the Government carry out a Sami fishing rights inquiry in Finnmark as soon as possible. The Department of Fisheries and Coastal Affairs, together with the Sami Parliament and the Finnmark County Council, have established a committee – the ‘Coast fisheries committee for Finnmark’ – to investigate ‘the Sami’s and others’ rights to fish in the sea adjoining Finnmark. Former Chief Justice of the Supreme Court, Professor Carsten Smith, is the head of this inquiry, which is to be finished by the end of 2007. According to the President of the Sami Parliament, the Parliament’s goal is to establish that Sami have a right to fish in the sea outside Finnmark. However, she stresses that this right is not exclusive to the Sami, but a right for everyone who lives in Finnmark.¹²

The fishing rights issue is an important matter for the Sami Parliament, and was in fact one of the first issues put before it when it was constituted in 1989.¹³ But it was after the introduction of the vessel quota system in 1990 that the question of Sami fishing rights became crucial. In the first allocation almost no small-scale fishers in the fjords were eligible for a vessel quota. The Sami Parliament criticised the design of the system and the principles employed in determining who was entitled to a quota. It argued that Sami fishing practices, (small-scale using simple gears, stationary fishing close to the shore, and fishing combined with small-scale farming or other activities) were not taken into consideration. The Sami Parliament therefore demanded an investigation of the government’s legal responsibilities towards Sami fisheries. According to Davis and Jentoft (2001: 229), there is little doubt that this protest took the Norwegian government by surprise and that the protest could be neither overlooked nor simply dismissed. In

by the Finnmark regional county council and the Sami Parliament. The composition of the board should, in this manner, represent both Sami and non-Sami interests, and hence brings legitimacy to resolutions

¹² Article in the newspaper *Fiskaren*, 11 April 2006

(<http://www.fiskaren.no/incoming/article104099.ece>).

¹³ However, before the constitution of the Parliament, there were other Sami movements voicing their concerns regarding the national authorities’ fisheries policy (Eythórsson and Mathisen 1998).

1990, the Ministry for Fisheries and coastal affairs engaged then law Professor Carsten Smith to examine what kind of juridical obligations the government had towards the Sami in regard to fisheries management, the first investigation into this issue.

Smith's (1990) report concludes, with reference to national and international law, that the nation-state has a legal duty to take measures to ensure the survival of Sami culture. Since fisheries are an essential part of the material basis of Sami culture, such initiatives should also include fisheries. These conclusions are in accordance with the UN convention for Civil and Political Rights, article 27, concerning minority populations. Smith argues that *positive discrimination* is necessary to secure the material basis and that: "when positive discrimination is essential in order to protect the Sami minority culture, the interests of other citizens must necessarily yield." (Smith 1990: 524, translated and quoted by Jentoft and Karlsen 1997). In Smith's view, both Norwegian and International Law confirm that, where positive discrimination is essential in order to sustain an indigenous culture, the government must allow it and thereby provide social readjustment and justice. However, Smith also believes that this should be arranged on a *collective* rather than on an individual basis, arguing that there would be fewer conflicts if privileges were differentiated among geographical areas rather than among individuals of different ethnic origin. Thus fishing rights of any kind should be directed at Sami communities or regions populated by Sami, rather than individual fishers.

Smith's 1990 report has been important for the Sami fisheries rights struggle, and has established Sami fisheries as a legitimate concept in Norwegian fisheries' policy. However, further investigations into the rights issue were initiated in the 1990s. Their reports argue in common for a more open and co-managed fishery within certain territories, also referred to as 'Sami fisheries zones' or 'indigenous zones', without discriminating against other ethnic groups.¹⁴ In 1992, the Sami Parliament also asserted this:

The Sami Parliament has, as a stated objective, to manage the resources in the Sami areas, and the question in this regard is how the fishing rights shall be managed in the future The Sami Parliament opts for an arrangement that model distinct

¹⁴ Article written by Eythórsson and Nilsen in the news paper *Nordlys* 18 February 2006 (<http://www.nordlys.no/debatt/ytring/article1961414.ece>).

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fisheries zones with regulations of fishing gears and restricted areas to secure the resource base for coastal- and fjord fishers. The demand for such fisheries zones is based on a collective right to fish in an open common for all who belong to a certain geographic area. (Sami Parliament's response, case no 33/92, to the white paper, *Strukturmeldinga*, St.meld. nr 58 1991-92, quoted Angell 2004: 8; my translation)

To establish Sami fisheries zones has been in line with the Sami Parliament's goal of securing the resource basis for Sami coastal settlements. However, the Sami Parliament has not yet had a breakthrough with the central Norwegian government on this issue.

Overall, there has been an increased use of legal arguments in the Sami Parliament's fisheries policy, and throughout the 1990s its arguments became more embedded in indigenous peoples' rights to resources. The Sami rights struggle was established within the global discourse on indigenous peoples' rights, and the access to local fish resources is disputed on a more general foundation, and on the basis of historical user rights. The Sami political community has in this manner become more oriented towards the global indigenous people's community and towards policies regarding rights to natural resources and self-determination.¹⁵ Their arguments refer not only to the Norwegian constitution,¹⁶ but also to international law and especially the International Labour Convention no. 169.¹⁷

¹⁵ In 2002 the former Sami president, Ole Henrik Magga, was elected as a leader of the UN's Permanent Forum on Indigenous Issues.

¹⁶ In the 1988 constitution, a new paragraph (§ 110 A) was inserted concerning the Government's obligations towards the Sami: "It rests with the national authorities to ensure that the Sami are able to secure and develop their language, culture and social life [my translation]." (In Norwegian: "*Det påligger Statens Myndigheter at legge forholdene til Rette for at den samiske Folkegruppe kan sikre og utvikle sitt Språk, sin Kultur og sit Samfundsliv.*")

¹⁷ The Indigenous and Tribal Peoples Convention of 1989. The convention states that indigenous people have the right to conserve and develop their unique culture on a permanent basis, to decide priorities and directions for their own development, and to be consulted and participate when initiatives that could affect their life and lifestyle are being decided and carried out. The convention has distinct provisions about respect for indigenous people's traditional values,

Norway, as one of the first countries to ratify the Convention, in 1990, is obliged to follow it. The convention has been an important component in the birth of the Finnmark Act, which also cleared the way for the new inquiry into Sami and others' fishing rights along the coast in Finnmark County.

Overlapping goals, common adversary, but different strategies

The two fishing right struggles have overlapping goals and a common adversary in the nation-state. According to Hernes et al. (2005: 155), the government adheres to the principle that fish resources are a national property, and that management should be conducted in cooperation with user groups such as the Fishers' Union that are directly affected, not with regional or municipal authorities. This means that marine resources are vested in individuals rather than in a collective, such as a municipality or a local community. The situation in Norway seems to be quite similar to that in Canada. According to Wiber, in Canada, “[g]lobal trade liberalisation strategies, taken together with national and international policy directions towards privatization, are producing a significant revision of patterns of access to and control over natural resources”. She argues that this “will present new difficulties for those local polities which are working to entrench or to protect local access to resources, whether based on First Nation status or local economic survival” (Wiber 1999: 45). In this manner, the non-indigenous and indigenous small-scale fishers in Canada and Norway are in the same boat, facing the same challenges regarding the nation-state's fisheries management. They are both struggling to gain more local control over marine resources.

One crucial need is for both fishing rights struggles is to uphold the argument for coastal and fjord fisheries, which are overall small-scale, and thereby to sustain coastal and fjord communities. According to Bull (2005), this is basically the same argument as Norway once used in an international dispute of the early 1950s. A British trawler harvesting in a north Norwegian fjord began a conflict between Norway and Britain over the fishing border. This was determined in 1951 in Norway's favour at the International Court of Justice. In the litigation Norway

institutions and common laws. It stresses areas and territories significant for indigenous people's life

(http://www.fn.no/ilo/ilo_informasjon/aktuelle_tema/urbefolkning/urfolks_rettigheter_tatt_paa_alvor_av_ilo).

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stressed the importance of the old, customary fisheries on local fishing grounds and argued that these local fisheries were still maintained. Norway founded this argument on fishers' knowledge about their local fishing grounds and local fisheries rules, that is, on the basis of peculiar legal conditions of the Norwegian fisheries that did not conform to the Roman law of *Mare Liberum*.¹⁸ In ruling in favour of Norway, the court stressed that the demonstration of historical use and local custom along the coast were central to the decision: "Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors; that of certain economic interests peculiar to a region, the importance of which are clearly evidenced by long usage." (International Court of Justice Reports 1951: 133, referred to in Bull 2005: 14)

In addition to the 1951 judgment, local fisheries customs are also recognised in a Norwegian Supreme Court judgment known as the 'Kåfjord verdict' (Bull 2005). The background to this case was that, because of a power plant development, the ice conditions in Kåfjord, a fjord in north Norway, changed and the traditional wintertime cod spawning fisheries were impeded. The affected fishers claimed compensation for their loss, and a decision was given in their favour by the Supreme Court in 1985. The first judgment on behalf of the Court stated that, since the fishing areas were very restricted geographically, a pattern of shared use had tacitly developed between the fishers. Others outside the local community respected these particular conditions, as they recognized the local fisheries as reserved for the people in this part of the fjord. Fishers from other parts of the municipality therefore did not compete with the local fjord fishers for the fish resources (Bull 2005:15).¹⁹ This judgment also stated that the fisheries were important in maintaining the local settlement, and concluded that the fisheries by and large might be characterised as exclusive to the people in a limited area in the inner part of Kåfjord.

¹⁸ This fishers' knowledge and legal conditions were built up over centuries. To illustrate the customary conditions in Norwegian fisheries, Norway submitted two investigations to the International Court of Justice: Robbestad 1950/1951; Hovda 1951 (Bull 2005).

¹⁹ According to Bull (2005), this decision has similarities to a later Supreme Court decision, where the people in Manndal in Kåfjord municipality as a result of their use of it were awarded proprietary rights to the local communities' outlying field, *Svartskog*.

In spite of these rulings, the Norwegian government adheres to the principle that fish resources are a national property based on the free-for-all principle (in Norwegian *allemannsrett*, literally ‘all men’s rights’),²⁰ and consequently local control over marine resources is hard to secure. The situation for the Norwegian small-scale fisheries is therefore also in this sense similar to the situation in Canada. Davis and Wagner (2006) demonstrate that, although small boat fishing families in a region in Nova Scotia have been fishing the grounds adjacent to their communities for many generations, they are now forced to fish those areas on the basis of a state-granted ‘privilege’ rather than a secure right. In Norway, the non-indigenous rights struggle is based on a belief that this runs contrary to the constitution, and concerns are therefore voiced in the courtroom. The Sami fishing rights struggle, on the other hand, is using both national and international political channels to voice its concerns. This is in contrast to similar situations in other parts of the world, as in Canada, where indigenous, First Nations groups have gained rights through the legal system. According to Davis and Wagner,

... ‘rights’ are most frequently achieved through struggle, usually articulated in the current era as courtroom battles resulting in judicial interpretations and decisions. Such has been the case in Canada for legal recognition and affirmation of indigenous people’s treaty-based entitlements, a situation where negotiated and signed treaty agreements already exist. (Davis and Wagner 2006: 492)

In Norway, however, there exist no treaty agreements that the Sami can try out in the courtroom. Still, there is already domestic and international legislation that suggests that, if the Sami would pursue their claims, they might succeed as their counterparts in Canada have done.

Both fishing rights struggles use arguments based on the principles of democracy

²⁰ The concept of a commons in Norwegian is expressed as *allmenning*. Generally *allmenning* (all men’s property) is either a particular area with a strong collective use right tradition, or a collective where private property rights are vested in a group of users in a local community. Such arrangements pertaining to land are not uncommon in Norway. The ocean, however, is legally ‘free-for-all’. Here the *allemannsrett* (all men’s right, ‘free-for-all’) in contrast to the *allmenningsrett* is applied (NOU (Norwegian Official Report) 1993:34, quoted in Jentoft and Karlsen 1997).

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and justice in their efforts to gain control over marine resources. The *non-indigenous* struggle argument rests on the principle of *Mare Liberum*. This means that the ocean is free for all (Norwegians), and no user groups should have exclusive rights over fishing. This rights struggle calls attention to the value of democracy and the wrong of discrimination to obtain their goal: according to Norwegian law all fishers as citizens of Norway are entitled to the same rights to marine resources. They argue that, since in practice fishing rights are not equal as a consequence of the fisheries regulations, fishers are being discriminated against. The *indigenous* struggle argument rests on the fact that the Sami are an indigenous people and an ethnic minority, and that they are therefore entitled to exclusive rights that will allow them to protect their culture. The Smith report (1990) concluded that positive discrimination was necessary to the survival of coastal and fjord-based Sami settlements and hence for the sustainability of Sami culture. Thus it concluded that Norway as a democracy had a responsibility to take care of their indigenous people through positive discrimination. The enactment of the 'Finnmark Act' and the establishment of 'Finnmark Property' embedded these principles in land tenure and opened the political channel for claiming rights to marine resources. Thus, the indigenous rights struggle does not rely on the principle of *Mare Liberum*, but argues for positive discrimination based on residence, so that Sami communities rather than Sami individuals are given special treatment.

Both struggles have in common that they represent two groups that are rather invisible in the 'governing system'. Eythórsson holds that: "Matters pertaining to the coastal Sami have been considered not merely irrelevant, but highly inappropriate" (Eythórsson 2003: 159). This was clearly demonstrated with the introduction of quota management in 1990, when almost no Sami fisher qualified. However, this goes for the non-indigenous small-scale fishers as well. Small-scale fishers as a group have probably become less visible as fisheries have been differentiated and as the quota holders have gained power in the governing system – largely through the Norwegian Fishers' Union.

The small-scale fishers and the Sami now have in common a lack of power to set the agenda and to define policy in the Norwegian Fishers' Union. As the Fishers' Union has until quite recently been considered a legitimate representative of all fishers, irrespective of scale and geography, it has been considered irrelevant to argue for the inclusion of other interest groups in fisheries management (Eythórsson 2003). The established system of stakeholder representation has been reluctant to involve groups that do not define their primary interests with reference

to a national community of professional fishers. Eythórsson holds that this applies to local and regional interests, as in the non-indigenous struggle, but even more to the coastal Sami as an indigenous, ethnic minority (Eythórsson 2003: 150). This is also supported by Hernes et al., who stress that the Fishers' Union and the management system as such have failed to include ethnic and territorial concerns (Hernes et al. 2005: 115). According to them, this can be explained in different ways. First, it has always been important for the Union to avoid internal strife that might cause disruption and dissatisfaction among Union members. Second, the members identify themselves in functional categories (gear use groups), and not on the basis of geography or by ethnic categories. Therefore, neither the interests of indigenous small-scale fishers nor those of non-indigenous North-Norwegian small-scale fishers receive attention from the Fishers' Association.

We are therefore dealing with two groups that seek to gain influence as stakeholders. However, using the classification by Mitchell et al. (1997), also applied by Mikalsen and Jentoft (2001; and see Buanes et al. 2004, 2005), Eythórsson argues that the coastal Sami have become *latent*, or even *expectant*, stakeholders in relation to Norwegian fisheries management, as the urgency, and to a certain degree the legitimacy of their claims has become widely recognised. However, he concludes that they still seem to lack the third attribute, *power*, which would, according to Mitchell et al., qualify them as definitive stakeholders (Eythórsson 2003: 160). Thus, through political channels and negotiations the Sami rights struggle is trying to gain influence to define the fisheries policy. The same goes for the non-indigenous rights activists, who attempt to fortify their stakeholder-position by organizing themselves outside the established political channels such as the Fishermen's Union and to pursue their interests by challenging the legality of current state management practices in court.

Conclusion

Thus it can be concluded that the two rights struggles have partly overlapping goals. Both seek to influence the national fisheries policy of privatization of fishing rights, which is changing the coastal landscape in North Norway from a historically largely open frontier to an area where access rights to marine natural resources are a limited commodity held by a privileged few. In both struggles the goals are about gaining a kind of property or strong use right that would protect the small-scale coastal and fjord fisheries. Both the Sami Parliament and the group of small boat fishermen argue that coastal and fjord settlements should derive

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advantages from being close to the marine resources, which was the reason why people built their homes there in the first place. However, nearness to and dependency on resources are generally not taken into consideration in the present dominant fishing rights discourse. As the two rights struggles have little or no influence on the national fisheries discourse, small scale fishers, be they Sami or ethnic Norwegians, find themselves in a situation described by Czarniawska as that where:

... other people or institutions concoct narratives for others without including them in a conversation; this is what power is about. Some people decide about other people's job, their livelihoods, their identities. But even as puppets in a power game, people are still co-authors of history – that other enacted dramatic narrative in which they are also the actors.
(Czarniawska 2004: 5)

The challenge for both fishing rights struggles is thus to get rid of their puppet status, and gain control of the creation of their own narratives. This is exactly what they are striving to do by voicing their concerns and claiming their rights through political and legal channels.

What will happen if their strategies fail? What other strategies are there to choose from? Here the Sami and the ethnic Norwegian fishers are in different situations. For the Norwegian fishers, who have given up the political channel, the legal channel is one of last resort. In the legal system the communication rules are more set than in the political system. The arguments are founded in law, and the court sets distinct rules for how to conduct and further one's arguments. If one loses in one court, one can lodge an appeal. The appeal case can be continued all the way to the Supreme Court, or if necessary, to the International Court of Justice in The Hague. The outcome in the legal system is however rather definitive. This means that if the non-indigenous fishing rights struggle were to lose in the courtroom, their battle would be lost, as this seems to be the final strategy available to regain their lost fishing rights.

For the Sami fishing struggle the situation seems more encouraging. As expectant stakeholders, their battle is not necessarily lost if they do not succeed through the political channel. If the Sami do not obtain their claims through political negotiation, they still have the opportunity to bring their case before the court supported by international or even national law, relying on the International Court

of Justice judgment of 1951 or the 'Kåfjord decision' (Bull 2005). The Sami Parliament's increased use of legal arguments in their rights discourse, suggests that the legal channel could well be their next move. This could result in a situation where, on a case-by-case basis, the Norwegian court system would have to decide whether fishing grounds in Sami areas are to be exempt from the free for all rule and be granted status as a communal property (*allmenning*) of a local community. Apparently the Norwegian state wishes to avoid this. One reason is that it will be expensive, both economically and in terms of time. Another and perhaps more obvious reason is that, whether the Sami win or lose in court Norwegian authorities will lose face internationally. As a self-appointed peace campaigner and a sponsor of indigenous people's rights, it will look bad if Norway does not grant the Sami rights that are supported in international law. The possibility of such a lawsuit continues to fortify the stakeholder-status of the Sami. The newly appointed 'Coast fisheries committee for Finnmark' is also a clear confirmation of their status as stakeholder. The result of the committee's work will therefore be significant for the next step in the Sami fishing rights struggle. Since the committee's mandate is to investigate Sami *and* others' fishing rights in Finnmark, the result of its work is also important to the non-indigenous fishing rights struggle, especially if the conclusions affect small-scale fisheries in general, beyond Finnmark County.

The 'Coast fisheries committee' has started to investigate fishing rights in Finnmark. It will arrange public meetings in all 17 coastal and fjord municipalities, offering an opportunity for people to communicate their opinions. The main objective of the meetings is that the committee members should learn about contextual conditions in local fisheries from affected interests. This is in line with what Selznick argued when he wrote: "When we understand the *relevant* context, with its special problems and conditions, we can make law more effective and responsive" (Selznick 2003: 181). A no less important side effect of the public meetings is that they provide opportunities for dialogue between people living in the coastal zone, regardless of ethnicity. In fact the committee could become an arena in which indigenous and non-indigenous fishing rights struggles come together. Until now they have been parallel processes, even though they have much in common. One may suppose that solutions exist that will tend to meet common challenges. Securing collective property rights could be part of the solution for both indigenous and non-indigenous small-scale fishers' challenges. This means that both rights struggles could gain from collaboration, by for instance arguing for their natural rights to, and mutual dependence on, marine resources (Jentoft 2000b, Davis and Jentoft 2001, Davis and Wagner 2006). They

could then initiate the creation of a common narrative. As Rose says: “Through narratives, or so it is said, people can create a kind of narrative community in which the storyteller can suggest the possibility that things could be different and perhaps better ...” (Rose 1994: 5-6). Thus, to have a common narrative could improve the status of both parties as stakeholders. On the other hand, the public meetings could also reveal conflicting interests between the parties at a local level, and moreover, interests that are difficult to unite, or even that are incompatible. For instance, Norwegian fishers have voiced concern that the recognition of exclusive rights for Sami fishers will just replace one injustice by another. Some even dispute the Sami’s status as indigenous and hence, the government’s legal duty under international law with respect to the Sami. It is easy to predict that the harder Norwegian fishers insist on these issues, the less likely it is that they will be able to arrive at some consensus.

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