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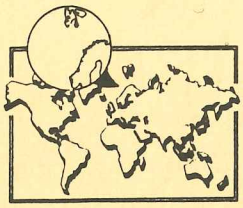

MaB
Man and the Biosphere
The Norwegian National MAB Committee

A CONFERENCE

on

Common property regimes: law and management of non-private resources

Nyvågar, Lofoten, Norway
16 - 21 February, 1993

Papers Presented

NLVF

RURAL DEVELOPMENT

FSU
Economy & Ecology

This is an e-book version of the proceedings from the conference "Common property regimes: Law and management of non-private resources", Volume II:

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THE E-BOOK PROCEEDINGS HAS 3 VOLUMES

- Volume I contains 21 papers that were presented during the conference
- Volume II contains 8 papers that were presented during the conference and the discussion remarks given by moderators of the 10 sessions of the conference
- Volume III contains the program for the conference, the corrected list of participants. The volume includes one paper that was presented during the conference but came too late to be included in the printed proceedings from 1993 and one that was written afterwards reflecting on the proceedings. It also includes a translation to English of one paper in Volume I that was printed in French.

PROCEEDINGS
OF
A CONFERENCE ON

COMMON PROPERTY REGIMES:
LAW AND MANAGEMENT
OF
NON-PRIVATE RESOURCES

16-21 FEBRUARY 1993
NYVÅGAR, LOFOTEN
NORWAY

VOLUME II

Compiled
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Preface

OPENING PAPER at “Conference on common property regimes: law and management of non-private resources”, Nyvågar, Lofoten, Norway (16-21 February 1993)

THE NORWEGIAN “MAN AND BIOSPHERE PROGRAMME”

N. C. Stenseth, prof. of Biology, University of Oslo, (Chairman of the Norwegian MAB-Committee)

One of the major environmental challenges confronting humanity today is the development of proper management regimes of our common resources. The Norwegian Man And the Biosphere (MAB) programme focuses on the exploitation and management of common property resources as exemplified by the fisheries based on the resources in the Barents Sea and the Samii pastoral production system of Finmnarksvidda. This is done through multidisiplinary research on the inter-relationships between natural and social systems, both of which interpreted in a wide sense. Before proper management regimes can be developed, improved understanding of both the ecological and the social/political system are needed. Research within the Norwegian MAB-programme is applied in its character; that is, it aims at providing improved knowledge about how to exploit and manage our resources in a sustainable manner.

Central themes within the Norwegian MAB-programme are:

- the state of the relevant common property resources and their carrying capacity, and the application of scientific knowledge in resources management
- indigenous adaptations to resource exploitation and traditional ecological knowledge
- the implications of government regulatory systems and regional policies for the sustainable development of these regions.

The insights gained during this programme will be seen in a comparative manner to insights from other circumpolar regions and countries in the Third World.

The research programme has just started and is planned to go on for approximately four years. As part of and in close cooperation with the research programme of the Norwegian MAB programme, conferences will be organized (partly for a Norwegian audience and partly for an international audience). The conference on "Common property regimes: law and management of non-private resources" we are about to start now, is part of this effort. Both as a scientist working on these issues and as the Chairman of the Norwegian MAB committee and its Board for the research on common property, I am very much looking forward to the presentations and discussions and presentations at this conference. I'm sure all of us will learn a lot.

Nils Chr. Stenseth,
Professor of Biology, University of Oslo,
Chairman of the Norwegian MAB-Committee

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* Please see volume one of the proceedings for these papers.

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Audun Sandberg (1946) is associate professor in the Department of Social Science in the Nordland Regional College, Bodø. He is also part time employed (since 1992) as head of a research project on common property management regimes in northern Norway under the Nordland Research Institute. He holds a cand. polit. degree (sociology) from the University of Bergen. Audun Sandberg has a wide experience from research work in developing

countries in particular from Tanzania and Kenya. During several periods he has been employed as adviser or consultant by the Norwegian Development Agency on issues related to development aid (e.g. poverty orientation, environmental questions). He has been a visiting research fellow at the University of Alberta (1982), Pacific Lutheran University, Tacoma (1987), Indiana University (1990) and at the University of Sussex (1991). He has published on fishing culture and coastal societies in northern Norway, on management of fishery resources and common property issues.

Hans Sevatdal (1940) is professor of cadastral law and land consolidation at the Department of Land Use Planning, The Agricultural University of Norway.

Resource Management in the Barents Sea: The Russian Perspective

by

Sergey V. Belikov,
Pinro, Murmansk
Russia

There are over 100 species of fish represented in the fauna of the Barents Sea, one of the world's most important fishing basins, of these about 25 species are exploited commercially. Demersal fishes, such as cod, haddock, Greenland and S. mentella, are nutritionally valuable, and make up the bulk of the biological resources that are exploited. Along with the above species, pelagic fish, i.e. Herring (especially in the 1950´s and 60´s) and capelin (from the 1970´s to the present) also form a successful fishery. World catch taken from the Barents Sea and adjacent waters has increased from 1 to 4.5 million tons over the period from 1947 to 1977. At the same time negative influences of man upon the Barents Sea ecosystem has grown. The abundance and biomass of some aquatic organisms began to decline in the 1980´s due to unfavourable reproductive conditions and antropogenic factors, which have caused a sharp decrease in catch size and even a cessation of certain fisheries. Thus, the Atlantic-Scandian herring fishery ceased in 1969 and was not resumed until 1985, and from 1986 to 1990 a ban existed on capelin fishing.

The following are comments on the stock status of the main commercial fisheries in the Barents Sea:

Cod

Cod commercial stock is increasing gradually from the extremely low level observed in 1988-9 (Figure 1). Such increases became possible at the expense of lower fishing mortality rates in 1990-1 and were recommended by the ICES. In accord with calculations, cod commercial stock will constitute 1.7 million tons in 1993, which is lower than the long-term mean (2.8 million tons), however it is above the mean level for the last 40 years. Both adult fish, 7 to 10 years of age, from the 1983-6 years classes and 4 to 5 year old fish from the 1988-9 year classes will make up the bulk of the commercial stock. Spawning stock is expected to increase to 0.8 million tons (which is above the long-term mean level) due to a higher maturation rate.

Haddock

Abundant haddock year classes in 1989-91 will contribute to a gradual increase of commercial stock, which will make up 540 thousand tons in 1993, which is above the long-term mean level of 500 thousand

tons for the period 1970-88. The dynamics of the haddock stock are presented in figure 2.

Capelin

Compared to 1991 the total capelin stock declined in 1992 and was only composed of 5.1 million tons (figure 3). Such reductions were caused by a higher total fish mortality. Nevertheless, the spawning stock has remained at the level of 1991 and contains 2.2 million tons. The 1989 year class, which proved to be the most abundant during the recent 12 years contributed to keeping the mature portion of the stock at this level.

Samples obtained from the stock have allowed the ICES working group, and the ACFM to estimate the total stock size, and the Mixed Russian-Norwegian Commission to recommend a total catch of 600 thousand tons for the spring of 1993. Practices of the fishery show that it cannot be efficiently regulated through only minimum mesh and fish size regulations. In our opinion, stock management through catch quotas is more effective.

Russian specialists believe that fisheries management using total allowable catch and fishing effort related to the stock status is a more radical and scientifically substantiated method for the production of a rational fishery. In the late 1980´s and 90´s the trophic relationship between predator and prey (Korzhev & Tretyak, 1989) as well as population fecundity (Kovtsova, 1989; Serebryakov, et al., 1980) were allowed for in the calculation of the total allowable catch.

Catch quotas in the Barents Sea were initiated in connection with the introduction of the 200 mile economic zones in the waters off coastal states, when distribution ranges of most exploited species appeared to be divided by the boundary between Russian and Norwegian zones (see figure 4). The majority of commercial fish species grow and feed in the Russian zone and spawn in the Norwegian zone, therefore both countries share the ownership of these resources equally.

The Mixed Soviet/Norwegian Fisheries Commission, presently the Russian/Norwegian Fisheries Commission, was established in 1976 in order to regulate the fishery. In accordance with the 1976 agreement a joint stock exploration has been conducted on the basis of traditional harvesting within the allocated quotas of cod, haddock, capelin, and herring. The parties also exchange part of the catch quotas established for the national stocks of their respective zones, i.e. blue whiting, S. marinus, seals from the Western Ice, to Russia, and shrimp, and Eastern Ice seals to Norway. The 21st session of the Mixed Russian/Norwegian Commission was held in 1992.

The principle relations between the two parties in the field of fisheries has been developing for more than 15 years, since the introduction of the Russian and Norwegian economic zones. It is based on a joint decision that makes a whole series of questions related to the

provision of mutual rights by the parties to conduct fishing in the zones relevant, i.e. the treatment of those rights in view of the biological integrity of stocks in the Northeast Atlantic, the status of resources, and principles of the traditional Russian fishery in the economic zones of both parties.

Co-ordinated research, pursuant to agreed on programmes, discussed and endorsed by the Mixed Russian/Norwegian Fisheries Commission for each coming year is the main form of scientific and technical co-operation between Russia and Norway. Co-operation in scientific research of fish resources, by combining the scientific potential of both countries, allows us to find the most efficient ways to exploit national resources. Research institutes of both countries, PINRO (in Russia) and the Institute of Marine Research in Bergen, Norway, participate in the joint investigations.

Joint research programmes incorporate the following activities; co-ordination of scientific investigation by national programmes and the exchange of results, joint acoustic surveys to estimate the commercial stock abundance, as well as joint participation in the international surveys within the ICES framework. Scientific recommendations are provided on the basis of joint assessments of commercial stock biomass, and are used by the Mixed Commission to allocate catch quotas for each party for the next year.

Expansion of contacts between Russia and Norway in the field of coastal fisheries, implemented within the framework of scientific and technical co-operation, was an important development in the work of the recent 21st meeting of the Mixed Russian/Norwegian Commission. In this respect, a joint scientific and commercial activity on development and utilisation of new technology for growing cod, development of specific fish feeds for cod farming, as well as joint activities to explore complementary resources of Icelandic scallop in the Barents and Norwegian Seas are very promising.

In May 1992 a decree "On conservation of natural resources in the territorial waters, continental self and economic zone of the Russian Federation" was issued by the President of Russia, in order to facilitate rational harvesting practices. Thus all responsibilities connected with the management, enhancement, development, and conservation of fish stocks has been delegated by the Russian Government to the Russian Federation's Fisheries Committee (the former Ministry of Fisheries). The committee is a central organ of the federal executive power and ensures common policy in the fisheries, farming, mariculture, research, conservation, rational utilisation, and enhancement of aquatic biological resources in inland water, territorial waters, economic zone, on the continental shelf of the Russian Federation, as well as on the high seas of the World's oceans.

To realise a "basin" principle of managing the aquatic biological resources, and to ensure co-ordination and consistent activity between the

organisations concerned, the Northern Scientific and Fisheries Council has been established by the Committee. One of its functions is to allocate catch quotas for the main commercial species. Major principles which are used in quota allocations are traditional and historic prerequisites in fisheries, as well as ownership of vessels. For the first time, in 1993, a small quota for cod has been allocated to commercial structures and small nations of the North. Unfortunately, after the USSR split up, the fishery in the Barents Sea was conducted by the vessels from former Soviet Union republics, which do not have any catch quota allocated to them. First of all these are the vessels from the Baltic countries. Fishing without respect for quota results in over fishing valuable fish species and, eventually, has an adverse effect on the stock status. In view of this, it was decided in 1992 to reinforce the fish inspection service, which will control the fishery in Barents Sea more rigidly.

At present a "Law on Fishery" is being developed which will regulate all problems associated with fisheries of aquatic animals, fish and plants.

Figure 1.

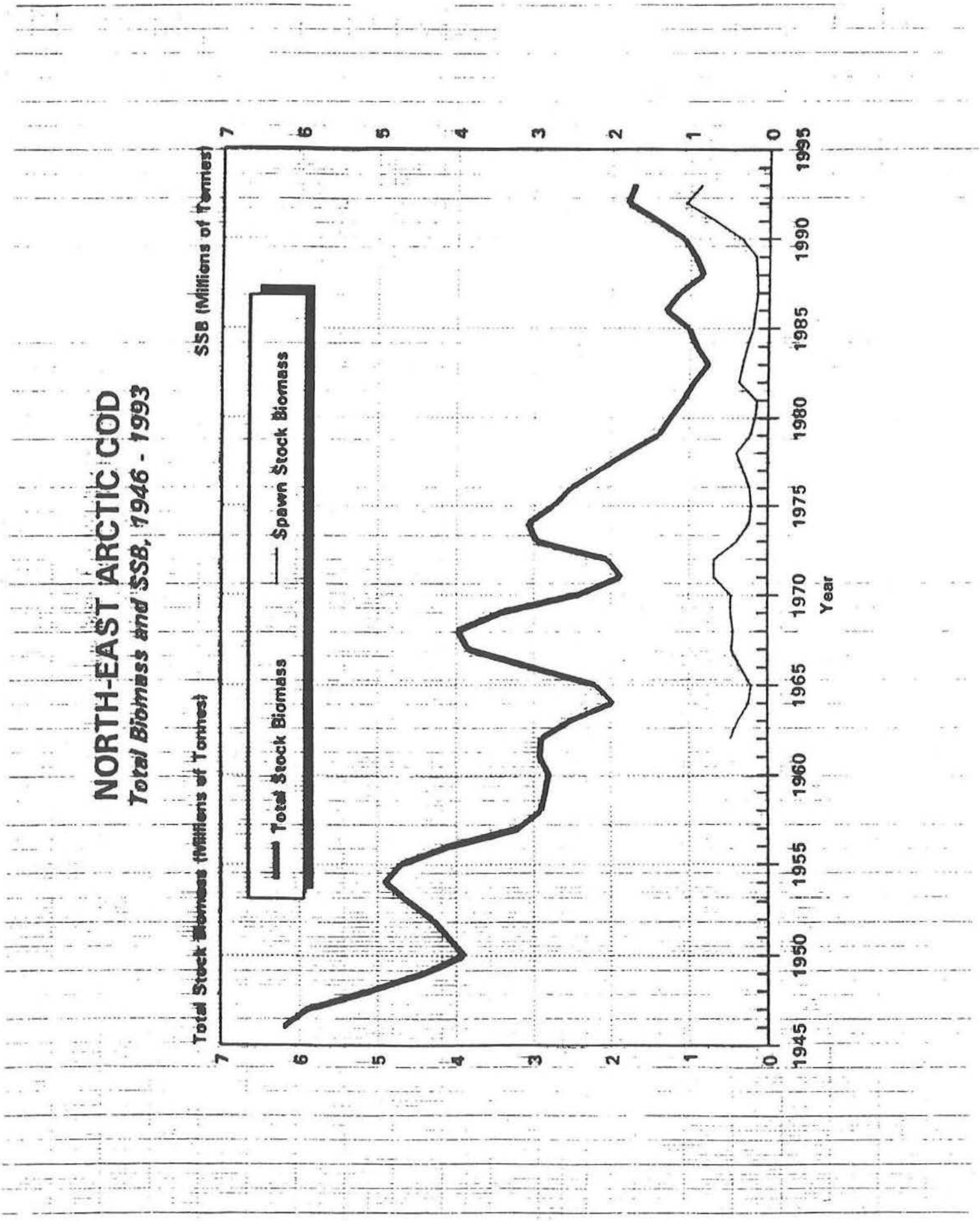
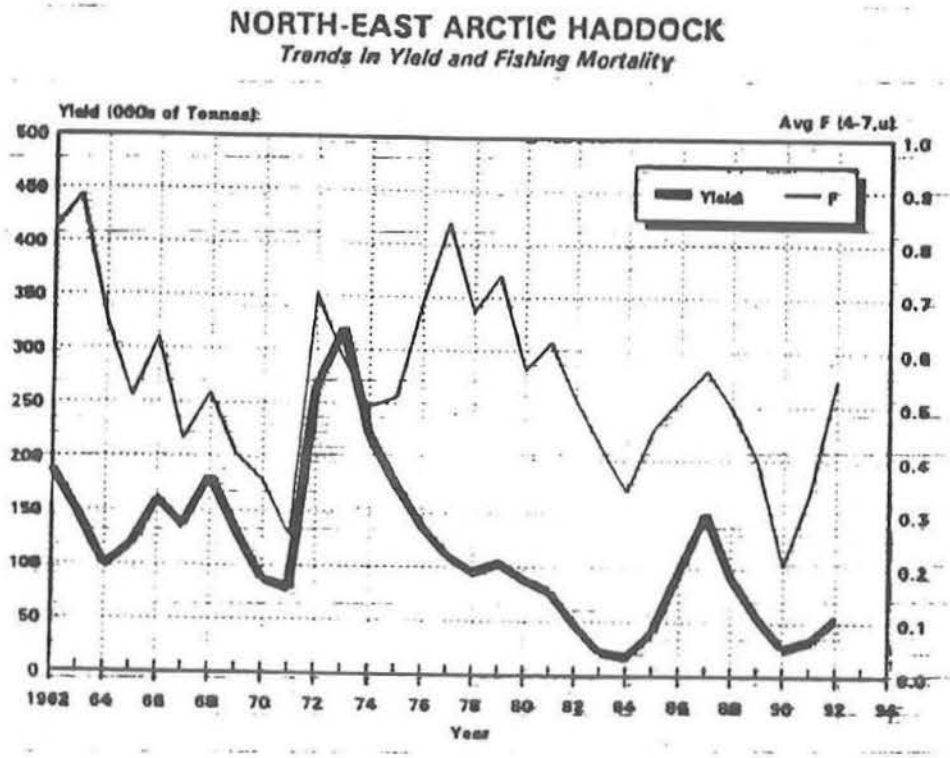

NORTH-EAST ARCTIC COD
Total Biomass and SSB, 1946 - 1993
Total Stock Biomass (Millions of Tonnes)
SSB (Millions of Tonnes)
Total Stock Biomass
Spawn Stock Biomass
Year
0
1
2
3
4
5
6
7
1945
1950
1955
1960
1965
1970
1975
1980
1985
1990
1995

Figure 2.


NORTH-EAST ARCTIC HADDOCK
Trends in Yield and Fishing Mortality
Yield (000s of Tonnes)
Avg F (4-7,u)
Yield
F
Year

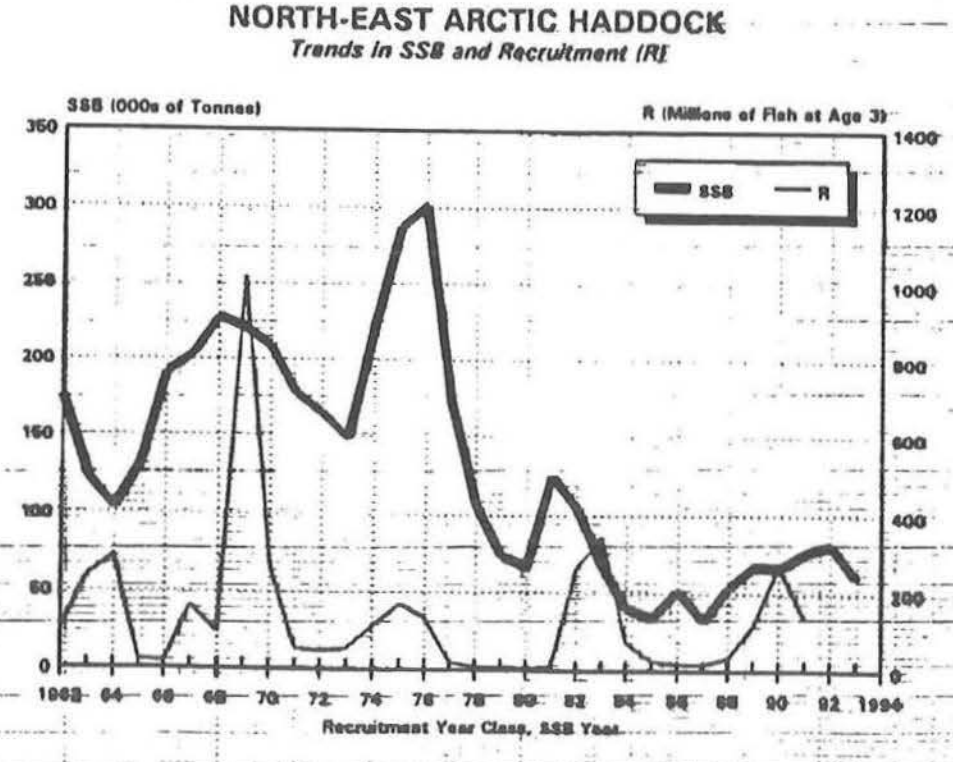
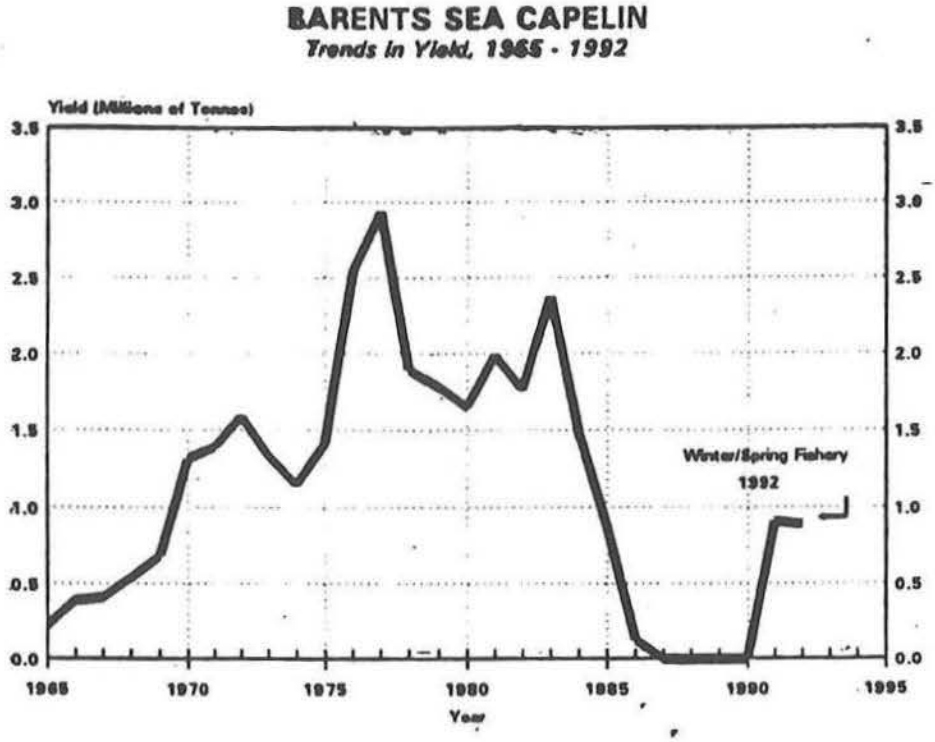

NORTH-EAST ARCTIC HADDOCK
Trends in SSB and Recruitment (R)
SSB (000s of Tonnes)
R (Millions of Fish at Age 3)
SSB
R
Recruitment Year Class, SSB Year

Figure 3.


BARENTS SEA CAPELIN
Trends in Yield, 1965 - 1992
Yield (Millions of Tonnes)
3.5
3.0
2.5
2.0
1.5
1.0
0.5
0.0
Winter/Spring Fishery
1992
1965
1970
1975
1980
1985
1990
1995
Year

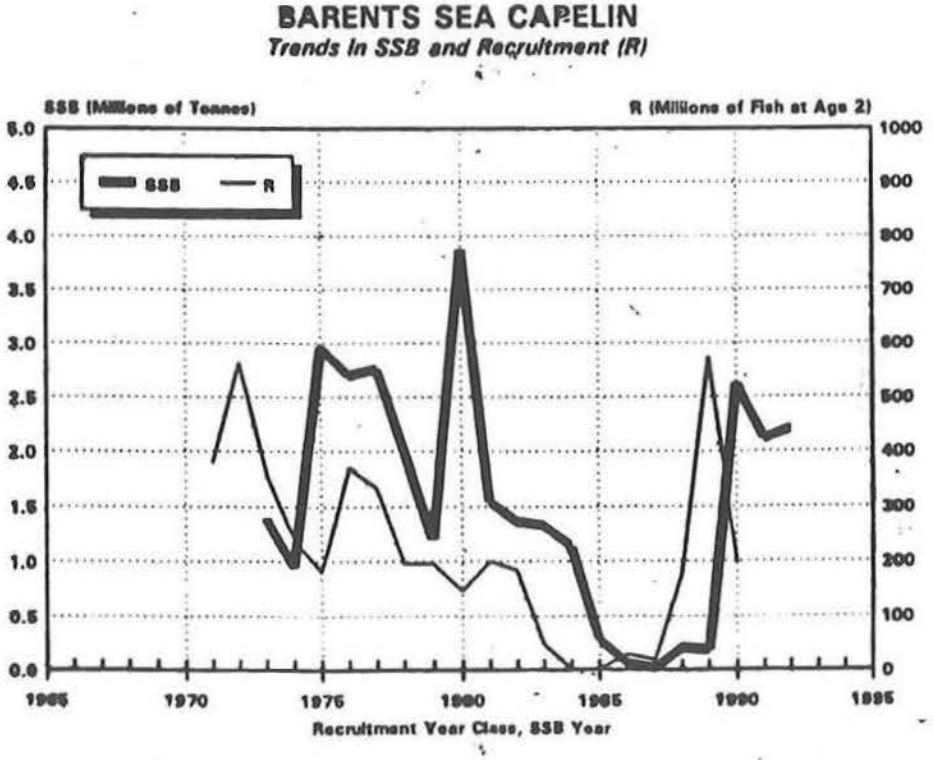
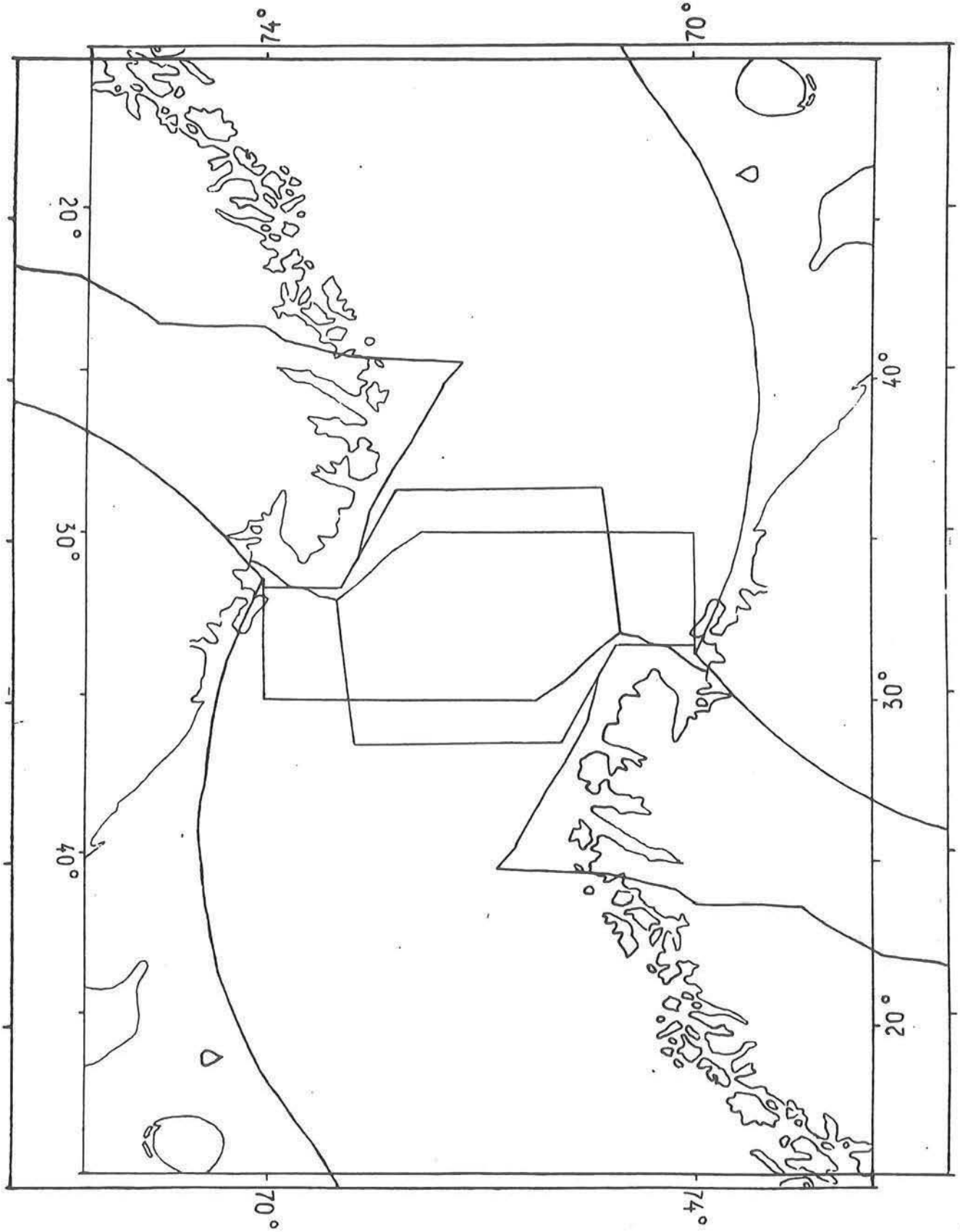

BARENTS SEA CAPELIN
Trends in SSB and Recruitment (R)
SSB (Millions of Tonnes)
R (Millions of Fish at Age 2)
SSB
R
5.0
4.5
4.0
3.5
3.0
2.5
2.0
1.5
1.0
0.5
0.0
1000
900
800
700
600
500
400
300
200
100
0
1965
1970
1975
1980
1985
1990
1995
Recruitment Year Class, SSB Year

Figure 4.



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Managing the Barents Sea Fisheries: Impacts at National and International Levels

by
Alf Håkon Hoel
NFH/University of Tromsø

Living in North Norway has always been - and to a considerable extent still is - based on the rich fish resources off its coasts (Brox 1989, Jentoft 1991). A characteristic of these resources is their internationality - the most important fish stocks are shared between Norway and the Russia. Hence, the bilateral fisheries regime set up by Norway and the Russia in the mid-70's is of crucial importance to North Norway, as the region's welfare depends upon how well the Barents Sea fishery resources are managed.

1. Purpose & perspective

Taking this as the point of departure, the purpose of this article is to describe the Barents Sea fisheries regime and assess its performance. Following some introductory remarks on resource management in general, the legal basis for the regime and the regime itself are analysed before its performance with regard to management and distribution of resources among various groups of users are discussed.

According to conventional wisdom, two characteristics of fishery resources neccessitates their use being subject to management: First they are conditionally renewable resources, which require that exploitation should not exceed the resource's carrying capacity if a stable long-term yield is to be expected; and second it is assumed that ownership rights to fish resources are non-existent, leading to a competitive race for scarce resources with disasterous ecological and economic consequences. In order to avoid such "tragedies of the commons" ownership rights to resources must be established, or the right to manage resources must be vested with a public authority (Hardin 1968, Gordon 1954).[1]

The enormous expansion of international fisheries after world war II (Borgstrøm 1968), based on dramatic changes in technology and scale of fishing operations, led to overfishing in many areas within few decades. In the North Atlantic, for example, the Northeast Atlantic Fisheries Commission (NEAFC) was not able to manage fisheries in an appropriate manner (Underdal 1980). The failure of international regulatory bodies to manage fishery resources according to their sustainable yield was the impetus for the establishment of extended coastal state jurisdiction in the late 1970's. The 200

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[1] This menu of choice has been increasingly contested, as the the commons paradigm assumes an open access situation which seldom is found in reality.It is suggested that there may also be a third way, commonly termed "co-management", in which the existence of common property is viewed as a solution to, rather than the cause of resource management problems.
Cfr. Jentoft 1987, McKay & Acheson 1987, Berkes 1989.

mile exclusive economic zone concept emerged from the 3rd United Nations Law of the Sea Conference, and entailed essentially that the competence to manage marine resources within the 200 mile zone - which contained most of the world's fishery resources - was shifted to the coastal states (Ulfstein 1982).

At the international level, the approach to resolving the "tragedy" was thus one of ownership right entitlement (Eckert 1979), thereby abandoning the "public authority" approach represented by the international fisheries commissions established in the 1950's and 1960's. By the latter half of the 1980's this approach has however been increasingly challenged (Sætersdal & Moore 1987). Vesting ownership rights with coastal states does not resolve the "tragedy", for at least two reasons: many fish resources are shared between two or more countries, and hence require international cooperation on management; and second, insofar as national fishery management regimes were inadequate, the commons problem was only shifted to the national level (Hoel 1991). Both of these traits applies, as we shall see, to the Barents Sea fisheries regimes.

2. The Barents Sea fishery regime

2.1 The resources and the economy

The Barents sea - some 1.4 million square kilometers of shallow waters between the European continent and the Arctic Basin - is among the world's most productive ocean areas. The Barents sea ecosystem is based on stocks of pelagic fish species on which other species, most importantly cod, feed.

The ecosystem stretches southwards along the Norwegian coast and westwards into the Norwegian Sea (see map).[2] The total catch from the biological production of the Barents Sea used to be considerable. In 1980 it amounted to some 2.4 million tonnes of fish, or 3.75 per cent of the world catch. After 1985 the percentage has declined sharply due to the reductions in all major fisheries in this area, most of which were at an all-time low in 1990 when the total yield from the area was only a small fraction of that in 1980. For the years ahead, the prospects appears more promising. The capelin fishery was opened again in 1991, and the cod quotas are set to increase the next years. For 1993, the total allowable catch (TAC) for Barents Sea cod was set at 460.000 tonnes, almost a fourfold increase upon the 1990 low of 120.000 tonnes.

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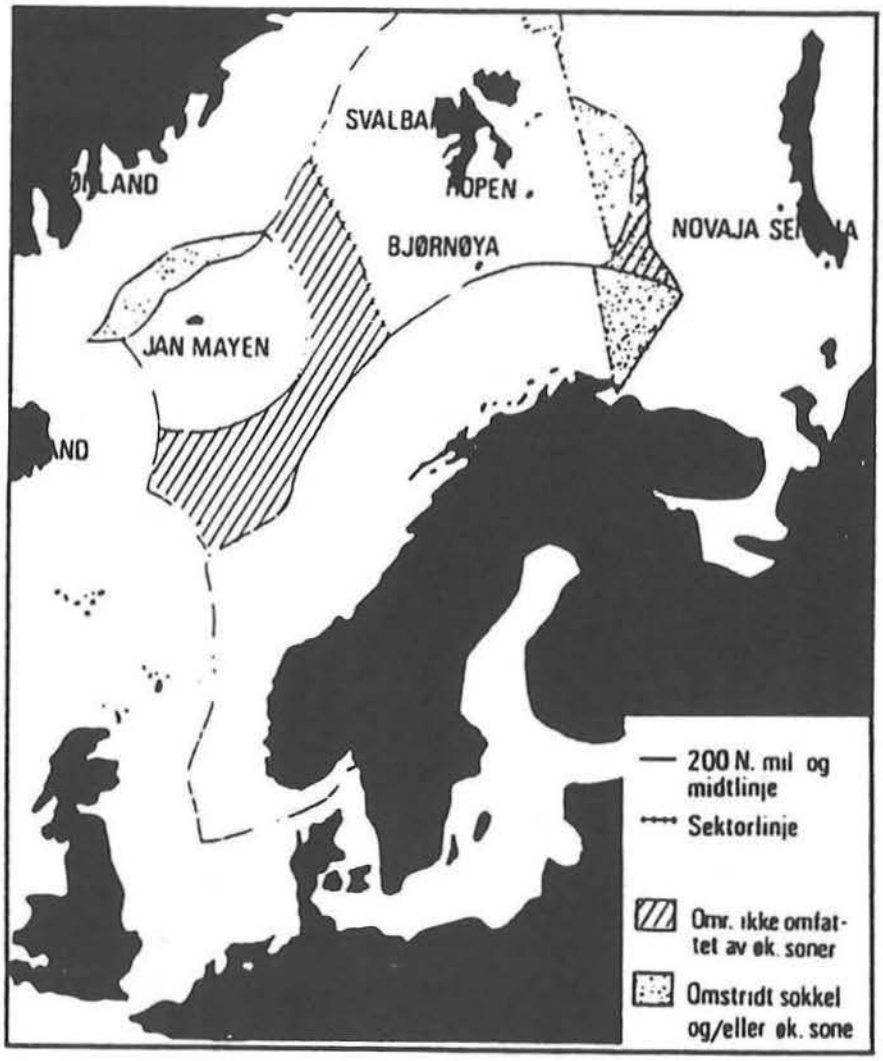
[2] The catch figures referred to here therefore includes not only the catches in the Barents Sea proper, but also the areas to the west and south where the fish stocks are exploited. The statistical reference areas are ICES areas I and IIa&b.



Map Showing the Norwegian EEZ.

To the North Norwegian economy, the Barents Sea fishery resources are crucial. Of a total population of 460.000 in the three northernmost counties -Nordland, Troms and Finmark - 13,500 are fishermen[3]. 6.700 persons work in the fishing industry, in about 540 fish processing plants which are located in 271 local communities.[4] About 240 of these communities have less than 1.000 inhabitants (Brox et al. 1989:20). Since the work force constitutes about half of the population, about 10 per cent of the North Norwegian population

[3] Of these, 10.000 are defined as full-time fishermen ("Blad B").

[4] 1987 figures, from the Fishery Statistics from the Central Bureau of Statistics.

depend directly on the fisheries for their income. In addtion come those dependent on work in related industries.[5]

2.2 A variety of legal bases

The Barents Sea fishery resources are taken in a number of areas where different legal conditions apply.[6] In international waters the fishery resources are subject to the open access rule - anyone may fish what he wants. That in fact did occur the summer 1991 when trawlers from Greenland were fishing for cod in the international waters between the Spitsbergen Archipelago and Novaya Zemlja. A bilateral fishery agreement between Norway and Greenland of September 1991 has brought and end to this, by allowing Greenland a quota in the Norwegian economic zone. Trawlers from EC countries took up this practice in the summer 1992, and provisions for avoiding this in the future was included in the bilateral fisheries agreement between Norway and the EC for 1993.

The 200 mile exclusive economic zones of Norway and the Russia are the most important in terms of weight and value of fish caught.[7] The fishery regime here is based on part V of the 1982 Law of the Sea Convention (LOSC), the essence of which is that the coastal state decides on the management and use of the resources within this zone.[8] As for resources that are shared, i.e. wandering between the zones of two countries, article 63 of the LOSC states that "these States shall seek, ... to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks..." It is left to the states to decide how they will share the resources. In the territorial waters of Norway and the Russia the two states have undisputed rights not only to regulate fisheries, but also to perform other jurisdictional authorities, as specified in part II of the LOSC.[9]

Where the Norwegian and the Soviet boundary claims in the Barents Sea intersects there is a "disputed area". The existence of such a disputed area created problems for the regulation of fisheries, especially third country fishing. In 1977 a practical arrangement for handling these problems was

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[5] Not all North Norwgian Communities are situated by the coast, however. Of a total of 58 local municipialities in the three northernmost counties, 43 are dependent on fisheries (Sørlie 1990).

[6] The most thorouggoing analysis of the legal conditions in the Barents Sea is found in Churchill, R. & Ulfstein, G. 1992: Marine Management in Disputed Areas: the Case of the Barents Sea Routledge, London

[7] The Norwegian 200 mile economic zone was established by an Act of 17 December 1976. The Soviet introduced permanent legislation on their 200 mile economic zone in 1984, but an intermediate arrangement had been in effect since 1976.

[8] Cfr. articles 61 and 62 of the 1982 Law of the Sea Convention.

[9] It should be noted that the Law of the Sea Convention has not yet entered into force. As of July 1991, 47 of the required 60 ratifications were done. The basic rules of LOSC part II and V is however international law by state practice. Neither Norway nor The Russia have ratified the Convention.

negotiated, and the solution was an area with "shared exercise of jurisdiction", commonly termed the "grey zone". In this zone, which is situated in the southern part of the disputed area and to some extent to the west of it, Norway and the Russia regulate and control their own fishermen and the third country fishermen each of them has licensed. As a fisheries arrangement, the zone appears to have worked well (Ulfstein 1987, Hoel 1989).

In the 4-mile territorial waters around the Spitsbergen archipelago the rules of the Spitsbergen Treaty of 1920 applies. This states that Norway holds sovereignty over the archipelago, but that all Treaty parties are subject to equal treatment. Also in the 200 mile Spitsbergen Fishery Conservation Zone which Norwegian authorities erected in 1977 fisheries are regulated on a non-discriminatory basis, but here the legal basis is the 1976 Exclusive Economic Zone Act.[10] The main difference between the Economic Zone and the Fishery Conservation Zone is that the right to exclude foreign fishermen stated in the 1976 Act is said to be preliminarily postponed in the latter zone. When establishing the zone the the aim of Norwegian authorities was to get the fishery under control, while at the same time avoiding conflicts with other states over the jurisdictional status of the zone.[11] Latent conflicts here stem not least from the potential petroleum resources in these areas. Fishery regulations here are therefore of a non-discriminatory nature, as e.g. closure of areas with under-sized fish. Doubts have however been cast as to the long-term effects of this arrangement. The way it is practiced by Norwegian authorities, by a "gentle enforcement" policy where e.g. Soviet vessels are allowed to continue an illegal practice of not reporting their catches, which they are obliged to do under Norwegian law. This may serve to undermine Norwegian jurisdiction in the area (Ulfstein 1987, Hoel 1989).

The upshot of this is that legal basis for regulating the Barents Sea fisheries is very complex. The patchwork of different legal conditions renders management difficult as the rights and duties of the states concerned change according to where in the area resources are taken. This legal complexity used to be compounded by international security concerns overlying it, but this aspect seems to be less important now than a decade ago (Schram Stokke & Hoel 1991). Other policy concerns are important, however: This pertains in particular to the prospects for petroleum resources in the area, which renders the resolution of the jurisdictional issues in the disputed area and in the Spitsbergen Zone very difficult. In relation to this also environmental concerns is becoming a major policy issue (Brubaker 1991), not least because of Soviet dumping of radioactive material in the Barents Sea and nuclear test detonations at the Novaja Zemlja archipelago.

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[10] The reason is that Norway claims the right to establish an EEZ around Spitsbergen, but has temporarily postponed the implementation of that claim.

[11] See e.g. Frydenlund, K. 1986: Lille land - hva nå?. The Russia has lodged an official reservation to the zone, while several nations have reserved their positions with regard to the Spitsbergen Treaty here. Only Finland recognise the Norwegian approach here.

2.3 The international fishery agreements

The international fishery agreements covering the Barents Sea are of two types: multilateral and bilateral. Although the latter are the more important, multilateral regimes are also of some significance here: The Northeast Atlantic Fisheries Commission (NEAFC) was the major management body until the establishment of economic zones in the late 1970's. It still has relevance for high seas fisheries, which in the North Atlantic basically means the blue whiting fishery in the Norwegian Sea. The International Whaling Commission (IWC) has a decisive say in the management of large whales. Since 1976 it has set quotas for the Norteastern Atlantic minke whale stock, but following the adoption of a moratorium on commercial whaling in 1982 and pressure from the USA, Norwegian authorities decided in 1986 to halt commercial whaling from 1988 onwards, awaiting the completion of a comprehensive assessment of whale stocks to be carried out by the IWC (Hoel 1989, 1990). It has however been demonstrated that this decision was ill-founded as far as biological aspects are concerned. In 1992 the Scientific Committee of the IWC agreed to a stock estimate of 86.700 animals, which means that the Northeastern Atlantic minke whale stock may well sustain commercial exploitation.[12]

There exists several bilateral fishery agreements relating to the Barents Sea. The most important of these is the four Norwegian - Soviet agreements.[13] The negotiations are institutionalised in a Joint Norwegian - Soviet Fisheries Commission, which from 1983 on also incorporates a Joint Seal Commission set up in the 1950's to regulate sealing. The task of the Joint Commission is to manage resources so as to maximise the long-term yield from the resources. In 1990 the total yield from the Barents Sea fisheries was in the order of some 3.7 billion NOK.[14] The potential yield is however

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[12] In response to the abdication of the IWC from its treaty-based management responsibilities, and the development of multispecies fisheries management requiring the role of marine mammals in ecosystems to be taken into account, the Faroese Islands, Greenland, Iceland and Norway has set up an alternate marine mammals regime: The North Atlantic Committee for Cooperation on Research on Marine Mammals. As the name indicates, this is concerned with research only. For a discussion, se Hoel, A.H. 1992: "Regionalisation of International Management of Whales: The North Atlantic Committee for Cooperation on Research on Marine Mammals", Arctic 1993.

[13] The four agreements are: The 1974 agreement on trawl-free zones, the 1974 agreement on fisheries cooperation, the 1976 agreement on reciprocal fisheries relations, and the 1977 grey zone agreement.

[14] The basis of this calculation is as follows: the 1990 cod catch of 171.000 tonnes, priced at NOK 10 per kilo, has a first-hand value of 1.7 billion NOK. The 23.000 tonnes of Haddock is given the same price per kilo, being worth 0.2 billion, while saithe, Greenland halibut and redfish amount to 183.000 tonnes and are given an average value of NOK 5, totalling NOK 0.9 billion. In addition comes the Norwegian shrimp fishery in this area, amounting to 85.000 tonnes in 1990. The total value, based on an average price of NOK 10 per kilo, amounts to NOK 0.9 million. Marine mammals is not included.

considerably higher, as most stocks in 1990 were at an all-time low. Management on a multispecies basis may result in a total yield three to four times higher than this (Flaaten 1989:40).

The basis of the negotiations is the scientific advice and management strategy options from the Advisory Committee on Fisheries Management (ACFM) of the International Council for the Exploration of the Sea (ICES).[15] The ACFM advice for the Barents Sea fisheries management is the result of research carried out mostly by Norwegian and Soviet scientists, to some extent in joint programmes.[16] The international scientific screening and elaboration of national scientific work provides the legitimacy ICES management advice carries with administrators and fishermen in its member states.

According to the 1976 reciprocal fishery agreement quotas are to be set according to "..the need for rational management of the living resources, catching methods, the traditional catch levels of the contracting parties and other relevant factors." There is a considerable joint gain to the two parties by cooperating in management (Armstrong & Flaaten 1989).

The three joint stocks, cod, haddock and capelin are shared on a 50-50 basis in the case of of cod and haddock, and 60-40 in favour of Norway for capelin.[17] Thus each party's quotas follows automatically when total quotas (TAC's) are set. It is therefore a built-in temptation in the regime to resolve distributional conflicts by raising the total quotas.

The delegations to the meetings consist of government officials, research personell, and representatives from the fishermens' organisations. The negotiations proceeds as follows: scientific advice regarding catch levels is reviewed, total quotas (TAC's) for the shared stocks are established, quotas of the joint and exclusive stocks are exchanged,[18] and various types of technical regulations relating to fishing seasons, gears and areas are established. The exchange consists basically in that the Russia give Norway some of its cod quota, while Norway give the Russia a share in her quotas of the exclusive stocks of redfish, herring, and most importantly, blue whiting. The outcome of the negotiations is adopted in a protocol,[19] and is formally a recommendation to the two governments. In practice the recommendations are almost always adopted.

The most contentious issues over the last ten years have been the questions of mesh size regulations and Norwegian coastal fishing. The former relates to the claim of Norwegian scientists - supported by the ICES - that the

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15 The ICES is a scientific organisation, set up in 1902 to to provide its member states with scientific advice for the fisheries, having the coastal states in the North Atlantic as its parties.

16 Joint resource estimation surveys are regularly carried out, and the last years there has also been cooperation on development of multispecies modelling.

17 The basis for this distribution is the zonal attachment of stocks.

18 "Exclusive stocks" are stocks owned by one of the parties alone, as for example Norwegian redfish.

19 Formally these are only recommendations to the respective governments, but in practice recommendations are adhered to.

mesh size in trawls should be increased, in order to the growth potential of fish better. The Soviet counterargument is that mesh size is not as important to the exploitation pattern as commonly believed.[20] Also the trawl-free zones set up by Norway in the mid-1970's have been a bone of contention, as Soviet fishermen claim that the zones prevents them from taking the quotas they have in Norwegian waters.[21]

The issue of Norwegian coastal fishing is rooted in the 1974 Tripartite Fisheries Agreement between Norway, the Russia and Great Britain. At that time the overriding concern was the advent of economic zones, and Norway was a strong advocate of the coastal state preference principle for distribution of fishery resources among nations. A vehicle for giving teeth to this argument was to regulate the ocean-going fleet of all nations, while the coastal fleet remained unregulated. A sentence in the Tripartite Agreement allowing for unlimited coastal fishing - even when the total quota was taken -remained in the subsequent bilateral agreement between the Russia and Norway, and its essence was not changed before 1984. Soviet resistance to this part of the agreement stems partly from overfishing of the TAC by the Norwegian coastal fleet in the early 1980's. And partly the Russia has claimed that the Norwegian coastal fishery, in winter targeted at the spawning stock of cod, is a wasteful way of exploiting the resources as it disturbs fish in the spawning grounds. To an outside observer an interesting aspect here is that Norwegian scientists conveys scientific advice bolstering the Norwegian negotiating position - that the management problem is to delimit the take of small fish, while Soviet scientists in turn provide advice that supports the Soviet position - that mesh size regulations are wasteful and that fishing on the spawning stock should be halted.

As to the relations to third countries, the two parties give away resources in separate sets of bilateral negotiations. The Faroese Islands is the more important third country for the Russia, while the European Community is the major recipient of the Norwegian share of the third country quota. The EC quota is part of an arrangement between the two countries including also North Sea fisheries and shrimp fisheries off Greenland.[22] Norway has wished to avoid a too heavy fishing pressure in the Spitsbergen zone which holds an immature part of the cod stock, and has therefore not only set up the aforementioned fishery conservation zone there, but also tried to divert attention from that area by offering more generous quotas in its EEZ.

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20. The Soviet experiments show that most small fish that escape through the meshes in the trawl die anyway. It is also argued that bigger mesh sizes forces the fishermen to increase trawling time, causing a higher mortality rate among young fish, which is precisely what one wants to avoid.

21 Norwegian authorities - having a better exploitation pattern in mind - prefers Soviet fishermen to take their quota in Norwegian waters.

22 The European Community buys a shrimp quota from Greenland, which is given to Norway in exchange for fish quotas in Norwegian waters.

2.4 Internal aggregation in Norway

At national level in Norway there is considerable legal complexity as to the status of fishery resources and fishermens' rights in relation to these. While commonly regarded as a resource which belongs to the nation ("fish is a national resource"), the actual content of the "common property" rights concept is very difficult to handle in legal practice (Fleischer 1990, Ørebech 1990). Beyond legal doubt is however the right of the fisheries authorities to regulate entry into the fisheries as well as fishing itself.[23]

The formal point of departure for the internal decision-making process on distribution of northern fishery resources is the result of the bilateral negotiations with the Russia. These negotiations are normally concluded by late November.[24] The Fisheries Directorate works out a proposal on how various fisheries are to be regulated, by estimating the quantitites that would be taken under open access, and comparing this to the TAC's for shared stocks and scientific advice for exclusive Norwegian stocks as saithe and herring. Thereby one arrives at a measure of "management need", which is greater the scarcer resources are. The regulatory measures and their distributive implications are specified in great detail in a proposal on how next year's fisheries may be managed.

Within a few weeks from the tabling of the regulatory proposal the Director of fisheries meets with several of the fishing industry's organisations, the Marine Research Institute and environmental authorities in the Regulatory Concil to discuss the proposal. The Council has 13 members, 6 of which belong to the fishermen.[25] The shore-side of the fishing industry have 3 members, while the Fisheries Directorate have 2 members and the Marine Research Institute 1 member. The Directorate for Natural Resource Management has 1 had representative since 1989. The fishery interests thus hold a majority in the Council. These are however more often than not fairly divided among themselves, and for that reason the NFA does not always win acceptance for its proposals for distribution of fish quotas.[26] In addition to the regular members of the Council several observers are admitted, i.a. the Shipowners' Association and, since 1990, following considerable public canvassing, a consortium of environmental organisations.

The Regulatory Council was established in 1973 as a forum for administrators and fishermen to prepare for the negotiations in the international fisheries commissions.[27] Given the importance of international resources to Norwegian fisheries - then as now - it is evident that Norway's approach to these negotiations is crucial to the welfare of its coastal

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[23] The bases for this are the 1972 Participation in Fisheries Act and the 1954 Trawler Act, and the 1984 Marine Fisheries Act, respectively.

[24] In the current regime, it is impossible to do this earlier, as the management advice from the ICES is not presented before early November.

[25] 5 from the Fishermens' Association and 1 from the Seamens' Association.

[26] The 1992 regulations are a case in point.

[27] Primarily the Northeast Atlantic Fisheries Commission (NEAFC).

population. The task of working out the strategy for international negotiations was however shifted to a working group under the Sea Boundary Board when 200 mile zones were established. This working group has held a very low public profile, considering the importance of its role to coastal Norway.[28] The Regulatory Council in the late 1970's took on tasks corresponding to those formally vested with it in 1983, when its role was defined in the Marine Fisheries Act. According to this, the Council shall on the basis of the information given by the Marine Research Institute, "consider which regulations of the fishery which are required and how they may be appropriately implemented."[29] In practice this involves discussions in Council on which seasonal, temporal and technical restrictions which are to apply to the quotas set, as well as distribution of quotas on various user groups. In the case of national stocks, also the setting of quotas are discussed.

The Regulatory Council meets three or four times a year, their meetings being preceded by a bargaining process within and among the organisations. The major actor is the Norwegian Fishermens' Association (NFA), which organises both labor and capital in fisheries: Most fishermen in the coastal fleet and the ocean-going groundfish/shrimp fleet holds a rank-and-file membership through the regional (county) departments of the organisation.[30] The regional departments in turn have numerous local divisions.[31] There also exist four independent organisations associated with the NFA, three of which organise shipowners. These may also hold membership through the regional departments, and thereby have several channels of influence with the NFA. Thus the NFA combines geography and the labour-capital relationship as organisational principles, thereby incorporating conflicts between fishermen in various regions, between fishermen using different types of gear, and between the ocean going fleet and the coastal fleet.[32] This structure of course affects the way the NFA operates.

Fisheries regulations always have distributional implications, and very often these centers on the coastal - ocean, north-south and gear controversies. In the NFA the Directorate's regulatory proposal is subject to a thorough examination and debate on its board, yielding compromises which leaves the Associations' Council members with their hands tied to particular solutions as

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[28] The Fisheries Ministry, its Directorate, the Ministry of Foreign Affairs, The Norwegian Fishermens' Union, and the Norwegian Seamens' Union are represented here.

[29] This mandate applies to the articles 4, 5 and 8 in the 1983 Marine Fisheries Act, which authorises a variety of regulations.

[30] In addition some fishermen are organised in the Norwegian Seamens' Association, and some in the Coastal Fishermen's Organisation.

[31] In Troms county, for example, there are about 80 local departments.

[32] Due to the remuneration system in Norwegian fishing, the labour - capital conflict manifests itself not so much between shipowners and crew as between coastal vessels with labour as its major economic input and ocean-going vessels having capital as its major input.

to how resources are to be managed and distributed.[33] The major lines of conflict in the Council corresponds to those within the NFA. The coastal fishermens' interests are represented by the NFA and the ocean-going fleet's interests are represented by the NFA and by the Seamens' Association. Moreover, the latter interests are often allied with the producers which prefers the ocean-going fleet due to the volume and regularity of its landings. It follows that power relationships within the NFA are crucial for its position on various issues as well as the outcome of the Council's deliberations (Hoel, Jentoft & Mikalsen 1991).

Distributional decisions in the Council are mostly made with reference to gear types, and the north-south and coastal-ocean dimensions are indirectly affected as various types of gears are not evenly distributed along the coast. As a result of these contradictions, the deliberations in the Council sometimes results in conflicts being solved by raising the quota for exclusive stocks, as has happened e.g. with saithe. The Council does not make such decisions for cod, however, as its TAC is decided in the preceeding negotiations with the Russia. But as long as the Council recommended regulations which made it possible for the coastal fleet to overfish its quota, it indirectly solved distributional conflicts in this manner for cod too.[34]

The Council decides mainly by way of debate, while resorting to voting only when matters are very contentious. This is significant for the outcome of the deliberations, as the observers also are allowed to take part in the debate. Their views are also included when the Director of Fisheries sums up the debate and formulates his advice to the Fisheries Ministry. Thereby the shipowners may get still an extra vote, adding to the decision-making power their multiple channels of influence to the NFA give. On the other hand, fishermen's influence is more now than before balanced with environmental considerations, not only due to the membership of the Directorate for Natural Resource Management and the observer status of the environmental groups, but also because the fishermen themselves and the fisheries administration has become increasingly concerned with this aspect.

The advice provied by the Council is to a large extent adhered to by the fisheries authorities, especially when the Council is unanimous in its recommendations. The Ministry has however from time to another introduced additional measures, in particular with geographical redistribution in mind. The last few years a part of the total quota of cod has been reserved for Finnmark, the northernmost county.[35]

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[33] The NFA members meeting in the Council reflects the membership profile: 2 coastal fishermen from the north, 1 representative from the trawling interests in the North, 1 representing the purse seine interests in western Norway, and 1 representative for the North Sea fishermen in southwest Norway.

[34] This occurred mainly in the early 1980's, but happened to a certain extent also in 1990, due to the manner the fleet fishing with conventional gear was regulated.

[35] The 1983 Marine Fisheries Act did not previously allow for geographically defined allocations, and was changed to this end in 1988.

This organisation of the regime, with corporative structures both in the preparations for and in the delegations to the international negotiations and in the Regulatory Council, leaves the NFA with a considerable influence over the Norwegian fisheries policy, and thereby also over coastal community development, in that it has a decisive say over the distribution of resources.[36] In return, Norwegian authorities benefit from qualified technical advice concerning the complex details of fishing. And many conflicts are resolved by the NFA, thereby relieving the authorities of the task of setting up compromises. In addition, when the fishermen are participating in the formulation of fisheries policy from the outset, policy holds greater legitimacy among the fishermen and its implementation may be more successful (Hoel, Jentoft & Mikalsen 1991, Jentoft 1991).

What emerges from the above, then, is a picture of a two-tiered decision-making system where the important decisions as regards management and distribution of the Barents Sea resources are taken at the international level, while the distribution of those resources among various groups in Norway is decided on by a corporativist body, comprising regulators as well as those to be regulated.

The next question, then, is how this organisational setup has functioned, in terms of how well resources are managed and how they are distributed.

3. Fisheries policy: resource management and distribution

3.1 International management and distribution

Both groundfish and pelagic fish are important in the Barents Sea fisheries. As mentioned, cod is the economically most important species, and its management therefore also the more important: the total catches were mostly between some 500.000 and 1 million tonnes between 1960 and 1977, when extended coastal state jurisdiction was established. After that catches have been sharply reduced.

The sharp reductions in the catches of cod stems from the decline in the cod stock and consequent quota regulations from 1977 onwards. In 1977 a TAC of 810.000 tonnes was set, while the 1990 TAC of 120.000 tonnes was an all time low. This was somewhat alleviated however with the traditional 40.000 tonnes of coastal cod to Norway and 40.000 tonnes of Murmansk cod to the Russia, which always come in addition to the cod TAC. By 1993 the total quota was however up to 460.000 tonne - almost a fourfold increase (fig. 1).

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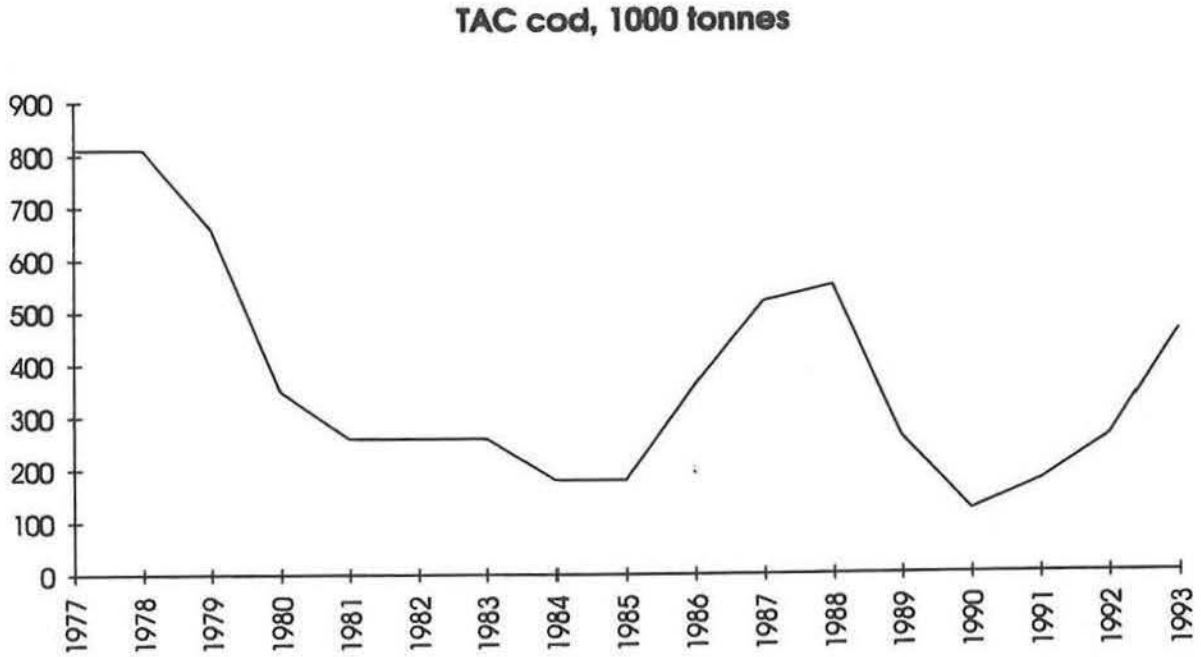
[36] This applies not only to resource management, but also to financial support: the system for providing public financial support to the fisheries sector is also governed by a corporate structure. This has compounded the distributional problems in that it has contributed to build up overcapacity in the fishing fleet (Jentoft & Mikalsen 1987, Holm 1991).



As for the pelagic species, during the highly intensive herring fisheries at the Norwegian coast in the 1960's herring was brought almost to extinction, and disappeared from the Barents Sea. During the 1970's the capelin fisheries expanded enormously, reaching its peak with almost 3 million tonnes taken in 1977, In 1985 it was discovered that the stock was about to collapse, and the fishery was halted early in 1986. In 1991 the fishery was restarted, with a TAC of 850.000 tonnes. This quota marked the real start of multispecies fisheries management in the Barents Sea, as the single-species recommendation from the ICES was at 1.0 million tonnes.[37] 150.000 tonnes was thus set aside as food for other fish species.

Underlying the improvement in various fish stocks is a change in regulatory philosophy in the Joint Commission. Management are based on increasingly strict principles. Another important measure in rebuilding the fish stocks has been a system of regular surveillance of fishing ground and automatic closures of areas with a high percentage of immature fish in the catches. Threatening the succesful management efforts are however the failure to control especially the operations of Russian fishing vessels. In the winter 1993 more than 100 Russian trawlers were fishing in the eastern Barents Sea, beyond the control of any responsible body and delivering their cayches abroad in return for desperately needed hard currency.

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[37] For 1992 the capelin TAC is set at 834 tonnes.

In addition to the fishery, there is also a whaling and sealing industry which have both been cut back, albeit for other reasons than those related to biology. The latter is now in the order of 40.000 animals, and is carried out both by Norwegian and Russian sealers.[38] Whaling is conducted by Norwegians only in this area, and has since WWII averaged about 1.800 animals per year. The commercial catch was, as mentioned, halted in 1988, removing an important fishery to some 50 vessels in North Norway. Only a few animals were taken for scientific purposes in 1988-90, while 95 was taken in 1992. In 1992 the Norwegian Government announced that the tarditional coastal whaling would be resumed in 1993.

As to the distribution of catch between countries, there is a dividing line before and after 1977. Before 1977 these waters were international outside a 12 mile fishery zone. Most of the fishery resources were therefore subject to international management under the auspices of the Northeast Atlantic Fisheries Commission (NEAFC) and a more or less untamed international exploitation, as reflected in the share of the total catch by third countries (figure 2). After 1977 Norway and the Russia have kept most of the resources to themselves. The third country quota of cod has been steadily reduced from 19 per cent in 1977 to 10-11 per cent since 1984.[39] By the late 1980's Norway and the Russia had established as a firm principle that they retain about 90 per cent of the total quota of cod for their own fishermen. This appears to be changing somewhat now: Following the exchange of quotas, the Norwegian quota amounted to 73.000 tonnes (60.8 per cent of the TAC) in 1990 (the 40.000 tonnes of coastal cod come in addition). The corresponding figures for Russia and third countries are 33.000 tonnes (27.5 per cent of the TAC) and 14.000 tonnes (11.6 per cent of the TAC). For 1993 the Norwegian cod quota has increased to 208.000 tonnes (45.2 per cent of the TAC), Russia's quota is up to 188.000 (41 per cent of the TAC) tonnes while third countries received 64.000 tonnes (13.9 per cent). Compared to 1990, Norway's quota has increased with 185 per cent, Russia's with 470 per cent and third countries' with 357 per cent. Of an overall increase in the cod quota of 283 per cent Russia and third countries have therefore gained the bigger share (figure 2 - which shows percentages of total quotas, with third countries, Russia and Norway counted from above).

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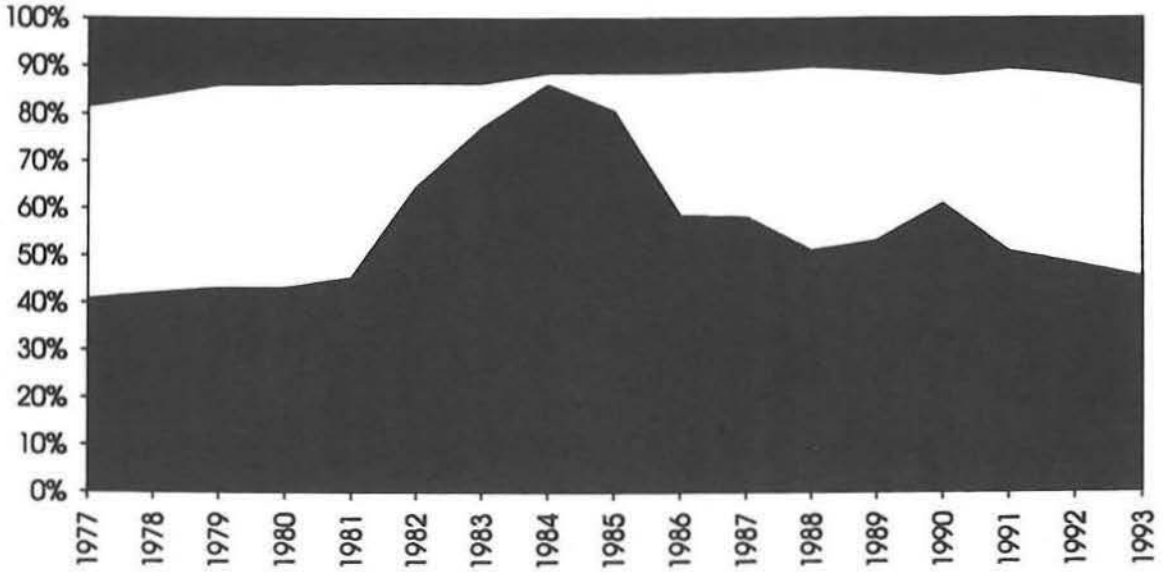
[38] The seal stocks now appear to be in a rather bad shape, not least because of the massive "seal invasions" along the North Norwegian coast in the late 1980's.

[39] Due to increased third nationing fishing in the Spitsbergen area, a total quota for third country fishing in the Fishery Conservation Zone was established in 1986, set at 4 per cent of the total quota for cod. Most of this (3.46%) is given to the EC.

Distribution of cod quota, percentages



As to the bilateral results of these negotiations, Norwegian government officials claim the outcome of the negotiations are fairly balanced and that the negotiations with the Russia have been far more business-like and practically oriented than the case is with the EC (Paulsen 1989). Some has however argued that the final distribution appears to be skewed in Norway's disfavour (Hoel 1989, Schram Stokke & Hoel 1991), at least when measured by conventional western price indices.[40] Moreover, the Russia in addition to their 50 per cent share annually gets the aforementioned 40.000 tonnes of "murmansk cod", which in reality is a part of the northeast arctic cod stock.[41]

On the other hand, taking Norway's catch of marine mammals in Soviet waters and overfishing of the cod quotas in the early 1980's into account,[42] as

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[40] An analysis of the aggregation of Norwegian and Soviet preferences concerning the management of shared stock will suffer from a major deficiency: information on the Soviet preferences are scarce.

[41] This is also rooted in the 1973 Tripartite Agreement, where Norway was granted a quota of 40.000 tonnes of coastal cod, corresponding to the average catch of this stock which is distinct from the arctic cod stock. At the second meeting of the Joint Commission in 1976, when Norway and the Russia for the first time were to set quotas for the joint stocks, the Russia demanded a corresponding quota and the "Murmansk cod stock" was created to this end.

[42] In 1982, for example, the Norwegian quota was overfished with some 120.000 tonnes, the same quantity as the 1990 TAC.

well as the fact that the quotas the Russia receive from Norway to some extent is paper fish,[43] the distribution appears somewhat more balanced. It should also be taken into account that Norway's major goal in these negotiations has always been to secure as large a transfer of cod as possible from its counterpart, in exchange for fish species of less interest to her. This strategy has definitely been in the interest of the coastal population in North Norway, and since substantial amounts of cod has been obtained this way the strategy may from that perspective be characterised as successful. The Norwegian share of the cod quota increased from 41 per cent in 1977 to 86 per cent in 1984, then levelling off to between 50 and 60 per cent annually. On average in 1977-1991 period Norway has had 52 per cent of the quotas of cod. In addition come the quantities of fish purchased by Norwegian processing plants from other nations. In 1990 more than 40.000 tonnes extra of cod was landed in North Norway this way, most of it from Alaska, Canada and the USSR.[44] By 1992 this trade had virtually exploded, with Norwegian fishing plants importing between 70.000 and 80.000 tonnes of cod from Russia. As a consequence of the increased suuply, prices have dropped considerably, angering Norwegian fishermen who see their income falling as thei fish quotas increase.

3.2 Internal distribution results in Norway

The total Norwegian catch of all fish species in northern waters has been reduced from 2.5 million tonnes in 1977 to 470.000 tonnes 1990, a reduction of 80% (Hersoug & Hoel 1991). Northern waters thereby became less important to Norwegian fisheries in general. With the resumption of the capelin fisheries in 1991 and the increase in cod quotas the importance of Northern waters has increased again. The reductions in available resources have of course led to considerable overcapacity in the fishing fleet, adding to the economic difficulties fishermen and their communities face. For cod alone, the mainstay of the North-Norwegian fishing industry, the Norwegian catches in 1990 (116.000 tonnes) are only a fourth of those in 1977 (429.000 tonnes). And the capelin fishery - the biggest Barents Sea fishery measured by weight, was reduced to naught in the latter half of the 1980's.

Scarcity has served to intensify the distributional conflicts between north and south and between various gear types. The actual distribution of catches of cod between conventional gears and trawlers appears however to be fairly constant, although there has been considerable deviations for certain years (Hersoug & Hoel 1991). The variations stems mainly from shifts in the migration pattern of cod, which is unavailable for coastal fishermen when it stays too far off the coast as happened in the years 1986-88.[45] The

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[43] The blue whiting quota, which has been varying between 290.000 and 385.000 tonnes has never been taken in its entirety.

[44] Fiskeribladet, Januar 1991.

[45] Thus, in 1987, conventional gears' share of the Norwegian cod catch was down to about 40 per cent in 1987 (Hersoug & Hoel 1991).

distributional decisions of the Regulatory Council is not of much help to the coastal fishermen when natural phenomena intervene in its distributional scheme. Over the last decade the distribution of the most important species, cod, has been about 65-35 in favour of the coastal fleet. This distributive key has been a recurrent source of tension. In 1989 the NFA suggested a scheme for codifying the distribution of cod on gear types according to TAC size. This implies basically that when cod quotas are low, trawlers will have about 25 per cent of the total quota, and when quotas are high their share rise to 35 per cent.[46] By establishing such a fixed distributive scheme the annual conflicts may be softened, as the various groups' share not will be subject to bargaining each year.

The great redistribution in Norwegian fisheries appears to be that between north and south, as North Norwegian fishermen has lost considerable shares of the total catches. While taking about a third of the total catch in 1977, they are now down to a fifth (Hersoug & Hoel 1991). In absolute terms, the North Norwegian catch has been reduced with about 1 million tonnes. Had North Norwegian fishermen maintained their share of the total Norwegian catch from 1977, the reduction would have been only half of that (Hersoug & Hoel 1991). The basic reasons for this development are scarcity of resources in the north, as reflected in the figures above, and, in the pelagic sector, a considerable transfer of fishing licenses from north to south.[47]

Just as important are the impacts of these cutbacks for the fishing industry. While half of all Norwegian fish catches were landed in North Norway in 1977, only 20% of the catches were landed in the North in 1990. This decline stems to a large extent from the closure of the capelin fishery. As to cod, landings were in absolute terms in 1990 down to a third of the 1977 level (Hersoug and Hoel 1991). The supply to the North Norwegian fishing industry have thereby been dramatically reduced. In the groundfish sector this has to some extent been compensated for by the aforementioned deliveries from abroad. In the pelagic sector many fishmeal plants have been shut down, while some have been maintained by state aid to this end.

3.3 Explaining the crisis

The Barents Sea fisheries regime as described above is the institutionalisation of an attempt to avert a "tragedy of the commons" in the area. The three joint stocks the regime is to manage have all been sharply reduced during the 1980's, as have several exclusive stocks. It is therefore no bold conclusion that the regime's success is at best qualified. It should be noted however, that it is open to discussion exactly how much of the development in the resource situation that may be attributed to the regime. Explanations can therefore be grouped into two categories: "natural" and "political":

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[46] In 1990 conventional gears was up to about 75 per cent of the catch.

[47] Of about 100 licenses for purse seine fishing in 1990, 66 are held in two counties in western Norway.

As to explanations relating to natural phenomena and science, scientific advice have in some instances been inferior, as in the case of the collapse of the capelin stock (Tjelmeland 1989). Fishermen misreporting their catches have compounded these problems in that the data on which management is based is faulty. In addition comes that climatic variations may be an important explanatory factor here (Loeng 1986), which is not taken fully account of up to now. Thus not only inferior advice, but also neglect of factors which contribute to stock development is a feature here.

As for the political aspect of management, the more popular explanation is the corporativits hypothesis stating that fishermens' greed in combination with fisheries authorities' lack of understanding is the cause of the crisis (Brox 1989, Nilsen 1991). However, the quotas have by an large been set in accordance with the scientific advice given (ICES 1989/91). Summing the total quotas for cod set during the 1980's yields a lower total than the sum of advised TAC's in the same period. This indicates that the vagaries of nature are important in explaining the failure of management - it is not faulty management alone which accounts for the crisis. A clear case of mismanagement is however the 1985 decision, against scientific advice, to allow for a capelin fishery in 1986 - this resulted in the spawning stock almost being fished out (Hamre 1991). In addition to such issue specific, fisheries related explanations, come those related to the complex legal basis for the regime and other policy concerns which has a direct bearing on the regulation of fishing in the Spitsbergen area, for example. The last years has however witnessed considerable improvement in the resource situation, both for pelagic species and for groundfish. As the decline in resources only to some extent can be explained with reference to political factors, so tne improvement in stocks may stem from other factors as well.

The upshot of this is that, while the introduction of 200 mile economic zones which conferred resource rights to coastal states cannot be said to have yielded substantial results with regard to resource management, this aspect of ocean law has been very instrumental in the distribution of resources. The partial phasing-out policy as regards foreign fishing after the introduction of 200 mile zones[48] has left the two coastal states with about 90 per cent of the cod quotas. This pattern appears to be challenged now, as witnessed by the admission of new fishing nations into the area and the increase in the EC's share here. Thus, the turn-around trend witnessed in the development of resources is accompanied with a certain tendency towards international redistribution towards third countries. In this context it is the establishment of

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[48] A turn-around trend in this policy can now be observed: following the entry of Greenland trawlers in the international waters in the Barents Sea the summer 1991, Norway has, as mentioned, entered into an agreement with Greenland which gives it a quota in the Barents Sea. And in order to engineer a final solution to the negotiations for an European Economic Area in the autumn 1991, the EC was given an increased share of the total quotas for the cod fisheries in the Barents Sea, to be taken from the Norwegian share of the TAC.

rights by formal agreements and the abjuration of well-established principles by coastal states that is important, not the actual quantities of fish involved.

As regards the distribution of quotas between the two coastal states in the area, overall power relationships appear to have little explanatory value (Schram Stokke & Hoel 1991).[49] More issue specific explanations, as the parties' interests for different fish species, and and bargaining dynamics - as the salience of focal points are more important explanatory factors. An example of the former is the Norwegian interest in highly valued species as opposed to the Soviet interest in quantity. Example of focal points are the 50-50 divisions of resources and the stability of the annual transfer of blue whiting from Norway to its counterpart.

Turning to the national part of the regime, the mobilisation of a broader public interest in fisheries management has undermined the legitimacy of both the corporativist regime and its policy, which is said to have engineered a grand-scale "tragedy the of the commons" in a North Norwegian context (Brox 1989, Nilsen 1991). As long as fisheries was a matter for the fisheries authorities and the fishermens' organisations, the NFA was very useful to the authorities: First in that it functions as an information central, providing the technical knowledge required in the international negotiations, and secondly in its role as a clearing-house, in which the Directorate's proposal is molded into a politically feasible regulatory scheme. This is no longer true: the increasing scarcity of resources has intensified conflicts not only among fishermen, but also among regions as the economic repercussions of scarcity has been felt onshore too. There has been a growing concern of other groups in society, as politicians and enviromentalists, of how fisheries are managed and distributed. The extent to which the distributionary pattern can be explained by the corporative organisation of the fisheries regime is difficult to assess however. In general the management aspect is not that important in the decision-making process at national level, as the economically most significant stocks are stocks shared with other nations. The basic reason for resource shortage in North Norway is the decline of the fishery resources in the North, which, as we have seen, is due to a mix of factors where the more important probably are beyond the realm of national politics. Compounding the effects of scarcity are redistributions at national level, which has caused North Norway's share of the total Norwegian catch to drop from about one-third in 1977 to about one-fifth in 1990. As to cod, the change in distribution among various groups of vessels can primarily be attributed to natural variations and to changes in the regulatory scheme (Hersoug & Hoel 1991), in favour of coastal vessels. As to pelagic species, the regulatory system has allowed for a large-scale transfer of fishing rights from north to south.

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[49] This seem to be the case also for other instances of international fisheries cooperation - cfr. Underdal 1980 for the case of NEAFC.

4. Prospects for the coastal populations

4.1 Social disruption following the crisis

The quota reductions for cod alone means that the inputs to the North Norwegian economy is reduced with figures in the order of NOK 3 billion, relative to early 1980's catch levels.[50] As the North Norwegian economy is to a large extent based on fish and the fishing industry one should expect that the economic upheavals resulting from catch reductions can be measured along traditional social indicators. It is however difficult to assess precisely how much of the scores on these indicators that can be attributed to the variations in the fisheries.

The decline in the population in most municipialities in Finnmark and the northern part of Troms (the two northernmost counties) in the latter half of the 1980's, as well as the generally stagnant population in most coastal communities, is basically a consequence of long-term changes in the age-structure of the population.[51] Also imbalance in sex composition in most communities is of relevance here (Jentoft 1991). The decline in in-migration (Eikeland 1991), which traditionally has contributed significantly to the population, may however to some extent be ascribed to the fisheries crisis.

The rise in unemployment to levels far above the national average, in 1990 at 13 per cent in Finmark and at 17 per cent in northern Troms, was evidence of the decline in the fisheries sector and in dependent industries. The same applied to the soaring number of private and company bankruptcies. The biggest vessel owners in the north are now the banks, whose troubles in turn stems not least from the problems in the fisheries. Following the improvements in the resource base, unemployment levels have now dropped considerably, and are now generally low compared to other parts of Norway.

In addition to such measurable social indicators, more intangible changes are also occurring: peoples' general outlook on the prospects of staying in their home district, and young peoples attitude to the fisheries industry are being negatively affected.[52] Such attitudes do not co-vary with the fluctauations in fish stocks, and may take considerable time to change.

4.2 The general outlook

A basic feature of the public debate on the Norwegian fisheries policy is however that it is almost devoid of reference to the international context fisheries management necessarily must be done in. This is reflected also in the debate on regime change. It follows from the above that the prospects for the North Norwegian population depends in large part upon the development of

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[50] A reduction in the cod catch of 100.000 tonnes corresponds in 1990 prices to roughly 1 billion NOK. The Norwegian cod quota, three-fourths of which are taken by North Norwegian fishermen, have been reduced with more than 300.000 tonnes since 1977.

[51] Cfr. The report to Parlimanent No. 32, (1990-91), at page 16.

[52] This is by no means a feature of North Norway alone. On Canada's Atlantic coast the experiences are similar (Andersen 1989).

the resources in the Barents Sea - that is, on the performance of the bilateral fisheries regime. It is at the international level that significant advances can be made in management that renders the coastal population better off. It is obvious that considerable improvements in management are already made, as witnessed by the increase in the cod and capelin stocks, which to a large etxent stems from the tight management. With a more directed effort at multispecies management there is a great scope for deriving more benefits from the resources.

This raise two questions, first what are the obstacles, and second, who will benefit? As to the obstacles, international attitudes to harvesting of marine mammals is one problem, as the predators in the ecosystem need to be controlled if maximum production of commercially interesting species is to be achieved. The costs of freely growing marine mammal stocks are considerable to North Norway (Flaaten 1988, Heen 1989). Moreover, the fishing pattern has to be improved, which is difficult to achieve due to the complex legal situation in the area.[53] Related to this, in case of an Norwegian entry into the EC much is set to change, as the EC will take Norway's place as the Russias counterpart in the negotiations over the management of the Barents Sea's resources. This is by virtue of the EC's fisheries policy, which shifts the competence to manage fish resources from the member states to the Community. Thereby management strategies may change significantly. It is to be noted that the EC approach here amounts to a reversion of the process of transferring ownership and management rights to coastal states which resulted in the establishment of the 200 mile economic zone principle during the United Nations Law of the Sea negotiations in the 1970's.

This brings us to the second question - who will benefit from the results of increased stocks - those who have carried the costs by tight management or others? With the European Economic Area agreement negotitated in 1991, the EC is set to increase its share of the cod quotas in northern waters.[54] In addition, also Greenland has obtained a share in Norwegian waters. In the fisheries negotiations with the Russia in November 1991, the quotas set for third countries in 1992 did increase relatively much.[55] This trend was continued for the 1993 quotas. And the Russia have since the mid-1980's gradually become less interested in transferring resources to Norway, and currently only a few thousand tonnes are granted to Norway this way.

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[53] Spanish fishing vessels, for example, in August 1991 landed catches consisting of fish avergaing about 300 grammes each, less than half the legal minimum size in Norway (700 grammes/47 cm). Fiskeribladet 14.8.1991.

[54] There is two components in this: first an increase in the EC's general TAC share in cod in the Economic zone from 2.14 to 2.9 per cent, and secondly an additional amount (also in the Economic Zone) increasing from 7.000 tonnes in 1993 to 11.000 tonnes in 1997. Given a TAC of 700.000 tonnes in 1997, the EC quota in northern waters will therefore constitute 3.46% (Spitsbergen Zone) + 2.9% (Economic Zone) + 11.000 tonnes. This amounts to 55.500 tonnes, or 7.9 per cent of the TAC.

[55] From 10.3 per cent (18.000 tonnes) of the cod TAC in 1991 to 11.5 per cent (30.000 tonnes) in 1992

As the ownership entitlement approach thus is being challenged at the international level, with other nations enjoying new priveleges in coastal states' waters, an opposite tendency emerges in fisheries management at national level. A prominent solution suggested for improving management is to vest ownership rights with single actors, as companies or persons (Hannesson 1985, Strukturutvalget 1989). A consequence of this will be privatisation of fisheries resources, leaving fishing rights in the hands of a privileged group of persons. Efforts to this end were however not successful, where the Government, following an extensive public debate, rejected the idea of individually transferable quotas. It is evident, however, that the coastal population in general as well as the fishermen more particularly more than before now has an uncertain legal foundation for claiming that the resources off their coasts belong to them, let alone protection from outside interests that wants to reap those resources.

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Common Property In Rural Areas In Norway

by
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1 Introduction

The existence of land which is "common property" or in some sense collectively controlled, owned, or used, in rural areas in Norway, is closely linked to the historical evolution of settlement and tenure patterns. We call these lands by different names, for instance "allmenning" and "sameige" in Norwegian. For convenience I will use the word "common" for the whole group to begin with. Some of the laws governing use and management of the commons go right back to the early Middle Ages, which in Scandinavia means the 10th century. I find it necessary to stress this point, because the phenomenon must be studied and understood in its proper historical context. As the commons are of very ancient origin, and the topography, climate, settlement patterns, economy etc. in Norway show a wide variety, it must be expected that various aspects concerning the commons are equally diverse. Classification in seemingly homogeneous groups thus becomes rather dubious. It is said that each individual common must be studied separately to get a true understanding of the legal situation. This should be kept in mind when I present my classification, and the various features attached to each group of commons. Classification in itself violates the realities to some degree.

There is a mutual relationship between land use on the one hand, and ownership and tenure patterns on the other:

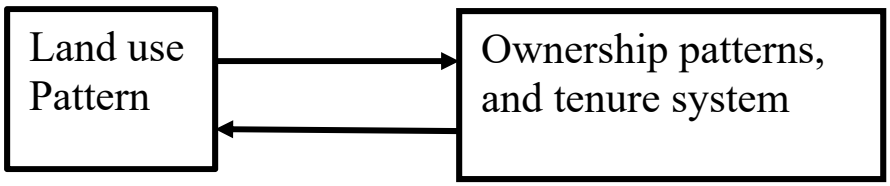


Figure 1. Ownership and land use.

Certain land uses lead to establishment of certain ownership and tenure patterns, which then influence further development of land use. Or vice versa, certain types of ownership promote certain land use. (Who came first, the bird or the egg?) These relationships could be extremely complicated and divers, but for our purpose it is important to note that the ownership pattern often tend to "lag behind". This means that certain ownership and tenure patterns can endure for a long time, even if the land

use that created them in the first place have vanished. This general statement could easily apply to some aspects of the commons. It should also be noted that the Nordic countries in general have a remarkable continuity in their legal systems concerning land tenure and ownership. This is so mainly because there has been very little migration into the area of alien groups of people in historical times, or other events causing sudden or revolutionary changes in land tenure systems.

Norway has got a small population compared to the size of the land area. The actual cultivated agriculture area, however, is very small relative to the population, at present, ca. 0.2 ha pr. person. And the rather marginal conditions for agriculture makes this figure even "smaller" so to speak, compared to more southern countries. The outfields (woodlands and mountains) consequently were of great importance, for grazing, fodder gathering (grass, moss, leaves etc.) for the livestock for the winter, wood and timber for various uses, hunting and fishing, just to mention a few important uses.

The predominant settlement pattern was constituted by the single farm. The farm area could be very large, in terms of area, but most of it was not cultivated land (forest, mountains). The actual cultivated area was quite small. However, by successive subdivisions of farms, clustered village like rural communities developed, particularly in coastal and fjord areas from the 1700th century. These villages have for the most part been dispersed by the process of land consolidation, during the second half of the last century and the first decades of this century.

All types of commons are related to some sort of a "local community". In many countries this will cause no problem of definition, the village constitutes the obvious local community. The term "local community" will be used by me too, in much the same sense as a village, but we have to keep in mind that in Norway it is seldom a village in its physical sense, meaning a clustered rural settlement (small town) . We must imagine an agricultural landscape with scattered farms and single houses or small clusters in between. This is, of course, a very unsatisfactory definition of the "local community", but a more precise definition of this unit will be given in its proper context when I feel it necessary.

2 The Commons

2.1 Definitions

The terms "common property", "commons", "common land" and so forth, constitute problems of definition. What should be understood by "common property"? It certainly is not enough that more than one person (physical or judicial) exercise rights of ownership or use of some sort, in a piece of agrarian, sylvan or pastoral land. Some clues are given in the invitation to the seminar, the ownership or rights to use, should be "tied to autonomous local bodies based on the cooperation of the families living in rural and mountainous districts". But the land should not have been converted into municipal property. I stress this point a little, because if comparison between various European countries should be possible, the concept has to be understood in at least roughly the same way by the reporters. We have to know what we are talking about. On the other hand, we have to allow for peculiarities in the different countries, or even areas within a country. Thus the definition should not be too narrow either.

I find it useful to start with the idea of degrees of ownership control placed along a scale. The extremes are to be found at both ends; completely individualized ownership control at one end, and completely collective at the other, as shown in figure 2, with various degrees of individual/collective along the line.

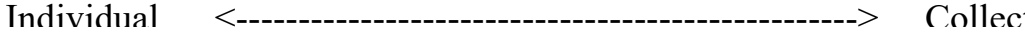


Figure 2 The scale of ownership control

The commons must clearly be of a high degree of collective ownership, towards the right end of the scale. In addition to be of a collective nature, the rights must be linked not to individual persons as such, but rather to capacities these individuals possess in the local community. Most typically such a capacity would be permanent residence in the local community, but it could also be "farmer", "owner of a farm", "tenant of a farm", or close relative to a person who possesses such qualities.

It is problematic to what extent cooperation in actual use should be emphasized, and entered into the definition. Common properties may be, and often are, used independently (individually) by the shareholders. I have come to the conclusion that for Norwegian conditions decisive importance must be placed upon the legal rights being common, and let the degree of collective use be part of the description. Consequently, I will classify some properties as "commons", even if the actual use is carried out mainly individually.

In Norway the two basic capacities attached to the individuals in this respect are residency in the local community and/or ownership to a farm,

or at least ownership to a piece of agricultural land which once have been a farm. Most typically it used to be both residency and being a farmer, which in Norway in practice meant to own at least part of the farm unit. It should be noted that for some types of "commons" it is not necessary with residency, ownership to farmland is the decisive factor. It could be argued that this types are not real commons (see type 3 below), but private jointly owned areas, but I will include them in the concept of "commons" here. It is the increasing number of absent or "not farming" owners of farmland that create problems. Because of this fenomenon (see figure 3 below), it seems necessary to exclude "residence" in the definition, to create a concept that gives a reasonable realistic description of the present situation concerning "collective" lands in Norway. In most cases there will be both resident and absent "owners" or "shareholders" to the commons.

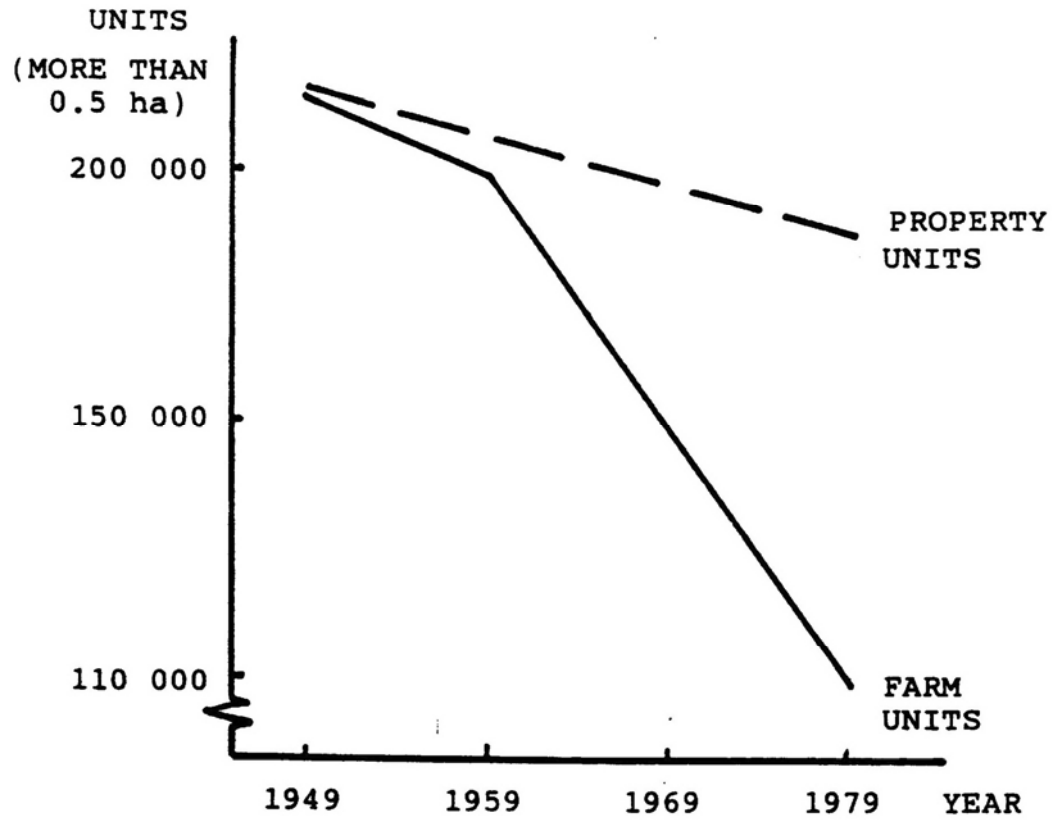
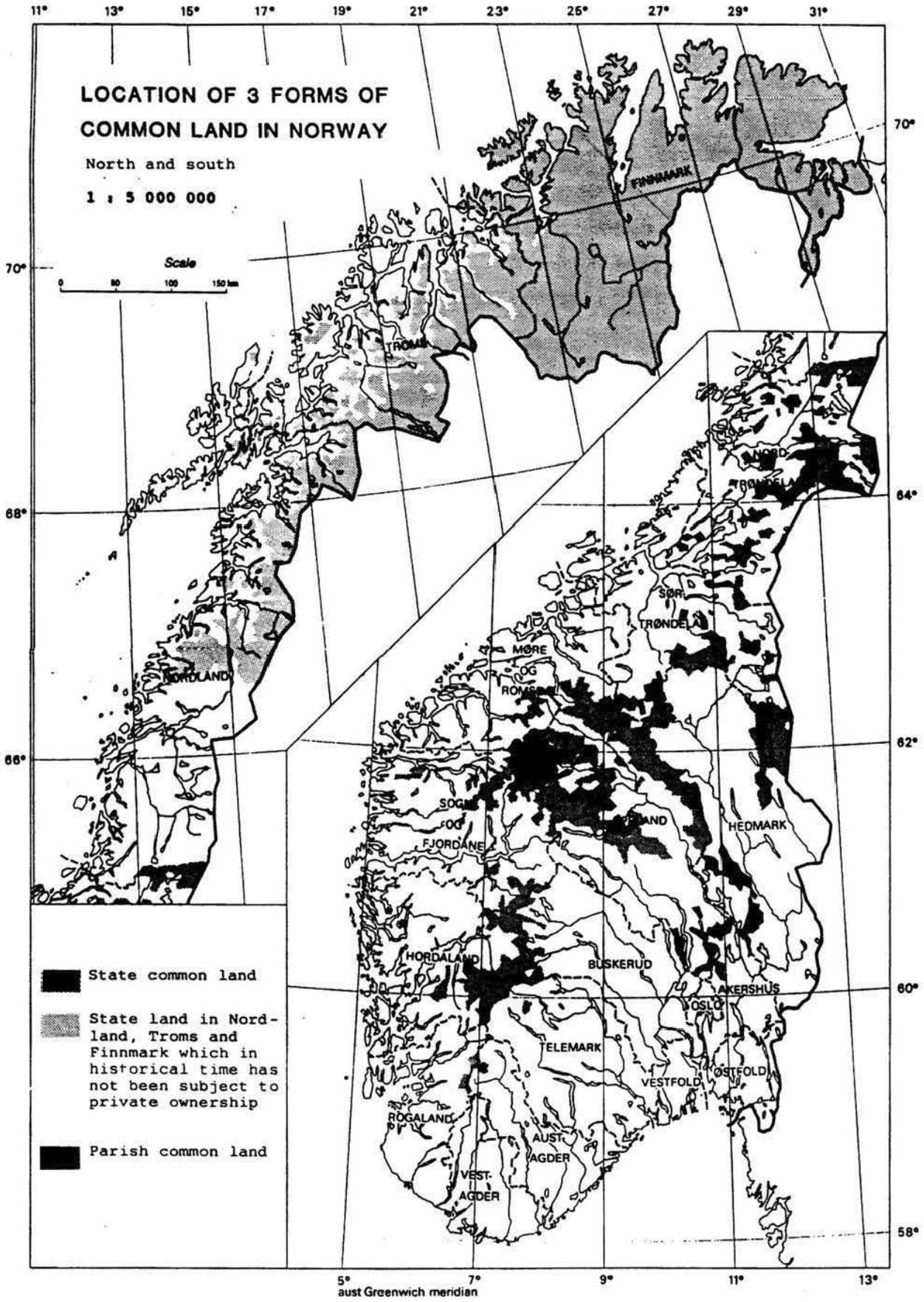


Figure 3 The number of property-units and farm-units, with more than 0.5 ha agricultural land. Source: Aanesland 1983.

Figure 4



Printed in Norges geografiske oppmåling 1982.

On this background I will present three main types of commons in Norway:

1) State common land
2) Parish common land
3) Land jointly owned by estates

In addition, I will make a few remarks on two other types, that may be related, but which do not quite meet the formal requirements of my attempted definition:

4) State land in Northern-Norway
5) Land used by Lapps in their reindeer husbandry.

I will not include coastal waters, riparian rights and other special rights and types of ownership concerning salt or fresh water, even if they could definitely be of common nature, and related to a local community. Finally I will mention some categories of commons in Sweden.

The distribution of state common land, parish common land and state land in Northern-Norway are showed on the map, figure 4.

2.2 State Common Land

A) Area:

These commons amount to an area of 26. 622 km2, which is ca. 8.2% of the total land area of the country. Most of these commons are mountainous, only 7% are productive forests. They are distributed unevenly in mountainous parts of Southern Norway, see the map and Sevatdal 1985. There is practically no "state common land" in the northern part of the country. The main land uses today are:

* forest (timber, fuelwood)
* pasture (sheep grazing)
* secondary summer farms with cattle grazing
* grassland for hay production (cultivated)
* fishing
* hunting
* tourism and recreational use of various sorts.

In addition conservation has to be mentioned, as several national parks and other protected areas are to be found· in state common land.

State common land once constituted much larger areas. Over the centuries parts of these areas passed into private hands in different ways. Commons could be sold by the King, to be subsequently divided between the buyers and those who possessed rights in the commons. Owners of adjacent properties could acquire title to commons or parts of commons

through long and exclusive use. By these and similar developments common land was taken over by private owners, either as individual holdings, or holdings held in common by the new owners. The sale of commons is now prohibited, and has been so for more than a hundred years, unless in cases of land for cultivation (reclamation).

b) Legal situation

The basic principle of ownership and rights of use are as follows (see Sevatdal 1985): The rights to traditional utilization of the resources rest with the local community. What may remain when local needs are satisfied, as well as the formal title to the land itself, (actually to the "ground"), belong to the State. Within this broad framework there are many refinements.

Rights to uses connected with farming, like that of pasture, firewood, timber for building purposes, cultivation etc., are reserved for the farming population in the local community. This means that all (with some exceptions) farming households in the local community have such rights. Absentee owners of farms, or resident owners possessing abandoned farms, do not have such rights. But if the farm is "reactivated", or in case new farms are established, the rights will come into being again. In case the farm is run by a tenant, he will utilize the right. At present ca. 20.000 farms actually exercise such rights.

Everyone living in the municipality - which is in general a larger area than the local community - have equal rights to hunting and fishing.

The public, i.e. everybody living in Norway, have access to certain limited types of fishing and hunting. The right to develop watercourses for hydroelectric power, which is very valuable, belongs to the land owner, i.e. the State.

The legislation derives from medieval times, but the actual laws have of course been modernized. At present a proposal for new codification of the laws concerning both state common land and parish common land has just been issued by a special official committee (NOU 1985: 32). A basic principle through all the history of legislation in this field, however, is a statement like this: "The rights and legal conditions in each common should be as it has been of old". This means for example that rights possessed by the actual local community do no change with changing administration units. The boundaries of a local community are the same, even if the boundaries of municipalities are changed.

c) Management

The management and decision making powers are divided between two, or in some cases three, bodies. These bodies correspond roughly, but not quite, to the "interested" parties; the State, the local community, and the municipality.

An official in the governmental forest service take care of the ownership interests of the State. This service also supervises most other activities that goes on in the commons.

The interests of the local community and the public within the municipality are taken care of by two bodies. We must here distinguish between commons with productive forests, and commons without. In commons with productive forests there is a board, elected by those who have rights to the forests, to take all decisions concerning the collective use of these resources. For mountainous commons (i.e. for areas over the timber line), there is a municipal board responsible for organizing the use. This board is elected by the local municipality "parliament", but the majority of the .members of the board should always by law be persons living in the local community.

2.3 Parish Common Land

This type of commons differs from state common land in the actual ownership (title) to the land itself. While the ownership to the land ("ground") in state common land rests with the State, the parish common land belongs to those farms which possess rights to the forests in the common. This is a rather formal legal definition, in practice we may say that the common belongs completely to the local farming population. Or put in another way: The common belongs to the farms in the local community. Neither the State nor the municipality have significant power, all decisions are taken by a board, elected by those farmers who have rights of use in the common.

Parish common lands cover an area of 5.500 km^2, of this 1.700 km2 are productive forests. Most of them are found in two counties in South-Eastern Norway (Hedmark and Oppland), and ca. 17.000 farms have rights in these commons.

A significant fact is that all the use of forests in these commons are now organized on a collective basis. Each common is managed as one unit as far as utilization of the forests go. This include commercial sale of timber and most often wood products need the farms from the commons for their own use. As most of the commons also have sawmills, the "users" get the wood products they need from those, instead of logging in the forests themselves. The value of these products are estimated to 20-25 mill. kroner annually. The saw-mills have quite often developed into wood-based industries, owned by the common.

2.4 Land Jointly Owned By Estates, Or "Real Joint Ownership"

The translation of the name of this type of "commons" is difficult. In Norwegian we call them "sameige mellom bruk", which literally means "land jointly owned by other properties". These lands are not "proper" commons, but private lands that constitute a very heterogeneous group, with various types of ownership. What characterize this type of properties is that they are jointly owned, not directly by persons, but by other

properties, normally a farm. We should in fact distinguish quite clearly between this type of joint ownership and the other main type, which we call "personal joint ownership". If two persons inherit or buy a farm or other type of land together, it will be a personal joint ownership. The other type, which concern us here - joint ownership by estates -is often called "real joint ownership", to distinguish it from personal joint ownership. This type is very common in outfields in general (lakes, pastures, mountains), but they are not so extensive in productive forests as they used to be, because they have been largely subdivided between the farms by land consolidation procedures.

Land jointly owned by estates differs from parish common in its historical development, but most important in the laws and regulations concerning its management.

Land jointly owned by estates goes far back in history, it developed mainly through the subsequent subdivision of the "infields" in new farms, while the outfields were kept in various types of joint ownership, as it might be practical in the use of the land. Each new farm established by the subdivision process, got a share in the outfields, normally according to the assessed value of the farms in the taxrolls. The various uses (not the ground) could, however, be treated like an "estate", or object of ownership in itself, and be subdivided in various ways, as need arose. For example, one farm might possess the right to the trees (or even to certain types of trees), another the hay-harvesting rights, while the grazing, hunting and fishing, and the land itself, could be held in joint ownership by the farms, all in the same piece of land.

The basic principle was to subdivide, or it might be better to use the word "individualize", each type of use as and when need arose, and keep the rest in common. Even if such "incomplete subdivisions" are the main cause behind "real joint ownership", it could also happen that several farms obtained joint ownership to for instance mountainous land, by some sort of collective action. The result would then be the same.

Since 1860 it has been the task, among others, for the Land Consolidation Service to clarify, individualize and/or organize the collective use, of such properties. In short - to readjust the ownership and tenure patterns to the changing needs in land use.

It is, unfortunately, impossible to present reliable statistics for this type of ownership. It is certainly more extensive than both state common land and parish common land together. An indication could be that while approximately 20.000 farms have access to (rights in) state common land, and 17.000 in parish common land, more than 50.000 farms hold shares in jointly owned land. It is the predominant type of ownership in the mountainous areas in South Norway, and in a modified form, i.e. pasture, hunting, fishing kept in common and the forests individualized in plots, in forest areas in the western part of South Norway.

The legislation has been "modernized" quite recently, with the "Act on joint ownership" from 1965 and the "Land Consolidation Act" from

1979. The majority of owners have the power to decide upon the management of the whole property, within the limits, roughly speaking, of suitable land use, both traditional and new to some extent. They cannot decide to sell any part of the property, and there are also other regulations to protect the minority. Most common, the shareholders elect a board to manage mutual interests, but the actual use is mostly individual - not collective.

It is always possible for one or several shareholders to apply for land consolidation. In that case all disputed aspects will be decided upon by the Land Consolidation Court, both judicial matters (disputes concerning ownership and rights) and rules for the management, for example if the use should be collective or individual. If the land consolidation court decides collective use, it will also organize the management, for example establish proper institutions. In case of individual use, it will lay down direct regulations.

2.5 Concluding Remarks

There are certain trends concerning the management and use of those three types of common property:

a) Traditional agriculture uses of the commons have declined. For example, hay-harvesting in the uncultivated outfields once very important - has hardly been practiced for several decades. Pasture in the outfields with milk-cows, without any kind of cultivation of the pastures, are of little importance. Grazing with sheep and some types of cattle are still important. In some areas the practice of using secondary summer farms in the mountains (in Norwegian "seter") are still in use, in modernized forms though.
b) The commons have always been, and still are, reservoirs of arable (cultivable) farmland, partly for establishment of new farms, but recently most important for enlargement of the cultivated land of existing farms. The land thus cultivated are either sold, or rented to the farms on long term contract.
c) Forestry is of great importance and value. In this field there is a tendency towards collective forms of use. For parish common land this is the dominant form, for the two other types of commons, both the legislation and actual policy try to encourage collective forms of use. "Collective" may, however, be a somewhat misleading term. It often means that the property is managed as a single unit, not necessarily that the shareholders actually work together.
d) Recreational use - building of recreational cabins, hunting and fishing etc., have been rapidly increasing in importance and value.

Selling such "commodities" is rather important, and require collective action.

It should also be noted that in Norway, as in Sweden, Finland, and many other countries there has always been a common right-of-way for the general public. That right is valid for everybody for all kind of outfields, regardless of type of ownership. During winter the right applies to infields as well, when they are frozen. Beside walking on foot or skiing, the right includes picking of wild berries, mushrooms etc., and camping for a few days.
In relation to general regulation and planning of land use, by the various authorities on municipality, county and national level, the commons are mostly regarded just as other types of properties.
The interested parties in both state common land and parish common land have formed nationwide organizations, to take care of common interests.
As a kind of summary I have made figure 5 below - showing the main features of the three types of commons.

Figure 5. Main Features Of The Three Types Of Commons

	MAIN FEATURES FOR:		
VARIABLES	STATE COMMON LAND	PARISH COMMON LAND	REAL JOINT OWNERSHIP
1. Type of land	7% productive forest, the rest mountain areas above the timber line	31% productive forest, the rest as state common land	Predominantly mountainous areas
2. Area	26.622 km2	5.500 km2	No statistics available
3. Number of common available	195	51	No statistics available
4. Number of share-holding farms	Ca. 20.000	Ca. 17.000	More than 50.000, but no better statistics available.
5. Land owner (title the ground)	The State	Local farming population	Certain groups of farms

6. Access to resources:			
Pasture, Secondary summer farms, cultivation	Local farming population, according to need	Local farming population, according to need	The shareholders only, according to their share
b) Wood	Local farming population according to need. The rest to the State	Local farming population according to need. Surplus is sold, profit distributed to the farms.	The shareholders only, according to their share.
c) Hydroelectric power (income of)	The State	Local farming population	The shareholders according to their share
d) Hunting/ fishing	Everybody in the municipality.	Everybody in the local community.	The shareholders according to their share
7. Management: a) Decision making body	1. The State Forest Service 2. An elected municipality board 3. An elected local board	Elected local board	The majority of the shareholders, according to their share, or an elected board. The Land Consolidation Court.
b) Dominant type of use	Individual	Collective	Individual
8. Alienation of rights or land.	Rights cannot be sold, farms can get land for cultivation (reclamation). The common as such cannot be sold or subdivided, and rights cannot be separated from the farm.	Same as state common land	Shares can only be sold together with the farm, or a part of the farm. Subdivision can be made by the Land Consolidation Court.

3 Related Types Of Ownership

3.1 State Land In Northern-Norway

In the three northern counties of Norway, most of the outfields belong to the State, see map figure 4. These are vast areas, covering ca. 68.000 km2, which is 21% of the area of Norway. From a legal point of view these areas have to be classified in a category of their own. They are not regarded as commons, but they are not held in fee simple by the State either. For classification purposes they are defined in this way in our National Atlas: "State land in Nordland, Trams and Finnmark, which in historical time has not been subject to private ownership". These areas, or at least some of them, have been commons once, but are supposed to have lost that status. The State has got a much stronger legal position than in state common land, but the local population has a variety of different rights, partly by law, partly by tradition, and partly by deriving right and property from the State. The different rights of use may belong to individuals, to farms, to the local community, to inhabitants of the municipality or the county, to the Lapps who keep reindeer, and to the public in general.
Various governmental agencies on state, county and local levels are responsible for the management, the central body being the "Directorate of State Forests and Lands".

3.2 The Reindeer Husbandry

The Lapps that keep reindeers have special, more or less collective rights to use of land in certain areas. These rights are independent of the actual type of ownership to the land, they are applied to state land in Northern-Norway, to private land, to commons in the South and so on. The crucial point is whether the area is legally defined as "reindeer grazing district" or not. In practice this means that the Lapps of old have used the land for reindeer husbandry. The rights include all necessary use in connection with their special type of husbandry and way of life; the right to reindeer grazing, to right-of-way along the routes between summer- and winter districts, camping, wood, hunting and fishing, and building of installations like fences, bridges etc.
The legal bodies that possess these rights are specific family groups of Lappish descent. For an individual it is, however, not enough to be of Lappish descent to get access to these rights. Some of his parents or grandparents must have had reindeer husbandry as their main occupation. This is because the reindeer husbandry always has been the occupation of a small minority among the Lapps, and the rights are protected for those special groups. There has for a long time been competition to get into reindeer husbandry, and access to suitable land is the crucial limiting factor in its modern forms, as it was in its traditional forms.

3.3 A Few Remarks On Common Properties In Sweden

The most important common properties in Sweden are very much like parish common land in Norway. There are, however, two types; defined and regulated by two different laws, both from 1952. The first may be called parish common land, the second "Common forests in Norrland and Dalarna". Norrland and Dalarne are two provinces of Sweden. Both types are mainly forests, covering 8.500 km2, see National Atlas of Sweden, and Wernstedt 1972. Parish common land belong of old to the farms in the parish, in proportion to the value of the farm in the tax rolls. Common forests in Norrland and Dalarne are much younger, they originated from land consolidation schemes, and belong to certain groups of farms. The managements are very much the same for both types. The decision making body is a board, elected by the shareholders. The utilization is collective, in the sense that the forests are managed by the board, and each shareholder gets his output, either in timber, other materials etc., or in cash.

The word "collective" may be misleading. As parish common forests in Norway, the shareholders do not actually work with logging collectively - the reality is that the common is managed more or less like an ordinary property, but the output is partly distributed to the local shareholders, and partly used for common projects in the local community.

The rights concerning the Lappish reindeer husbandry are much the same as in Norway, but the husbandry itself is somewhat different in nature. In Sweden there are more organized Lappish villages, and the husbandry takes place in typical forest areas also, and is less "nomadic".

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To Share or Not to Share. That is the Question of The Commons. Management under scarcity: The case of the Norwegian cod fisheries.

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Abstract.

The allocation of the scarce quotas of Norwegian-Arctic cod has caused severe political problems in the Norwegian fisheries for more than a decade. Government has been faced with confronting demands from different groups of fishermen. The political-administrative response has been a problematic political balance between equity and inequality. This paper argues that the solutions have had severe impacts for resource enhancement in the past. The paper focuses on the reasons why this situation has come about. The problem of establishing legitimacy to resource management seems to be prevalent. The political limits for conducting a policy for sustainable development by the existing administrative institutions is highlighted in this context. General models offering managerial solutions often neglect such facts. A functional model is the one that stands the test of political scrutiny.

Introduction.

The introduction of the 200 nautical mile economic zone on January 1,1977 gave promising prospects for resource maintenance and economic growth in the Norwegian fishing industry. Some few years later the scene was dominated by crisis in the Arctic cod fisheries, an almost break-down of the stock and continuos quarrelling about the allocation of the diminishing quotas. The 1980s ended in the lowest quotas since regulations of the stock started some 15 years earlier.

This experience with management of a common property resource is hardly specifically Norwegian. It is shared by most communities and nations depending on common pool resources(CPRs). The reasons why such situations have developed seems not to be due to the lack of scholarly advise. The tragedy of the commons is thoroughly described and analysed by numerous scholars in the field. Yet it seems hard to find a politically accepted recipe among the recommendations, ranging from market solutions, self-government to traditional top-down governmental administration. At least this could be said to be a prevalent problem in the Norwegian resource policy context.

Two main concerns have to be met in the policy applied.

Resource maintenance is the overall concern, not only because of internal economic considerations but also of our international judicial obligations. This is expressed by setting the MSY standard and the yearly

TAC on the basis of scientific advise. And as Norwegian-Arctic cod is a stock we are sharing with Russia, former the Soviet Union, close cooperation is needed to reach this goal.

The second concern is the one of **allocation** of the negotiated TAC. This implies negotiations both on the bilateral and the national level. While an accepted allocative key is used for the allocation on the bilateral level, it has been far more difficult to agree upon the allocation on the national level.

Different sciences approach the above mentioned problems in different ways. But in the search for general bio-economic and management models it is easy to overlook the social-political and institutional context management is depending on. In other words, there are certain social-political limits for the application of approaches and models in a given society. A functional model of management is the one that stands the test of political scrutiny.

This study could be read as a warning against the search for general models in managing CPRs. If managerial models shall work, they have to be developed on the basis of the social-political realities they are meant to affect. We are not managing only economic actors, but also social, political actors. Our case study on the management of the Norwegian cod fisheries underlines this simple lesson, the necessity of having a profound understanding of the affected social-political setting in lining out workable managerial strategies.

The character of the problem is, of course, closely related to the actual status of the resource system and the amount of the national quotas. In situations with insufficient and shrinking quotas, the question of rights and favouritism enter the agenda. Negotiated obligations to let so-called third countries exploit the resources despite the hardships national fishing communities are facing, make the allocative decisional process even more politically delicate.

What we shall focus on is the problem of shaping a national policy for sustainable resource development in this context.

What are the options and the political limits?

To what degree do the national allocative problems influence the political outcomes? The underlying problem we are facing is first and foremost the one of access to the resources and priorities under shifting resource situations. We are here dealing with a fundamental problem in the literature about CPRs, the open access character of such resources and its implications for ecological and economic maintenance.(Hardin 1968,Pearse 1981, Keen 1988)

Access and enclosure.

The open access to the fish resources in the Norwegian waters have been considerably modified in the last 50 years. And even if we expand the span of time there has been different kinds of restrictions to take up fishery as a way of living, both formally and informally. Since the Raw

Fish Act was passed in 1938 the entrance to the raw fish market was more or less controlled by the organised fishermen. And to be registered as a fisherman in the public files to obtain professional rights and benefits, a minimum of documented fishing activity was needed. Only registered fishermen were allowed to have boats over 50 tons registered as fishing vessels, and this was a necessity if the boat was used for that purpose. By organising and making use of the open political channels to the government in the 1930s, so-called outside, private capital and opportunistic speculations in the natural ups and downs of the fisheries was stopped by laws and organizations. (Hallenstvedt 1981) This policy was even strengthened in the post-war period, although some exceptions had to be made to develop a limited fleet of trawlers and deep sea fishing vessels. The renewed trawler act of 1951 gave nevertheless protection for fishermen drifting with traditional, passive gear. Trawling continued to be licensed, limited in number with restrictions on fishing areas.(Sagdahl 1982 a)

Despite the substantial reduction of the number of fishermen during the 1950s and 1960s the pressure on the resources turned out to be too hard. The first fishery to experience the increasing scarcity was the rather industrialised herring fishery. The technological development had increased the efficiency far beyond the limit for a sustainable development of the Atlantic-Scandic stock of herring. The traditional open access to the fishery for those belonging to the enclosure of fishermen and the lack of proper legal backing, made the introduction of licensing in this fishery belated and inadequate as a managing instrument to maintain the stock in time. The result was a total break-down with a following ban on industrialised exploitation of this resource. Some 15 years later the stock is still too small to be normally exploited, although there has been some recovery during the last years.

While the access structure to the herring fisheries could be formed by a national public policy, this was not the case with access to the cod fisheries in the north. The extension of the fishing border to 12 nautical miles in 1961, gave rather minor protection for the pressure on the resource from the growing fleet of foreign trawlers. With a transition period of fishing up to 6 nautical miles for a time period of 10 years for foreign trawlers, little seemed to be gained by the extension of the border. The coastal fishermen who had pressed for an extension, were consequently dissatisfied with the solution and feared a coming break-down of the stock.(Sagdahl 1982b) Besides there was no limit for fishing cod in the nursery areas of the stock in the Barents Sea. Any restraints on Norwegian fishing on the stock would therefore just bring negative socio-economic impacts for the industry and the affected communities without any certain positive effect for the enhancement of the stock. Or if it did, it was a high price to be paid by the Norwegian fishing industry and almost impossible politically to bring about. The dilemma of this situation is a rather classic one in the study of collective action. Its logic leads to

tragedy situations as the one described by Hardin. While a growing diminution of the cod stock was feared, the fishing effort of the international trawler fleet in the Barents Sea was just increasing.

But increased fishing effort and the lack of proper jurisdiction and managing tools to limit the effort was only one dimension of the problem. Norwegian purse seiners gradually increased their fishing on capelin in the Barents Sea after the break-down of Atlanto-Scandic herring. Later other nations followed. The food chain then became disrupted with severe consequences for cod, seals and other species belonging to the top of the chain. At least this could be maintained to be one of the reasons why severe imbalances in the ecological system became a fact at the turn of the 1970s.

The growing exploitation of the shrimp stock had probably also some effect on the balance of the ecological system along with circumstances in nature itself beyond human control.

The need for improved management of the ecosystem in the northern waters became evident. This implied restrictions also on the Norwegian fisheries in the north. A new fishing policy had to be formed and adopted and the question of formal, expanded limitations to the access structure in the cod fisheries became urgent in this respect. Allocative policy on the international and the national level could no longer be avoided.

Allocative policy.

Even before the economic zone was implemented, a policy of bilateral cooperation with the former Soviet Union to restrict fishing practice in the Northern waters was adopted. Since 1975 total quotas of cod and other species were yearly negotiated under the scientific advice from ICES. The maintenance of the cod stock nevertheless turned out to be unsuccessful. Despite growing restrictions on access to the resource, the improved management failed to give the necessary results. By the end of the 1980s the biological condition of the stock was worse than ever and in 1988 a situation of crisis was officially stated. Comprehensive restrictions both on inshore and offshore Norwegian fisheries in the Northern waters were introduced under a bitter political struggle. The old questions of whom was to blame for the situation aroused and who should pay the costs, dominated the public agenda as ever. Policies for the fisheries became a national matter, massive regional political mobilisation with both organisational and political impacts occurred. This situation highlighted the political limits for solving CPR problems by public policy and the shortcomings of the policy in the past. Our intention is to sort out these limits, to reveal their consistence thereby shedding some light on some of the causes to resource management failure in the north. We will especially focus on the national allocative policy in this respect. Our thesis is that due to the national allocative problem, sustainable management of the stock became neglected. Why so?

Allocative political processes often take place in situations with formidable political pressure from affected interests and under considerable political noise. But whether such situations occur or not is above all dependant on the allocative object. If scarcity is the problem as often is the case in allocative public policy, there is a difficult process of legitimising the allocative pattern.(Salisbury, Heinz 1970) Especially if the situation at hand has the character of a zero-sum or a minus-sum game. If so, some will become winners and some will become losers in the allocative processes. Not only the character of the allocative object is important in this respect. Groups dependant on the allocation will have different needs and claims against the allocating body. In the fisheries we often find that local or regional dependence of the resources lead to a political pressure for unequal access. Equal treatment could be conceived as political-administrative favouritism if some of the affected interests maintain not to be blamed for the scarcity of the allocative object and that they are not willing to bear the burden of what other actors have caused. This implies that not only the character of the allocative object is important for the degree of political noise, but also the historical setting and the involved interest structure.

In the process of allocating the Norwegian quota of Norwegian-Arctic cod, the government is confronted with different demanding groups and socio-political considerations. First and foremost we have the coastal fishermen in the north and the belonging communities. The cod fishery is the backbone of the economy in the north and especially at the coast. Problems in the cod fishery will easily affect most of the economic structure of the dependant regions and above all the labour market. Both local and regional public authorities will therefore take a strong interest in fishing policy and how it is performed. Some communities are dependant on trawlers and freezing plants, but these are few in number compared to conventional processing. A split of interests between active and passive gear and the belonging industry can be noticed in this connection, but by and large the coastal fisheries constitute the main interest in the north with a rather great potential for rallying political support. This implies regional departments of political parties, members to Parliament, organised interest groups as well as general public support.

Allocating cod quotas also affects the fishing industry at the West-coast. This industry is generally more capitalised than in northern Norway both at sea and shore. With general decrease in availability of fish resources at the west and in the south, ground-fish fisheries performed by trawlers, factory trawlers and the unlicensed, growing fleet of auto-liners have become more and more dependant of the cod resource in the north. As the West-coast has a more complex economic structure than northern Norway, the possibility of gathering a similar degree of political support is less. But the image of having a modern, competitive fishing fleet and its importance for coastal communities and the national

level as well, have been turned into a political asset both within the fishing industry and on the national level.

Allocating scarce resources and securing a sustainable development by governmental policy and administration seem on this background to be a risky political project. Government is here confronted with considerable political tension. The tension between those fishing with active (trawl) and passive gear(nets, lines etc.), capital-intensive versus labour-intensive forms of fishing in a period with growing unemployment, especially in the coastal areas in the north, and a developing regional conflict imbedded in regional political networks with open channels to the national political level. Members of Parliament are above all regional representatives. Besides, one of the traditional political bases for the Labour Party in northern Norway is the coastal areas. And the party has as such had a rather close cooperation with the Fishermen's Union being parts of the same social-political movement in the north.(Hallenstvedt 1982)

With the exception of a department within the Labour Union, offering membership to the crews of the industrialised fishing fleet, the rest of the Norwegian fishermen are more or less organised through the Fishermen's Union.(Norges Fiskarlag)

Whereas the union on the regional level channels the interests of the coastal fishermen of the north, it turns out to be a more complex organisation on the national level. As an umbrella organisation it adjusted to the differentiated structure of the fishing fleet that developed and comprises today the above mentioned tensions. The negotiated decisions that follow from such an organisational structure, may differ considerably from the more homogeneous interests advocated by its northern members. Organisational voice and dissatisfaction with its way of functioning has become a dominant trait of the organisational debate in the north. In 1988 it led to a split as a discontented group of coastal fishermen formed an alternative or rather supplementing organisation, Coastal Fishermen's Union. So far it has not succeeded in getting a formal status within the Fishermen's Union. Nor has it been accepted by the government and the Ministry for the Fisheries as a functional actor in the governmental organisational network (Sagdahl 1992a)

To form and implement a resource policy and allocate scarce quotas in such a context, easily challenges the political authority of the responsible government minister and the legitimacy of the decisions. Fishing policy is besides formally linked with the general district policy with a responsibility for employment and the general economic well-being for communities and regions linked to the industry. These are officially stated political goals along with more narrow industrial goals as resource maintenance and economic industrial efficiency. The potential for goal conflicts are therefore manifold as the one or another is activated.

The character of the blend decides the political reactions. But in situations where the allocative goods are scarce and diminishing, the allocative decisional process will easily be lifted out of the quiet scene of routine policy to a one afflicted with political noise and contending parties. And as the final outcome has severe consequences for economic maintenance and stock enhancement as in our case, the room for political action is limited. International and bilateral obligations complete the political scene in this respect.

Our question is how to legitimise allocative decisions on this background? Legislative backing is of course a pre-requisite but not necessarily sufficient to give political room for decisions without severe political costs. Giving co-influence and co-responsibility to the affected parties by corporate political-administrative bodies is a well known governmental technique in such situations.(Olsen 1983,Cawson 1985) An advisory body for resource regulations has been put up long ago, back in the early 1970s, but with decreasing quotas and growing concerns, its representativity has been questioned by the coastal fishermen in the north.

Attaining legitimacy to the decisions by sticking to scientific advice is another source, but the scientific validity of this advice has been challenged by the fishermen's own experiences and impressions of the present state of the resource. Later admittance of inaccurate prognoses has weakened the political functionality of this legitimacy source. Almost paradoxically, it has still become more political important both nationally and internationally as situations of resource crisis have come about. But it is also in such situations that the problem of legitimacy is stressed and challenged by the affected parties. Unacceptable political costs for the responsible government will therefore easily follow, a situation any government seeks to avoid in a parliamentarian system like the Norwegian one.

The above mentioned sources of legitimacy could be systematised as procedural legitimacy and scientific legitimacy. A third source should also be mentioned, what we here according to input/output analysis choose to label outcome legitimacy. If the affected actors are more or less content with the political- administrative outcomes, the two other sources will become less activated. But in allocative situations where discontent, protests and considerable political noise dominate the scene, all the sources of legitimacy will easily be challenged by the affected actors. A situation of reduced quotas of cod with no escape route for the affected actors (zero-sum, minus-sum game) illustrates such a scene. Allocative decisions in such situations will easily imply considerable political costs unless the character of the situation can be redefined in some way or another.

The allocative pattern.

Regulatory policy in the cod fisheries seems on this background to be a political challenge where any government may easily become unpopular by those affected. The coastal fishermen in the north have not defied regulations as such, but maintained that those who had caused the situation should also pay the price of restrictions to the resource. Since the 1950s they have pressed for access limitation to the resource by extending the fishing border and thereby limiting national and foreign deep sea trawling. The extension of the Icelandic fishing border in 1972 reactivated their demand. They feared a break-down of the resource if the capital intensive fishing effort was not restricted and above all the consequences for themselves and their communities.

Up to 1980 the coastal fishermen avoided being a target group for the expanding regulations of the fishing effort on Norwegian-Arctic cod. To solve the national allocative problem, thus preventing political noise and a possible compliance problem, Norway had in the newly established bilateral commission with the former Soviet Union negotiated an exclusive right for those fishing with passive gears. Those could go on fishing although the national quota was reached. The result was a massive over fishing of the total quota of cod for most of the regulative period up to 1988. And when the resource situation made more comprehensive regulations necessary from 1980 on, included restrictions on the coastal fisheries, the government got its first lesson on what was to come. Believing not to have caused the depletion of the resources, the coastal fishermen in the north regarded it illegitimate to have to bear the burden of a time limited fishing ban that was suggested. Considerably voice was uttered and even threats of civil disobedience.(Sagdahl 1989)

Our table reflects some of the regulatory political problems government has been facing. The discrepancy between TAC and the total catches, quotas given to third countries in a situation with national scarcity, the over fishing for years of the Norwegian quota, convey a message of an underlying political landscape not easy to handle for any government. But in 1988 there was a change in the problem structure, when almost a state of emergency was declared due to the reported status of the cod stock. Improved models and new data made the former optimistic message from the marine biologists into the one of crisis. Drastic reductions of the quotas were needed and a sudden stop in the over fishing possibility for the Norwegian coastal fishermen. While the 1980s had given hopes for resource conservation through extended regulations with prospects for enhancement for the last part of the decade, a contrary situation had arisen where all groups of fishermen had to share the extended burdens of regulations. The political costs of enforcing detailed regulations upon the coastal fisheries could no longer be avoided. Up to 1988 we find that the regulating authorities had met the compliance problem of the coastal fishermen by following at least four supplementary strategies.

First, the size of the total quota was increased somewhat over the biologically recommended one, or the maximum quota was chosen in situations where options were recommended. By doing so the formally zero-game situation gave better opportunities to avoid national allocation conflicts .

Second, the negotiated right to have the opportunity of exceeding the quota by fishing with passive gear turned the zero-game allocation situation into a plus-sum situation for the most numerous group of fishermen. In reality no fixed quota existed for this group until 1989, where the stated resource situation made this negotiated right impossible to go on with.

Third, the Soviet Union was willing to transfer a considerable share of its cod quota in exchange for Norwegian quotas of other species. Thereby the allocation situation became improved and conflicts could more easily be avoided.

Fourth, the negotiated quotas for third countries were considerably reduced, although not to the size demanded by the coastal fishermen in the north. Giving away shares of the quota was regarded unacceptable when Norwegian fishermen had to bear the burden of reduced fishing.

This strategy was regarded politically functional up to 1988. Except for two periods with bans on fishing - lasting some few weeks - there had been no set quotas for the coastal fishermen in the north. This does not imply there was a general agreement on the policy. The fishery closure during the seasonal fishery of spawning cod at Eastern had been heavily criticised since it was introduced in 1980, being very economically important for those fishing with passive gears. Also the extended week-end restrictions on fishing that were introduced in the midst of the 1980s were fought. One important underlying reason was the general decline in the availability of cod at the coast. The important seasonal fisheries at the Lofoten Islands and at the coast of the northernmost county(the Finnmark) some months later had shown a decline since 1984. Spawning cod were reported to be meagre, the growth of the immature part of the stock was slowed down, seals invaded the coastal waters in the north with severe consequences for the availability of any species of fish in affected areas and hence the economic sustenance of the fishermen involved. The ecological system in the Barents Sea seemed to be out of order, the coastal fishermen feared for their future and pressed unsuccessfully for a sudden reduction of the deep-sea trawling on immature cod. The backing from marine biologists was lacking in this respect. Their prognoses reported stock improvement and "better times" at the turn of the 1980s.(Sagdahl 1992a) In the spring of 1988 these experts had on the contrary found the situation to be alarming. Severe administrative measures had to be taken to avoid a complete break-down of Norwegian-Arctic cod. The most important one in this respect was the suggestion of the use of boat quotas for almost all kinds of vessels. All groups of fishermen had to be affected. The reactions followed immediately.

Regional political mobilisation.

The new recognition of the state of the cod stock led to a renegotiated reduction of the quotas for 1988 and a major reduction for the following years. Besides, the coastal fisheries became an important target group for extended regulations from now on. Their right to over fish the national quota of cod was dropped. Access to their main resource was utterly reduced by administrative measures. The introduction of individual boat quotas for all parts of the fishing fleet was heavily disputed. Some former participants were even closed off as the quotas of cod were allotted on the basis of average catches over the last three years. Economic sustenance became difficult and led to a reduction of crew and even to bankruptcy and selling off their boats for some. The economic and social fabric of many coastal communities became endangered and led to a comprehensive social and political mobilisation.

While the resistance against restrictions on coastal fishing on cod had been previously made up mainly by coastal fishermen and their local and regional organizations in the north, heavier political actors entered the political scene. Local

politicians and mayors of coastal municipalities with national and regional political networks came into the foreground. Wide support was rallied among different groups and professions. Formal movements were established and environmental interest groups got unexpected allies demanding a new policy for resource maintenance and the fisheries in the north. Mass meetings of fishermen and other coastal citizens demanded that the responsible minister leave his post. The conflict was covered by the national media and coastal problems in the north were highlighted.

The regional mobilisation that was triggered off in the wake of the resource crisis led also to a political focusing on the regional allocation of fish resources in general and how the capital-intensive fishing fleet from the west coast had increased their share of the available resources during the 1980s. The northernmost regions dependence upon the resources in the Barents Sea and the northern waters became a hot topic. A policy of regionalization of access to the resources was advocated by influential actors, leading county politicians and the public county assemblies in the north. Preparatory steps were taken to form an alternative fishing policy based on a regionalization of fishing rights by regional quotas and a licensing system. This represented a severe challenge and a political attack on the present fishing policy and caused political mobilisation also in the western part of the country.

Another momentum should also be noted in this respect. Coastal fishermen in the north had for a rather long time been dissatisfied with their national interest organisation, the Fishermen's Union, and its way of functioning. One argued that its heterogeneous character had prevented it from being an efficient advocate for the coastal fisheries in the north. This judgement became utterly nourished by the disputes over regulations and the pattern of quota distribution. A new organisation was formed,

challenging the established interest structure of the industry and its political-administrative network.

Forming and implementing a policy to meet the reported resource crisis strained the traditional base of legitimacy under the conditions mentioned above. As the Ministry of Fisheries was forced to abandon the former strategy due to the biological status of the cod stock and Norway's international responsibility as a co-manager of the stock, the policy was from now on strictly derived from the advice from ICES. The zero-sum situation that rapidly developed into a minus-sum situation at the turn of the 1980s made the national allocation an extremely difficult administrative task.

The regional challenge from the north would easily lead to comprehensive political costs for the governing political party and especially for the responsible minister. The Labour party which recently had taken over the governmental responsibility was in particular politically vulnerable for political pressure from the north. Besides, the new minister for fisheries was an elected parliament member from the Finnmark, the northernmost county.

Formally the allocative decision was an administrative and not a political matter. The political implications were nevertheless unquestionable. A negotiated order was needed. The advisory body, the Council for Resource Regulations, formally had a mandate to suggest a solution, but without the consent of the Fishermen's Union it would not work politically. The organisation possessed the key to the problem of allocation. What we here find is a typical corporate solution to a political problem.(Lembruch, Schmitter 1979,Cawson 1985) Framing the factual policy was left to a private organisation outside government, thereby obtaining a sufficient legitimacy base to solve the allocative question. The top executives of the organisation had their meeting close by giving advice to the council. The press from the local organisational level in the north and the organisational split gave a recommendation that favoured the coastal fisheries in the present situation. No other option seemed politically possible. The coastal fisheries came out with 75% of the quota, but this relative share was to be reduced if the Norwegian quota became increased in the following years. If so, the trawlers share of the quota was to be increased.

Although this could be regarded a temporary victory under the present situation, the scientific justification for the extremely low quota was besides questioned by the affected fishermen. They experienced at this time a growing availability of cod despite the scientifically stated status of the stock. The fish seemed also to be in a good condition. The food base had been improved. Both the herring and the capelin stocks were in a state of recovery. The marine biologists and ICES had earlier proved to be mistaken in their calculations. The scepticism towards their science and advice was higher than ever. Consequently there was a demand for an immediate increase of the quota of cod.

While the 1980s started with access limitation to the resource by regulatory measures and prospects for a gradual deregularization when the stock had recovered, the decade ended in a situation of crisis, biologically ,economically and politically. The policy that up to then was formed to meet the situation as it developed had the character of being ad-hoc. It was meant to be temporary. But the need for a more long-range policy to avoid the experienced resource fluctuations and the political costs of administration became apparent as time went on. However, to form a functional policy under the present circumstances was more than a challenge. What could be regarded functional for sustainable management of the resources could easily turn out to be politically unfunctional.

Functional policy solutions.

The introduction of the economic zone in 1977 gave an impetus for long-range planning and development of the fishing industry. The policy document that passed Parliament in 1978, forwarded by a social democratic government, regarded further access limitations to the ground fish fisheries in the north as necessary. Deep sea trawling was to be reduced and the coastal fleet to be favoured. The rapid and rather unexpected decline of the resources, especially the cod stock, made the policy document obsolete even before its implementation. The revised plan that passed Parliament in 1983 under a non-socialist government, differed to the previous one by favouring market solutions to hierarchical management. This new policy direction was later followed up when the Ministry of the Fisheries in 1989 presented a preliminary working document where the access problem and the classic tragedy of the commons was to be solved by the introduction of privatisation of fishing rights and individual transferable quotas(ITQ).

The influence from fishery economists and other coastal states as New Zealand and above all Iceland was noticeable. But the political setting was different. To launch a policy based on privatisation of the fishing rights would represent a fundamental shift favouring those with access to financial backing. The capitalised part of the fleet regardless of regional affiliation would profit from such a policy. If such a policy was carried through without any modification, the coastal fleet would in the long run be the looser and hence the marginal districts in the north. The regional conflict as well as the other conflict dimensions in the industry became activated. Hence the political institutions in the north took an interest in the shaping of a new policy, a policy that should favour the region.

The regional conflict dimension in Norwegian politics is the oldest and probably the most fundamental one of the ones structuring Norwegian politics. This dimension does not follow the lines of the political parties, but exists within the parties. The crisis in the cod fisheries had activated this latent conflict dimension. The recent

development of political institutions at the county level, had besides led to new political arenas eager to be activated as regional political instruments, constituting a meeting-place for problems, participants and solutions. And the regional consequences of the resource crisis was a perfect case in this respect. The parallel development of the highly disputed Norwegian relation to The European Community (EC) did also contribute to the activation of the regional conflict dimension. Besides, the EC question activated all the conflict dimensions in Norwegian political life. Although shaping a new fishery policy and the governments aspirations for a future membership in the EC were different political processes and with different backgrounds, they coincided in time and were regarded by influential groups in the coastal areas to be closely linked. Political resistance could easily be rallied on this background, especially in the north. The fear for increased market solutions and growing pressure on the resources of the north, are widely shared among the inhabitants, especially at the coast. The general political frame for launching a shift in the fishery policy to management by market mechanisms was in fact the worst thinkable. Public opinion polls gave discouraging results for The Labour Party, especially in its northern stronghold. The public hearing of the preliminary policy document returned the message of more losses of voters in the north if this policy was carried through. Both local and regional departments of the Labour Party in northern Norway rejected the proposition. That ended politically the ITQ suggestion. Another policy had to be outlined.

The rewritten policy document turned back to the principles laid down by the Labour Party government at the turn of the 1970s. The coastal fleet was the one to be favoured due to its positive impacts for economic maintenance of the coastal districts in the north. The overcapacity of the fishing fleet, it was argued, was found in the bigger, deep-sea fishing vessels and expanded licensing was recommended for this part of the fleet.

The former discussion of the access problem and the use of market mechanisms was not in the fore any longer, obviously for political reasons. The political problems of legitimising such a policy under the prevailing circumstances had been too great a challenge. This could be read out of the policy document itself. There was, however, a considerable discrepancy between the general analysis and its policy recommendations. The urgency of the matter gave no time for a complete rewriting of the document. Besides, the analytical model of thinking could also probably be said to mirror the prevailing analytical approach found in the ministry. Although the ITQ question was left in the dark, some of the propositions could be linked to the market model of thinking found in the ministry. The introduction of a resource fee could be said to fall within the established analytical frame. Whether this remedy will have any effect for entry limitation or not is dependent on the size of the fee. What is more important as a political signal is the involved principle

as to the open access structure of fish as a common property resource. The proposed fee reflects a new way of thinking in this respect.

The proposition of making a new public record for registration of fishing rights should also be noted. Formal qualifications, not only experience of fishing, should be demanded as entrance tickets. Both these propositions may have impacts for the coastal fleet for access to fishing rights. Over time the enclosure of the commons will probably be narrowing if these policy recommendations become implemented. None of these proposals were justified by referring to any access structure as a problem for biological and economic maintenance. They were more or less presented as practical propositions to reduce management costs and to improve unreliable public data on registered fishermen.

Making a split between the coastal and deep-sea fishing fleet by direct limitations to fishing rights is above all justified by its political functionality. The experiences from the 1980s show that limiting resource access by a detailed regulatory system for the coastal fleet will be perceived illegitimate (Sagdahl 1992a). The new policy document underlines the importance of perceived legitimacy of the political-administrative measures for its efficiency. An important political lesson seems apparently to have been learned. The document also stressed the importance of control and the improvement of this variable for successful resource management. Here we are facing another limitation to sustainable resource management by policy solutions on the national level.

Legitimacy and control.

While the legitimacy of restrictions on fishing rights are questioned by those believing themselves not to be blamed for the situation that has arisen, the gravity of the situation may demand comprehensive action to be taken. Not only the allocation of benefits is important in this respect, but also the allocative pattern of burdens is important for perceived legitimacy and compliance to the administrative measures taken. This is not only important within industry at the national level, but also on the international level in the case of the resources in the Barents Sea. The motivation for subjection to national or group limitations is closely linked to the perceived compliance by other nations. The coastal fishermen in the north have consistently been complaining of suspected illegal fishing by vessels from the EC and especially from Russia, formerly the Soviet Union. These suspicions are rather widespread in the north although insufficiently documented. Several reported cases of illegal fishing indicate that the problem of over fishing seem to have far greater proportions than earlier expected.

But it is the belief whatever justified or not, which constitutes the political reality. Reports of uncontrolled fishing by EC vessels outside the economic zones in the Barents Sea, a situation similar to one of the east-coast of Canada (Sullivan 1989), have also nourished the criticism of the

insufficiency of the control regime. Former irregularities of fishing and shortcomings of the surveillance system in the fishing protection zone around the isles of Spitzbergen have also constituted a management problem. These events and the shortcomings of policing the implementation of rules laid down in the resource policy and negotiated treaties have undoubtedly influenced the compliance problem in the Norwegian fisheries in the north. What is more, the uncertainty of impacts for a sustainable resource management is even a bigger problem. Both stock estimates and prognoses impacts by the set quotas will be affected by unreported catches. An improvement of management control is therefore decisive for improved legitimacy and the efficiency of the regulatory measures.

The motivation for abiding regulatory statutes and to stick to low quotas in the domestic fisheries will naturally be influenced by the above mentioned momentum. Especially for those believing to be unfairly treated and that the TAC has been set too low. The road to over fishing and the use of black markets for selling the illegal catches is not long under such circumstances. Individual benefits to solidaric misery could be easy to prefer in such situations.

The transition to multi-stock management models as signalled by the government could also be said to necessitate a better policing system. Such a management scheme implies easily disputed decisions in a fishing industry made up by specialised and differentiated fisheries and its supporting economic activities ashore. Industrialised capelin and herring fishing has to be balanced against the bio-economic considerations of the cod fisheries and whaling. What interests are to be favoured are not merely just economic and biological questions in the light of professional models, but also a question of political networks and political realities. The political pressure from economic actors in the industry are diverted from their own investments and economic needs, not the well-being of the industry and the resource system as a whole. While the trawler interests were pressing for increased quotas of pollock in the fall of 1992, the coastal fishermen were protesting referring to the observed depletion of the stock.

Towards a new management regime?

An improvement of just the Norwegian control system would not suffice to solve the problems of legitimacy and compliance.

The resources in the Barents Sea are bilateral resources with Russia, and to improve the efficiency of the control system Russia has to be included. Besides, there are special problems of control in the protection zone at Spitzbergen and the jurisdictional problem of fishing activities outside the economic zones. These are special challenges that need special solutions on the international level.

The big question is how to organize an efficient surveillance and controlling system? The prevalent model of thinking is diverted from the

national judiciary system. Besides, the character of the former regime that Russia was a part of, supported this way of thinking and did not invite to cooperative solutions on the bilateral level. The political presuppositions for closer cooperation in policing the northern waters were lacking.

To solve the compliance problems by public deregulation and self-governing systems of the affected parties or by the formalization of local informal systems of cooperation have been advocated by a number of scholars.(McCay, Acheson 1987,Jentoft 1989, Pinkerton 1989,Ostrom 1990) But the Norwegian fishing industry consists of contending actors not easy to reconcile. And there is a long political tradition of regarding the public authorities as the natural problem solver. Environmental pressure groups have also taken an interest in the management of the resources. Besides we have the bilateral and the international aspects. On this background top down management seem to be the most plausible organisational approach.(Sagdahl 1992 b) Especially when dealing with matters concerning legal authority and bilateral questions no other approach seems legitimate or functional. Still it is a question how to organise to improve the compliance problem.

To regard the ecological system of the Barents Sea as an undivided unity regardless of national economic zones could be said to be a legitimate starting point. The present administrative institutions involved in administration of this ecological system are divided both on the international and the national level. They are parts of different political-administrative networks partly stemming from their functional differentiation and historical background. Both conflict and cooperation is found within and between these networks. Their functional potential for securing a sustainable development of the ecosystem is limited as to the complexity of the problems they are facing. Their ability to handle policing functions have been questioned for a number of years and the need for improved efficiency has in the Norwegian context become a politically recognised fact.

If the ecosystem of the Barents Sea was the only consideration to be taken regardless of national economic zones and borders for forming functional institutions for sustainable resource management, then bilateral co-administration by one organisation located in the area could be said to be preferable. Such an institutional framework for the policing functions will undoubtedly give improved possibilities .The political reality of such a solution can of course be questioned. Not at least will the mere existence of established institutions form a bar for such a development. The imbedded interests of their present localisation and networks will easily make any transformation unrealistic. Institutional transformations and relocations are heavy political processes not easy to carry through.

The political orientation towards an eventual membership of the Common Market could also be said to constitute an obstacle in this respect. Some of the EC countries have a strong interest of getting extended access to the fish resources in the north. Any institutional

change has to include the EC fishing interests in the institutional framework if membership becomes a reality.

The present improvement of the resource situation in the Barents Sea could also be said to be working for institutional preservation instead of institutional development in a regional and ecological context. Yet the importance of solving the problems of control will stay on the agenda forming an essential variable for the possibility for future compliance to the regulative measures to bring about a sustainable development of the ecosystem of the northern waters.

Quotas and catches of Norwegian-Arctic cod 1977 - 91 (1000 ton)

	QUOTAS							CATCHES				
Year	TAC	Third count.	Soviet	Norway	T	Types of gear Active	Passive	Total	Third count.	Soviet	Norway	Types of gear Active	Passive
1977	890	150	370	370		180	190	945	146	370	429	161	268
1978	890	130	380	380		195	185	733	69	267	397	151	246
1979	740	90 (15)	325	325		135	190	485	40	119	326	132	194
1980	430	48 (8)	191	191		80	111	420	33	115	272	89	183
1981	340	35 (5)	147,5	157,5	5	60	97,5	448	38	83	327	76	251
1982	340	35 (5)	97,5	207,5	55	60	147,5	406	36	40	330	69	261
1983	340	35 (5)	65	240	97,5	60	180	328	33	23	272	68	204
1984	260	20 (4)	45	195	75	55	140	311	25	22	264	55	209
1985	260	20 (4)	55	185	65	55	130	336	34	63	239	63	176
1986	440	40 (15)	150	250	50	93	157	457	47	151	259	102	157
1987	600	56 (24)	202	342	70	177	165	553	51	204	298	174	124
1988	491	41 (18)	200	250	25	120	130	456	40	169	247	122	125
1989	340	28 (12)	134	178	22	62	116	353	39	134	180	65	116
1990	200	14 (6,4)	73	113	20	28,25	84,75	287	14	75	118	29	89
1991	255	18	108,5	128,5		29,12	97,87	251	19	79	153	32	121

The numbers in brackets denote quotas supposed to be caught in the protection zone at Spitzbergen.
T denotes quotas transfered from the Soviet Union to Norway.

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The Legal Status Of Rights To Resources In Finnish Lapland

by

Heikki J. Hyvärinen

The rights of indigenous peoples to land, water and natural resources is a topical and difficult issue throughout the world. For a state, two essential problems emerge. First, it must decide which rights of the indigenous people it will recognise and what the scope of these will be. Second, it must consider the societal ramifications of the measures it takes.

Recognition of the rights of indigenous peoples is ultimately a question of justice in society. Justice is realised when a society can admit that it has made a mistake. An admission of error is accompanied by a change in economic values and power relations in favour of the indigenous people. Where rights and interests conflict, the decision-making person or body must ask whether a difficult decision is worth the effort.

These issues are also current in Finnish Lapland. Our indigenous people are the Saami (formerly called Lapps). They number 6 000 among a total Finnish population of 5 million; their language, culture and traditional livelihoods distinguish them from the population at large.

The term "Saami" comes from the Saami language and was adopted in legislation in 1973. At present, a Saami is a defined as a person who considers him- or herself a Saami and who has learned Saami as his or her first language or who has a parent or grandparent who learned Saami as his or her first language. The Saami have their own advisory body, the Saami Parliament, whose function is to protect the rights and interests of the Saami people.[56]

1. The Present Situation In The Saami Homeland[57]

Most of the Finnish Saami inhabit and use the northernmost part of Finland, which has been referred to since 1973 as the Saami homeland in our legislation[57]. This area encompasses Finland's three northernmost municipalities and part of a fourth. It is 35 000 km2 in size and represents 10% of the total surface area of the country. The area has a total of 12 000 inhabitants, of whom 4 000 are Saami.

The traditional Saami livelihoods include reindeer herding, fishing and hunting. Present legislation in Finland does not grant land title to Saami engaged in these livelihoods. At various times in history homesteads were established in the area for farming and cattle raising. Owners of these were eventually granted title to the land they occupied.

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56 See decree No. 988 on Saami Parliament of 16th November 1990.

57 See decree No. 824 on Saami Parliament of 9th November 1973.

Both Finns and Saami own homesteads. In the Saami homeland, homesteads account for some 10% of the total land area. The remaining 90% is land which the state regards as its property.

For over 100 years, the state of Finland has controlled the lands used by the Saami. It has felled coniferous forests, leaving barren stretches of land behind, and has poisoned birch forests to make room for conifers. Treeless areas have been ploughed and turned into waste land in an effort to promote timber growth. Extensive tracts of land have been inundated for the production of electricity. In the middle of a fell area there is a tourist resort recording more than 1 000 000 overnight stays a year. Finally, the state has protected by law some two-thirds of its land and imposed limits on how it can be used.

The traditional Saami livelihoods enjoy no legal protection against the state as owner. Legislation defines reindeer herding as a livelihood which may be practised both on state and private land. The right to engage in reindeer herding is granted to all residents of the Saami area. Fishing and hunting on state land have also been designated as a right belonging to all residents of the area. All of these livelihoods are under the control of administrative bodies in which the Saami do not have any special status.

In effect the traditional Saami way of life has been opened up to free competition. The competition has been quickened by the extensive network of cabins built on state land and by the year-round use of motorised vehicles in wilderness areas which is permitted to virtually everyone.

The developments mentioned above have had repercussions for both the Saami and their environment. The migration of Finns into the area has reduced the use of the Saami language, changed the social relations within Saami villages, increased Saami unemployment and prompted Saami migration to population centres. The many distinguishing characteristics of Saami culture fade and die out because they are no longer passed down from one generation to the next. In some areas, the Saami language has already died out. With no control over state lands, the Saami's attachment to nature, their use of the areas and regulation of natural resources diminishes. What the state does - and what it fails to do - deteriorates and spoils the land, restricting the opportunities the Saami might have of practising their traditional livelihoods.

Earlier, the position of the Saami was wholly different. Traditional land use gave them the status of masters on their own land with all the attendant rights and responsibilities. Kaisa Korpijaakko will be discussing this in detail in the afternoon.

2. The Tenuous Legal Basis Of Present Legislation

The Saami - unlike many other indigenous peoples - had the status of full citizens hundreds of years ago in Sweden- Finland. Their rights and responsibilities were spelled out in laws and statutes. It was at that

time that we already adopted the principle that all land must have an owner. If land had no owner, it was considered as belonging to the state (terra nullius).[58]

Over time, the rights of the Saami were "forgotten". In the 1900s, Finnish legislation rested on the notion that title to land presupposed farming and buildings; Accordingly, it became impossible for nomads to acquire title to land. The same reasoning deemed the lands which the Saami had used for centuries as 'ownerless', meaning that ownership reverted to the state.

The legal basis for state title to the land in the Saami area (terra nullius) has been dubious ever since Finland became independent. In recent years, it has been proven wholly untenable. The legal basis of state title to land was shaken substantially back in 1981 in a land title dispute between the state of Sweden and the Saami. In deciding the case, the Swedish Supreme Court accepted the premise that according the law of Sweden-Finland a nomad could have acquired title to land without engaging in farming or having a permanent dwelling[59]. Later, in a doctoral dissertation published in 1989, Kaisa Korpijaakko proved that the Saami as nomads, fishermen and hunters enjoyed ownership of the land recognised by state officials in the northernmost parts of Finland and Sweden[60]. The scientific community has not challenged this finding[61].

From the point of view of international law the land rights of the Saami were brought up before the Finnish Parliament in 1990 when it was considering ILO-convention No 169 on indigenous and tribal peoples. Finland could not become a party to the agreement at that time because our legislation did not conform to the provisions of the agreement concerning Saami land rights. In fact, the Government of Finland stipulated that the agreement could only be ratified if Finland would better recognise the rights of the Saami to the land they traditionally occupy and own and to the use of the natural resources on these lands.[62]

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58 See the decision of the Supreme Court of Sweden in Birgitta Jahreskog (ed): "The Sami National Minority in Sweden". Uppsala 1982 pp. 158, 186.

59 See "Afterword" by Bertil Bengtsson in Birgitta Jahreskog (ed.) "The Sami National Minority in Sweden". Uppsala 1982 p. 249.

60 See Kaisa Korpijaakko: "Saamelaisten oikeusasemasta Ruotsi-Suomessa". Mänttä 1989 p. 584.

61 See Bertil Bengtsson: "Samernas rätt i ny belysning". Svensk Juristtidning. March 1990 pp.138-142; Veikko O. Hyvönen: "Jaollisesta omistusoikeudesta oikeusjärjestyksessämme". Oikeustiede/Jurisprudentia XXIV 1991 pp. 171-187; Hannu Tapani Klami: "Käsitteet ja historiantutkimus". Historiallinen aikakauskirja 2/1990 pp. 132-135; and Heikki Ylikangas: "Kirjallisuutta: Korpijaakko Kaisa: Saamelaisten oikeusasemasta Ruotsi-Suomessa". Lakimies 8/1989 pp 1163-1169.

62 See Governement Bill to Parliament No 306/1990 containing a proposal not to ratificate convention (No 169) Concerning indigenous and tribal peoples in independent countries.

3. The Saami Bill

The land and water rights of the Saami can be established in two ways. First, a court can confirm the rights of Saami on state land where a dispute arises between Saami and the state. Second, these rights can be substantiated through laws enacted by Parliament.

The question of old Saami title to state land has yet to be decided in a court[63]. On the other hand, there have been numerous attempt to settle the issue by legislative means. In 1952 and 1973 state committees proposed bills which would have guaranteed Saami rights to land[64]. However, the Finnish Government did not bring either proposal before Parliament for consideration and both lapsed.

In 1990, a permanent state committee - called the Advisory Board for Saami Affairs[65] - drafted a legislative proposal[66].

According to studies done by the Advisory Board, state officials at one time had recognised in established practice the ownership rights of the Saami to their lands for the purpose of reindeer herding, fishing and hunting. The Saami are still using these same areas for the same purposes but the land is called state land. The title of the Saami to this land has never been legally terminated, i.e.. it should still be in effect. By contrast, no adequate legal basis for state title to these lands has ever been produced. For this reason, the Advisory Board considered that the present status of the state with respect to state lands violated the Saami's legal protection of property. Moreover, this situation amounts to a structural barrier causing inequality among different groups of citizens: the Saami are in an inferior position with respect to other citizens because of their special means of livelihood. Finally, the present position of the Saami conflicts with the provisions of international agreements.

To rectify the situation, the Advisory Board proposed that the rights of the Saami population to land, water and the traditional livelihoods should be safeguarded by through enactment of a special Saami Law. The law would not give the Saami new rights; it would restore their previous ones. The legislation would also promote the development of the Saami language and culture, improve social conditions as well as foster sustained growth in the area. According to the bill, these provisions would neither encroach upon anyone's property nor affect the practice of any established livelihood.

The Saami bill applies to the Saami homeland. The area would be divided into Saami villages, units which would include both state lands

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63 See Jyrki Virolainen: "Lapinkylien osakkaiden maanomistusoikeudesta" in Lapin Kansa 21.1.1992.

64 See Komiteanmietintö 1952:12 "Saamelaisasiain komitean mietintö" and 1973:46 "Saamelaiskomitean mietintö".

65 See order No 367 on an Advisory Board for Saami Affairs of 26th March 1987.

66 See Komiteanmietintö 1990:32. "Ehdotus saamelaislaiksi ja erinäisten lakien muuttamiseksi." Saamelaisasiain neuvottelukunnan mietintö 1, (which include the Saami Bill).

and farms. The state lands within a Saami village would be restored to Saami ownership and referred to as Saami common land. The bill does not apply to the area of farms proper, their interests or ownership; these would thus remain unchanged.

The Saami living in the area of each Saami village would own the common lands within the village and decide jointly on their use.

According to the bill, the title of the Saami to the common land would be limited in that the land could not be divided or transferred to others. Moreover, the lands could neither be given as security nor taken in execution. In all other respects, however, the Saami would control and use the lands they owned and enjoy the proceeds from them. They would have title to forests and ownership rights to sand and other extractable land resources. They could build in the area and grant leases to other persons. They would grant fishing and hunting permits as well as permits for harvesting wood and the use of motorised vehicles in the terrain.

Conservation areas on state lands would also be considered part of the Saami villages. They would remain conservation areas, and a separate administrative body with joint state and Saami representation would be set up to oversee their maintenance and use. If the Finnish Parliament should decide at any time to abolish the conservation area by law, the area would revert to Saami ownership and be incorporated into the common land.

According to Finnish law, the rights to ores and minerals do not belong to the owner of the land but rather to the person establishing a claim on it. The landowner nevertheless has the right to take part in mining and to receive compensation for mining activity. Mining operations cannot begin until the mining area has been finally demarcated.[67] The bill would making delimitation of a mining area more difficult, much as it is in a conservation area.

Under Finnish law, fishing and hunting are rights belonging to the landowner. In the area of a Saami village the Saami would be allowed to hunt and fish only on the common land which they own.

The bill would allow Saami to engage in reindeer herding throughout the area of the village. In other words, the herder could use land owned by anyone, as is provided for in present legislation provides. The right to engage in reindeer herding would belong particularly to the Saami, who now own 85% of the reindeer in the homeland.

Any non-Saami making his or her living from reindeer herding, hunting or fishing would be allowed to continue after the law comes into effect. In addition, other residents of the Saami area would be entitled to obtain fishing and hunting permits from the Saami as they obtain them from the state at present.

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67 See Mine Act of 17th September 1965 No 503.

4. Reactions To The Saami Bill

The Saami bill involves an indigenous people and the realisation of their rights in the Saami area, where the Saami are in the minority. While the bill would not encroach upon anyone's private property, it would change current practice, land ownership and power relations. The power of the owner to decide about present state lands would be transferred from state officials to the Saami. These implications have prompted a variety of reactions to the bill.

The Committee for Constitutional Law of the Finnish Parliament examined the bill even before it was presented to the Government. The Committee considered it important that Saami landownership on state land should be clarified. In addition, it gave top priority to having the bill presented before Parliament so that the traditional Saami livelihoods could be safeguarded.[68]

A number of statements on the bill were solicited; some were in favour, others opposed. The Faculty of Law at the University of Lapland was approved of the bill without reservations. The sharpest opposition came from the municipalities in the Saami area.[69]

The Government has not been in any hurry to bring the bill before Parliament. In fact, at this writing the Government still has no intention of forwarding the bill to Parliament. According to the Government, the reason for the delay is that no irrefutable legal historical bases for Saami land ownership can be produced, a contention which contradicts the latest research findings. In addition, the Government considers the legislation contrary to its social policy. In the opinion of Pekka Aikio, chairman of the Saami Parliament, the Government's position on the bill is politics couched in legal terminology. The line of reasoning is as follows: the Saami never had title to land at any time to begin with. And if they did have title it has ceased to apply. And if this is nevertheless still in effect, it cannot be realised in practice because the Finns in the area would get angry.[70]

Due to the Government's delays, the Saami Parliament has decided to continue its drafting work on the bill and supplement its arguments.

5. Evaluation And Conclusions

In our society, the rights of the Saami to land are a question of both justice and values. According to our history books, the Saami have always peacefully withdrawn farther north whenever Finnish settlers arrived. In the same vein, it can be maintained that the Finns have never

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68 See the Statement No 3 of the Committee for Constitutional Law of the Finnish Parliament of 8th May 1990.

69 See "Yhteenveto saamelaislakiehdotuksesta annetuista lausunnoista" Sisäasiainministeriö. Kunta- ja aluekehitysosasto. Moniste 17. Joulukuu 1991.

70 See Pekka Aikio's speech of 14th January 1993 at an occasion arranged by the Ministry of Interior in Helsinki because of the UN's year of indigenous peoples.

committed any wrong towards the Saami; the present situation of the Saami does not conflict with the Finns' sense of justice.

The Finnish media describe the Saami in a fanciful way. According to Pekka Aikio, the image of a Saami is a dirty, lazy drunk who also happens to be rich[71]. Such a person has no worth to speak of nor any need to be protected. Since our system of justice protects only valuable things, the Saami fall outside of any such protection. It is my view that the legitimate rights of the Saami to the lands of their ancestors cannot be realised in Finnish legislation as long as Finland maintains false and fictitious notions of Saami history and the Saami people today. In this, the UN Year of Indigenous Peoples we have all the more reason to rectify these misconceptions, although Finland has ample and weighty need to do so throughout its 75 years of independence.

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Summary

The Saami in Finland are an ethnic and linguistic minority as well as an indigenous people. They live in northernmost Lapland, where they engage in the traditional livelihoods of reindeer herding, fishing and hunting. The state of Finland considers itself the owner of over 90% of the land used by then Saami on the premise that the land has never been owned by anyone (terra nullius) and should therefore revert to state ownership. Recent research findings show that state officials treated the Saami at one time as owners of what is now considered state land. This right of the Saami has never lapsed legally to anyone's knowledge.

In 1990 a bill was drafted proposing the return of state lands to Saami ownership. The same legislation would also safeguard the traditional Saami livelihoods. The bill has not progressed to Parliament for a decision. The Government has been delaying the matter. The difficulty of making such a decision stems from Finnish interests in the Saami area as well as the status of the Saami in the Finnish sense of justice and in the Finnish system of values.

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71 See above under No. 16.

The Rights of Indigenous Peoples in Inter-Governmental Organizations

by

Gudmundur Alfredsson

Equality and dignity for all human beings in the enjoyment of human rights are well-established rules of human rights law. They have been pursued by way of non-discrimination and preferential treatment or affirmative action. The universality of the rules is guaranteed by provisions in the United Nations Charter (articles 1 and 55) and the Universal Declaration of Human Rights (UN 1948, article 2). It is, however, the experience of the human rights community that equality and non-discrimination in the enjoyment of rights afford insufficient protection.

Instruments providing for special rights or preferential treatment, from which indigenous peoples can benefit, include the Convention against Genocide (UN 1948), Convention against Discrimination in Education (UNESCO 1960), the International Convention on the Elimination of All Forms of Racial Discrimination (UN 1965), the International Covenant on Civil and Political Rights (UN 1966), the Convention on the Rights of the Child (UN 1989), the Declaration on Race and Racial Prejudice (UNESCO 1978), the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (UN 1981), and the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (UN 1992). Annex IV below will refer to the International Labour Organisation. Both individuals and groups can draw on these texts in their enjoyment of civil, cultural, economic, political and social rights.

The human rights and fundamental freedoms of indigenous peoples continue to be violated. In particular, the survival and the identity of indigenous peoples as distinct groups in many countries are endangered notwithstanding efforts undertaken by governments and the international community. Several governments expressly recognize the problems, the world press repeatedly reports on the plight of these groups, and international organizations acknowledge the existence of violations. The challenge facing the international community is a serious one: to translate the international standards into effective protection of indigenous peoples.

In international law, sovereignty and territorial integrity of states on the one hand and the promotion and protection of minority existence and identities on the other enjoy an uneasy coexistence. Governments have traditionally been reluctant to adopt and practice minority rights for fear of encouraging separatism and secession. Nevertheless and contrary to a frequently held impression, minority rights (and these are applicable to indigenous peoples) are a common sight in international human rights instruments

Ethnic groups are nowadays much in the news. Restlessness of minorities in most parts of the world, the breakup of a few multinational states, the fragility of some of the successor entities, and ethnic conflicts within and between states illustrate the explosiveness of such issues. Intergovernmental organizations are becoming involved with the security aspects, and justice and human rights are increasingly seen as useful tools to prevent conflict and promote peace while falling in line with the purposes and principles of the United Nations as set forth in articles 1 and 2 of the Charter.

In this written presentation, the relevant issues are surveyed by way of a few annexes.

ANNEX I: Statement by the Secretary-General at the opening ceremonies for the International Year of the World's Indigenous Peoples, in Press Release SG/SM/4878/Rev.1. The Secretary-General describes the problems faced by indigenous peoples and the issues and challenges pending at the United Nations.

In a recent report, entitled An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping, the Secretary-General also dealt with possible responses to conflict situations caused by ethnic, religious or linguistic groups when they claim statehood:

> "One requirement for solutions to these problems lies in commitment to human rights with a special sensitivity to those of minorities, whether ethnic, religious, social or linguistic. The League of Nations provided a machinery for the international protection of minorities. The General Assembly will soon have before it a declaration on the rights of minorities. That instrument, together with the increasingly effective machinery of the United Nations dealing with human rights, should enhance the situation of minorities as well as the stability of States." (UN document A/47/277 - S/24111, 17 June 1992, paragraph 18).

ANNEX II: Draft universal declaration on the rights of indigenous peoples, from the latest report of the Working Group on Indigenous Populations (WGIP), in UN document E/CN.4/Sub.2/1992/33. WGIP is the main United Nations forum for addressing human rights relating to indigenous peoples.

Among the draft articles in the universal declaration are innovative provisions, as far as international human rights law is concerned, about traditional economic activities, land, natural resources, the environment, participation in national politics, self-government or autonomy, respect for treaties concluded with indigenous peoples, and the duty of indigenous peoples to respect human rights. Many of these provisions, if adopted, would go beyond existing minority rights. WGIP also reviews national developments in light of human rights standards.

The Sub-Commission on Prevention of Discrimination and Protection of Minorities, to which WGIP reports, has appointed Special Rapporteurs to examine several indigenous issues. A Study on the Problem of Discrimination against Indigenous Populations by Jose R. Martinez Cobo was completed a few years ago (in documents E/CN.4/Sub.2/1986/7 and Addenda 1-4; addendum 4 with the conclusions and recommendations is also available as a UN publication with the sales number E.86.XIV.3). Ongoing studies deal with the value and validity of treaties concluded between states and indigenous peoples and the question of ownership and control of the cultural property of indigenous peoples. Other Rapporteurs on the right to restitution and compensation for victims of violations of human rights and on human rights and the environment have addressed indigenous issues in their reports. So has the Sub-Commission's Working Group on Contemporary Forms of Slavery.

The concerns of indigenous peoples have come up in still other United Nations fora, including a global consultation on the right to development (report in document E/CN.4/1990/9/Rev.1 and in publication HR/PUB/91/2); a seminar on racism and racial discrimination in the social and economic relations between indigenous peoples and states (report in document E/CN.4/1989/22 and in publication HR/PUB/89/5); a meeting to review the experience of self-government for indigenous peoples which adopted "The Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government" (report in document E/CN.4/1992/42, with a series of expert papers reproduced in Addendum 1); and a 1992 seminar on sound environment and sustainable development for indigenous peoples.

ANNEX III: Andrew Gray, "The UN Working Group - Where the Sublime Meets the Ridiculus," IWGIA Newsletter, no. 4, 1992, pp. 23-27 (International Work Group for Indigenous Affairs, Copenhagen, reproduced with permission).

The article is a good if somewhat undiplomatic description of the scene at WGIP. Representatives of indigenous groups and communities are free to participate in WGIP meetings with or without the consultative status which is normally required for non-governmental organizations attending the Economic and Social Council and its subsidiary organs. Thirteen international and national indigenous organizations, including the Inuit Circumpolar Conference and the Nordic Sami Council, have obtained this status which allows them to participate in meetings of the Group's parent bodies.

In 1985, the General Assembly established the United Nations Voluntary Fund for Indigenous Populations with the purpose of financing the attendance of indigenous representatives at WGIP sessions in Geneva.

ANNEX IV: Convention concerning Indigenous and Tribal Peoples in Independent Countries, ILO Convention No. 169, 1989.

The Convention was adopted by the International Labour Conference in 1989. It has recently entered into force, and Norway was among the first countries to ratify the text. Part II on Land contains the most frequently quoted provisions. Regular supervisory activities by the International Labour Office of the standards set forth in this and other Conventions have resulted in specific opinions and requests to governments relating to violations of indigenous peoples' rights.

Specialized agencies and organs of the United Nations, which have addressed indigenous issues, include UNESCO, the World Bank, the United Nations University, the United Nations Research Institute for Social Development (UNRISD), the Centre on Transnational Corporations, and the 1992 United Nations Conference on Environment and Development (UNCED). Other institutions are noted by their absence from such listing.

ANNEX V: Gudmundur Alfredsson, "Article 17" in The Universal Declaration of Human Rights, A Commentary, edited by Asbjorn Eide and others, Scandinavian University Press: Oslo, 1992, pp. 255-262.

It was stated above that indigenous peoples, like everyone else, should enjoy equality and dignity in the enjoyment of all human rights and freedoms. This observation extends to the right to own property; hence the inclusion of this annex. The rights to land and natural resources are major concerns of indigenous peoples, as partly reflected in the ILO Convention and the UN draft declaration.

Over the last few years, indigenous peoples or non-governmental organizations acting on their behalf have on several occasions resorted to international implementation procedures relating to existing standards.

Acting under the Optional Protocol to the International Covenant on Civil and Political Rights, the Human Rights Committee has found that traditional economic activity, if it is an essential element in the culture of an ethnic community, may fall under article 27 of the Covenant concerning the protection of minority culture (views on communication no. 197/1985 submitted by Ivan Kitok, with Sweden as the State Party concerned, UN document CCPR/C/33/D/197/1985, issued 10 August 1988, paragraph 9.2). A few other cases have been decided.

Treaty-based monitoring bodies, in examining state reports, are more and more frequently concerned with the rights of indigenous peoples. This is true for the Human Rights Committee and the Committee on Economic, Social and Cultural Rights set up under the two International Covenants on Human Rights and for the Committee on the Elimination of Racial Discrimination set up under the Convention on the Elimination of All Forms of Racial Discrimination.

Special Rapporteurs of the Commission on Human Rights investigating religious intolerance and the human rights situation in certain countries have also addressed indigenous concerns. The Secretary-General and the Under-Secretary-General for Human Rights have taken good offices action on behalf of indigenous peoples.

Non-discrimination and preferential treatment, based on objectivity and the rule of law with judicial avenues for redress, offer the best chances of bringing relief and justice to minorities and at the same time stability to states and peace to the international community. Minorites and members of minorities could utilize the United Nations system more effectively, and they should be given greater access and encouragement to do so. While existing procedures can be improved, new mechanisms could be set up not least for the purpose of facilitating dialogue and national reconiciliation. It will be tested this summer, at the World Conference on Human Rights in Vienna, whether recent developments in world politics have led to greater readiness to tackle these issues.

ANNEX VI: Suggested reading list.

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* Cand. jur. (University of Iceland 1975), M.C.J. (New York University 1976), S.J.D. (Harvard Law School 1982). The author is Visiting Professor at the Raoul Wallenberg Institute for Human Rights and Humanitarian Law at the University of Lund in Sweden, while on leave from his position with the United Nations Centre for Human Rights in Geneva. Any opinions expressed in this paper are his own and do not necessarily reflect the position of his employers.

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10 December 1992

SECRETARY-GENERAL CALLS FOR RESPECT AND TOLERANCE TO SECURE HUMAN AND COMMUNITY RIGHTS OF INDIGENOUS PEOPLE

Speaks at Opening Ceremonies For International Year of World's Indigenous People

Following is the text of the statement by Secretary-General Boutros Boutros-Ghali in the General Assembly this morning at the opening ceremonies for the International Year of the World's Indigenous People:

Today, on Human Rights Day 1992, we launch 1993 as International Year for the World's Indigenous People. The theme chosen by the General Assembly is "Indigenous people -- a new partnership".

It is no coincidence that we are launching this Year on Human Rights Day. Many of the 300 million indigenous people in the world face social and economic disadvantage in the societies in which they live. In the past, some of the world's worst violations of human rights have been perpetrated against indigenous people.

Today indigenous people are often among the poorest, worst housed and least paid; they usually have less access to education and welfare than other members of society.

For centuries indigenous people have lived at the margins of national and international life. Some have continued to live according to their traditional ways, and have not adopted the predominant language or religion of their country. Many have been outcasts in their own lands. Rarely have they been incorporated by the larger societies in which they lived. Often they have been denied citizenship by the authorities of their States.

Often the ancestral lands of indigenous people were "discovered" by colonial Powers and then allocated to foreign settlers. In many countries the indigenous people were relegated to reserved territories or confined to inaccessible or inhospitable regions.

(more)

* Revised to include English translation of French portion of text.

Some Governments viewed as subversive those who did not share the sedentary lifestyle or the culture of the majority. Nations of farmers tended to view nomads or hunting peoples with fear or contempt. Many indigenous people seemed doomed to extinction.

Today, a welcome change is taking place at national and international levels. Many indigenous people have formed their own organizations. They are active in seeking improvements in their situations. In the last decade indigenous people have come in increasing numbers to United Nations meetings -- the Commission on Human Rights, the Working Group on Indigenous Populations, and other conferences dealing with human rights, development and environment.

There have also been important changes in many countries, which have benefited indigenous people. More and more Governments have recognized the multicultural character of their societies. They have restored land to indigenous communities, and supported institution-building and socio-economic programmes for indigenous people.

The year 1993 will help to focus the United Nations system on the special situation of indigenous people and on their needs. One aim of the Year is to provide help to indigenous people and communities in areas such as health, education, development and environment. The emphasis must be on practical action, in the form of concrete projects benefiting indigenous people. An important element of these programmes should be the participation of indigenous people in their planning, implementation and evaluation.

The commitment of the United Nations system to the cause of indigenous people is long-standing. It goes back to a time before the creation of the United Nations itself.

This International Year is being organized in partnership by the United Nations Centre for Human Rights and the International Labour Organisation (ILO).

Since its creation in 1919, ILO has defended the social and economic rights of groups of those whose customs, traditions, institutions or language set them apart from other sections of national communities. In 1953, ILO published a study on indigenous people. In 1957, it adopted the first international legal instruments specifically created to protect the rights of peoples whose ways of life and existence were threatened by dominating cultures.

My own involvement and commitment to these issues goes back to that time. I was a member of the committee of experts on the ILO Convention in 1957, and its Rapporteur.

(more)

The United Nations Educational, Scientific and Cultural Organization (UNESCO), as part of its contribution to the World Decade for Cultural Development, has encouraged cultural expression and activities by indigenous people.

A major turning-point came in 1970, when the Subcommission on Prevention of Discrimination and Protection of Minorities recommended that a detailed study be made of discrimination against indigenous populations. The report provided information, definitions and recommendations for action by the United Nations. The work of Martínes Cobo, the Special Rapporteur, helped galvanize the United Nations system into action.

A new and non-paternalistic ILO Convention was produced in 1989.

For the past decade, the United Nations Working Group on Indigenous Populations, which is open to all indigenous people and their communities and organizations, has considered international standards and guidelines for the treatment of indigenous people. Over 600 people from all over the world attended the Working Group's last meeting, in Geneva in July.

Some indigenous people's organizations are asking how the United Nations should now proceed. What should the mechanisms be for ensuring that the United Nations system consults, and takes account of, indigenous people? This is a matter for further reflection and discussion.

I have set up a Voluntary Fund for the International Year of the World's Indigenous People, to provide resources for practical assistance to indigenous people. I appeal to all Governments, non-governmental organizations and other institutions and individuals to contribute. Without a full financial commitment from Governments the Year will not be the success we hope for.

It is important that this Year should see the situation of indigenous people brought into centre-stage as a subject for public awareness and debate. Members of the media, teachers, non-governmental organizations and other individuals and institutions will, I hope, help stimulate discussion and provide information. Cultural events are extremely important in this regard. But the really crucial role of the United Nations is to promote and protect the human rights of indigenous people.

The way indigenous people are treated by States and the international community will be a major test of the seriousness of our commitment to a genuinely universal human rights regime. If we are serious about development, political participation and human rights, we must address the special situation of indigenous people.

(more)

Soon this Assembly will be asked to consider a draft declaration on the rights of indigenous people. The adoption of such a declaration can be another milestone in the long struggle by indigenous people for recognition of their rights.

Agreeing on the text of the declaration and reaching consensus on the treatment of indigenous people will not be easy or straightforward. The situation of indigenous people changes widely. Some communities wish to preserve their distinctive ancient culture apart from the mainstream; others seek the path of integration into modern society. Some members of indigenous communities may wish to leave them; others may wish to pursue traditional cultures without change.

Similarly, the policies adopted by States differ widely. The political and legislative history of the Indian and Inuit communities of Canada is different from that of the native peoples of Brazil. Practices and attitudes, as well as the legal framework, are quite different in the United States as compared, say, to Ecuador. Australia and India, Botswana and Norway, approach indigenous affairs differently.

The balancing of individual and community rights is not easy, particularly when one civilization commands hugely greater material resources than the other. Human rights are universal but the promotion and protection of the human rights of indigenous people require a special sensitivity to particular situations.

One thing is clear: the human and community rights of indigenous people will flourish best in an atmosphere of respect and mutual tolerance. If the majority society understands the values and achievements of indigenous people, it will be far more prepared to uphold their human rights.

Education, public awareness, are therefore important. We are making progress. It is now clearly understood that many indigenous people live in greater harmony with the natural environment than do the inhabitants of industrialized, consumer societies. And the medical and botanical knowledge of tribal peoples -- especially of herbal medicines -- has begun to be recognized as a source of valuable knowledge for modern medical science.

It will take time for the international community to achieve agreement on principles which protect the rights of indigenous people, and yet take account of the different situations across the world. By dedicating 1993 to indigenous people and the idea of partnership, we mark yet another milestone.

I believe that the Year will be the starting point for two partnerships -- one between indig as people and States, and another between indigenous people and the Unite tions.

Throughout 1993 let us listen to, and work with, the indigenous people. Unity through diversity is the only true and enduring unity.

We are building for the future. I welcome the Year. I believe that we are in sight of justice for these most disadvantaged of people.

This meeting is addressed directly to the indigenous peoples, but it concerns all peoples of the world. For the situation of indigenous peoples prompts us to take a broader look at human rights today. Henceforth we realize that human rights cover not only individual rights but also collective rights, historical rights. We are discovering the "new human rights", which include, first and foremost, cultural rights.

The twentieth century has almost succeeded in reducing the world to the level of what some have called a planetary village; a village, perhaps, provided that cultural diversity is preserved in that village. But we cannot be sure that the twentieth century will hand down to posterity a favourable assessment, at least on that score.

A few months before his death, the French historian, Georges Dumezil, noted with bitterness that, on the eve of the year 2000, the number of languages and dialects spoken throughout the five continents was only half what it had been in 1900. The modern world will therefore prove to have been a great destroyer of languages, traditions and cultures. The latter are being drowned by the flood of mass communications, the instruments of which all too often remain in the service of a handful of cultures. Today, cultures which do not have powerful media are threatened with extinction.

We must not stand idly by and watch that happen. Diversity is another name for the world. What would the world be like if there were no differences? What would the world be like if there were only one language? It is true that, as Paul Valéry said, civilizations are mortal. But just because civilizations are mortal, that does not mean that we must kill them.

Allowing native languages, cultures and different traditions to perish, such "non-assistance to endangered cultures" must henceforth be considered a basic violation of human rights. An inadmissible violation. We might even say that there can be no human rights unless cultural authenticity is preserved. We have seen how a culture that is marginalised eventually disappears, and we know that when a community is left out of the mainstream of international life, it is very difficult for its members to preserve even the most elementary human rights.

We can no longer allow a single act of ethnocide to take place. Let us promise to be more vigilant in this respect than we have been until now; let us organize a watch and let us sound the alarm as soon as a civilization, a language or a culture is in danger. This promise, which is made by the international community as a whole, in my view represents the historic scope of the International Year which is opening here this morning.

This year, 1992, is well chosen, for our fight to defend indigenous peoples has just been acknowledged in splendid fashion by the awarding of the Nobel Peace Prize to Rigoberta Menchu in recognition of her work for social justice and ethno-cultural reconciliation. I extend my heartiest congratulations to the new Nobel Prize winner and I am very happy to announce that Ms. Menchu has agreed, at our request, to serve as Goodwill Ambassador for the International Year of the World's Indigenous People.

When I had the pleasure and the honour of meeting Ms. Menchu a few weeks ago in New York, she told me how much faith she had in the work of the United Nations, and she gave me her moral support for the struggle which we are waging here on behalf of human rights.

The International Year of the World's Indigenous People coincides with an important year for human rights since the World Conference on Human Rights is to be held next June, in Vienna. The international community is seeking by both events to illustrate one and the same value: the wealth of all singularity.

It is time, for technology possesses in itself a tremendous power to level out differences.

If we are not careful, it will gradually reduce men and women to mere interchangeable units. The world will thereby be reduced to a single culture, a single language; that is to say, it will be reduced to the lowest common denominator of our dead cultures; and, although we will speak with one voice, we will have nothing to say.

I was saying a moment ago that the situation of indigenous peoples was of concern to us. In respecting them, defending them, in helping them to take their place in the community of nations and in international life, it is perhaps the world itself that we are protecting, according to the view that we have of this very diverse world. And, ultimately, we will be protecting every culture, every people, every unique being and, in the final analysis, each one of us is a unique being.

- ... -

Annex II

Annex I

PREAMBULAR AND OPERATIVE PARAGRAPHS OF THE DRAFT DECLARATION AS AGREED UPON BY THE MEMBERS OF THE WORKING GROUP AT FIRST READING

First preambular paragraph

Affirming that all indigenous peoples are free and equal in dignity and rights to all peoples in accordance with international standards, while recognizing the right of all individuals and peoples to be different, to consider themselves different, and to be respected as such,

Second preambular paragraph

Considering that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Third preambular paragraph

Convinced that all doctrines, policies and practices of racial, religious, ethnic or cultural superiority are scientifically false, legally invalid, morally condemnable and socially unjust,

Fourth preambular paragraph

Concerned that indigenous peoples have often been deprived of their human rights and fundamental freedoms, resulting in the dispossession of their lands, territories and resources, as well as in their poverty and marginalization,

Fifth preambular paragraph

Considering that treaties, agreements and other constructive arrangements between States and indigenous peoples continue to be matters of international concern and responsibility,

Sixth preambular paragraph

Welcoming the fact that indigenous peoples are organizing themselves in order to bring an end to all forms of discrimination and oppression wherever they occur,

Seventh preambular paragraph

Recognizing the urgent need to respect and promote the rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which stem from their history, philosophy, cultures and spiritual and other traditions, as well as from their political, economic and social structures,

Eighth preambular paragraph

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from adverse distinction or discrimination of any kind,

Ninth preambular paragraph

Endorsing efforts to revitalize and strengthen the societies, cultures and traditions of indigenous peoples, through their control over development affecting them or their lands, territories and resources, as well as to promote their future development in accordance with their aspirations and needs,

Tenth preambular paragraph

Recognizing that the lands and territories of indigenous peoples should not be used for military purposes without their consent and reaffirming the importance of the demilitarization of their lands and territories, which will contribute to peace, understanding, economic development and friendly relations among all peoples of the world,

Eleventh preambular paragraph

Emphasizing the importance of giving special attention to the rights and needs of indigenous women, youth and children, and in particular to their right to equality of educational opportunities and access to all levels and forms of education,

Twelfth preambular paragraph

Recognizing in particular that it is usually in the best interest of indigenous children for their family and community to retain shared responsibility for their upbringing and education,

Thirteenth preambular paragraph

Believing that indigenous peoples have the right freely to determine their relationships with the States in which they live, in a spirit of coexistence with other citizens,

Fourteenth premabular paragraph

Noting that the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Fifteenth preambular paragraph

Bearing in mind that nothing in this Declaration may be used as an excuse for denying to any people its right of self-determination,

Sixteenth preambular paragraph

Encouraging States to comply with and effectively implement all international instruments as they apply to indigenous peoples, in consultation with the peoples concerned,

Seventeenth preambular paragraph

Solemnly proclaims the following Declaration on the Rights of Indigenous Peoples:

PART I

Operative paragraph 1

Indigenous peoples have the right of self-determination, in accordance with international law by virtue of which they may freely determine their political status and institutions and freely pursue their economic, social and cultural development. An integral part of this is the right to autonomy and self-government;

Operative paragraph 2

Indigenous peoples have the right to the full and effective enjoyment of all of the human rights and fundamental freedoms which are recognized in the Charter of the United Nations and in international human rights law;

Operative paragraph 3

Indigenous peoples have the right to be free and equal to all other human beings and peoples in dignity and rights, and to be free from adverse distinction or discrimination of any kind based on their indigenous identity;

PART II

Operative paragraph 4

Nothing in this Declaration may be interpreted as implying for any State, group or individual any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations;

Operative paragraph 5

Indigenous peoples have the collective right to exist in peace and security as distinct peoples and to be protected against genocide, as well as the individual rights to life, physical and mental integrity, liberty and security of person;

Operative paragraph 6

Indigenous peoples have the collective and individual right to maintain and develop their distinct ethnic and cultural characteristics and identities, including the right to self-identification;

Operative paragraph 7

Indigenous peoples have the collective and individual right to be protected from cultural genocide, including the prevention of and redress for:

(a) Any act which has the aim or effect of depriving them of their integrity as distinct societies, or of their cultural or ethnic characteristics or identities;

(b) Any form of forced assimilation or integration by imposition of other cultures or ways of life;

(c) Dispossession of their lands, territories or resources;

(d) Any propaganda directed against them;

Operative paragraph 8

Indigenous peoples have the right to revive and practise their cultural identity and traditions, including the right to maintain, develop and protect the past, present and future manifestations of their cultures, such as archeological and historical sites and structures, artefacts, designs, ceremonies, technology and works of art, as well as the right to the restitution of cultural, religious and spiritual property taken from them without their free and informed consent or in violation of their own laws;

Operative paragraph 9

Indigenous peoples have the right to manifest, practise and teach their own spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains;

Operative paragraph 10

Indigenous peoples have the right to revive, use, develop, promote and transmit to future generations their own languages, writing systems and literature, and to designate and maintain their own names of communities, places and persons. States shall take effective measures to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other effective means;

Operative paragraph 11

Indigenous peoples have the right to all levels and forms of education, including access to education in their own languages, and the right to establish and control their own educational systems and institutions. Resources shall be provided by the State for these purposes;

Operative paragraph 12

Indigenous peoples have the right to have the dignity and diversity of their cultures, histories, traditions and aspirations reflected in all forms of education and public information. States shall take effective measures to eliminate prejudices and to foster tolerance, understanding and good relations;

Operative paragraph 13

Indigenous peoples have the right to the use of and access to all forms of mass media in their own languages. States shall take effective measures to this end;

Operative paragraph 14

Indigenous peoples have the right to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their own political, economic, social, cultural and spiritual development, and for the enjoyment of the rights contained in this Declaration;

PART III

Operative paragraph 15

Indigenous peoples have the right to recognition of their distinctive and profound relationship with the total environment of the lands, territories and resources which they have traditionally occupied or otherwise used;

Operative paragraph 16

Indigenous peoples have the collective and individual right to own, control and use the lands and territories they have traditionally occupied or otherwise used. This includes the right to the full recognition of their own laws and customs, land-tenure systems and institutions for the management of resources, and the right to effective measures by States to prevent any interference with or encroachment upon these rights. Nothing in the foregoing shall be interpreted as restricting the development of self-government and self-management arrangements not tied to indigenous territories and resources;

Operative paragraph 17

Indigenous peoples have the right to the restitution or, where this is not possible, to just and fair compensation for lands and territories which have been confiscated, occupied, used or damaged without their free and informed consent. Unless otherwise freely agreed upon by the peoples

concerned, compensation shall preferably take the form of lands and territories of quality, quantity and legal status at least equal to those which were lost;

Operative paragraph 18

Indigenous peoples have the right to the protection and, where appropriate, the rehabilitation of the total environment and productive capacity of their lands and territories, and the right to adequate assistance, including international cooperation, to this end. Unless otherwise freely agreed upon by the peoples concerned, military activities and the storage or disposal of hazardous materials shall not take place in their lands and territories;

Operative paragraph 19

Indigenous peoples have the right to special measures for protection, as intellectual property, of their traditional cultural manifestations, such as literature, designs, visual and performing arts, seeds, genetic resources, medicine and knowledge of the useful properties of fauna and flora;

Operative paragraph 20

Indigenous peoples have the right to require that States and domestic and transnational corporations consult with them and obtain their free and informed consent prior to the commencement of any large-scale projects, particularly natural resource development projects or exploitation of mineral and other subsoil resources, in order to enhance the projects' benefits and to mitigate any adverse economic, social, environmental and cultural effects. Just and fair compensation shall be provided for any such activity or adverse consequence undertaken;

PART IV

Operative paragraph 21

Indigenous peoples have the right to maintain and develop within their lands and other territories their economic, social, and cultural structures, institutions and traditions, to be secure in the enjoyment of their traditional means of subsistence, and the right to engage freely in their traditional and other economic activities, including hunting, fishing, herding, gathering, lumbering and cultivation. In no case may indigenous peoples be deprived of their means of subsistence. They are entitled to just and fair compensation if they have been so deprived;

Operative paragraph 22

Indigenous peoples have the right to special state measures within available resources for the immediate, effective and continuing improvement of their economic and social conditions, with their free and informed consent, that reflect their own priorities;

Operative paragraph 23

Indigenous peoples have the right to determine, plan and implement, as far as possible through their own institutions, all health, housing and other economic and social programmes affecting them;

Operative paragraph 24

Indigenous peoples have the right to their own traditional medicines and health practices. This includes the right to protection of vital medicinal plants, animals, and minerals. The above may not be construed as a limitation to indigenous health systems, if they so wish;

Operative paragraph 25

Indigenous peoples have the right to participate on an equal footing with all other citizens and without adverse discrimination in the political, economic, social and cultural life of the State and to have their specific character duly reflected in the legal system and in political and socio-economic and cultural institutions, as appropriate, including in particular proper regard to, full recognition of and respect for indigenous laws, customs and practices;

Operative paragraph 26

Indigenous peoples have the right (a) to participate fully at all levels of government, through representatives chosen by themselves, in decision-making about and implementation of all national and international matters which may affect their rights, lives and destinies; (b) to be involved, through appropriate procedures, determined in consultation with them, in devising laws or administrative measures that may affect them directly. States have the duty to obtain their free and informed consent before implementing such measures;

Operative paragraph 27

Indigenous peoples have the right to autonomy in matters relating to their own internal and local affairs, including education, information, mass media, culture, religion, health, housing, employment, social welfare in general, traditional and other economic and management activities, land and resources administration, environment and entry by non-members, and the environment, as well as internal taxation for financing these autonomous functions;

Operative paragraph 28

Indigenous peoples have the right to decide upon the structures of their autonomous institutions, to select the membership of such institutions according to their own procedures, and to determine the membership of the indigenous peoples concerned for these purposes; States have the duty to recognize and respect the integrity of such institutions and their memberships;

Operative paragraph 29

Indigenous peoples have the right to determine the responsibilities of individuals to their own community, consistent with universally recognized human rights and fundamental freedoms and with the rights contained in this declaration;

Operative paragraph 30

Indigenous peoples have the right to maintain and develop traditional contacts, relations and cooperation, including activities for economic, social, cultural and spiritual purposes between indigenous peoples across borders. States should adopt measures to facilitate such contacts;

Operative paragraph 31

Indigenous peoples have the right to claim that States or their successors honour treaties and other agreements concluded with indigenous peoples, and to submit any disputes that may arise in this matter to competent national or international bodies, according to their original intent, or courts;

Operative paragraph 32

Indigenous peoples have the individual and collective right to access and prompt decision by mutually acceptable and fair procedures for resolving conflicts or disputes with States. These procedures may include, as appropriate, negotiation, mediation, conciliation, arbitration or judicial settlement at national courts and, where domestic remedies have been exhausted, international and regional human rights review mechanism for complaints;

Operative paragraph 33

States have the duty, in consultation with the indigenous peoples concerned, to take effective measures to ensure the full enjoyment of the exercise of the indigenous rights and other human rights and fundamental freedoms referred to in this Declaration;

Operative paragraph 34

These rights contained herein constitute the minimum standards for the survival and the well-being of the indigenous peoples of the world;

Operative paragraph 35

Nothing in this declaration may be interpreted as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire;

Operative paragraph 36

Indigenous peoples have the right to special protection and security in periods of armed conflict. States shall observe international standards for the protection of civilian populations in circumstances of emergency and armed conflict, and shall not:

(a) Recruit indigenous people against their will into the armed forces and, in particular, for use against other indigenous peoples;

(b) Force indigenous people to abandon their land and territories and means of subsistence and relocate them in special centres for military purposes;

Operative paragraph 37

Indigenous peoples have the right to retain and develop their customary laws and legal systems where these are not incompatible with human rights and fundamental freedoms enshrined in international human rights instruments;

Operative paragraph 38

Indigenous peoples shall not be forcibly removed from their lands or territories. Where relocation occurs it shall be with the free and informed consent of the indigenous peoples concerned and after agreement on a fair and just compensation and, where possible, the option of return;

Operative paragraph 39

The application of the provisions of this Declaration shall not adversely affect the rights and benefits of the indigenous peoples concerned or of any other national of a State pursuant to other international instruments, treaties or laws.

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United Nations Working Group on Indigenous Populations

The UN Working Group – Where the Sublime meets the Ridiculous

By Andrew Gray

Any tourist planning a brief visit through the United Nations Palais in Geneva at the end of July is in for a surprise. In addition to the usual diplomatic coterie of governmental human rights representatives in shiny suits making good use of generous daily allowances to solve the problems of the world, the unsuspecting visitor will encounter a strange sight peering over the balcony in the New Building of the UN down onto the large coffee bar the visitor might well wonder whether they have stumbled upon a crowd scene for a futuristic version of »Custer's Last Stand«. Indigenous peoples of all kinds appear to have taken over the United Nations. Some of them may sport some colourful cloth on even the occasional feather and all in the name of determination and self-determination.

Three hundred indigenous representatives may not match the power of the UN but, by their presence, government representatives and UN officials are forced to face the real world. For once they have to face ignoble humiliations such as having to queue for a cup of coffee, wait for a taxi or even find that the smoked salmon in the restaurant has finished. The power of indigenous peoples in Geneva is small but significant and is highly apparent during the unique annual gathering of the United Nations – the Working Group on Indigenous Populations – when for two weeks the world turns on its head.

But if the Working Group should seem strange to a tourist, imagine the culture shock for those indigenous peoples who first enter the huge monstrous white elephant known as the Palais des Nations. Over a kilometre from end to end full of blue uniformed guards, highly made-up secretaries and well-scrubbed diplomats the Palais is a state of states.

Even more strange, however, are the bizarre activities which orbit around the Working Group itself. In 1992 these events took on a form hitherto unprecedented when an extraordinary event met the gaze of two Amazonian indigenous representatives. At mid-day they were returning to the UN building after a meeting in Geneva. At the gates of the Palais des Nations, the two young men were faced with a spectacle. On the grass square facing the entrance a strange ritual was in progress. [illegible] the indigenous [illegible] travelled [illegible] were the White Indians [illegible] those members of the Wanabee tribe – those who »wanabee« Indian? Stripped to their pale hairless waists, the men wore loin cloths and buskin boots, while the women danced around them with wooden carts containing clusters of children. At the centre of the melee, a group of South American highlanders played long pan pipes (zampoñas) around the lone figure of a wild looking man in a headband playing a conch shell.

This conglomeration of White Indians dancing to an indigenous tune while the indigenous delegates watched in wonderment and amusement encapsulates the irony of the whole Working Group process. At one moment the dance was a commemoration of 500 Years of oppression and resistance while at the next the indigenous world seemed to have stumbled upon some wild re-enactment of those Carl May novels which in the early part of this century established the role models for today's White Indians of Europe.

Inside the United Nations, however, a ceremony, no less strange, was taking place. Once again the performance was organised within a circle. The new building which hosts the Working Group contains enormous circular rooms capable of holding over 500 people. As in the dance, the majority of the indigenous performers are at the periphery of the ritual, although [illegible] participate. The [illegible] circle of [illegible], however, [illegible] not [illegible] both [illegible] two [illegible] [illegible] representatives [illegible] of [illegible] [illegible] circle of the [illegible] consists of five legal experts from different parts of the globe who are engaged in setting standards for the rights of indigenous peoples. For two weeks every summer the experts listen to the statements of several hundred indigenous representatives who come from all over the world to make their cases known to the international community. The group have now a draft declaration of the rights of indigenous peoples based on the information they have been receiving over the last ten years.

The Madame of Ceremonies is Dr. Erica Daes. An expert in international law from Greece, she receives much affection from the indigenous peoples for all her tireless

Erica Daes, Chairman. IWGIA archives.

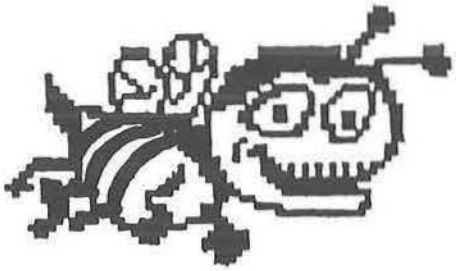
ork in promoting the Declaration ıroughout the difficult times of the Work-ıg Group. At the same time she com-ıands respect with a strongly maternal ıanner and likes to have order in her ıeeting. Unlike the dance leader outside ıe UN, she does not play a conch shell ·om her central point, but crashes her avel to keep the meeting's unruly dance ı motion. Her reasons are usually to si-:nce any indigenous representative whom he considers too garrulous or to wake up Vorking Group members and govern-ıent representatives replete with exces-ive lunches taken daily between one and hree o'clock. In this way the meeting gen-ly wends its way through two weeks of liscussion.

The meeting has for three years con-isted of one week discussing the standard etting and the text of a draft declaration ın indigenous rights while the second veek is reserved for an account of the levelopments which have taken place in he indigenous world over the previous 12 nonths. This enables representatives who ·ome from all parts of the world to explain he conditions under which they live.

Some of the more dance-like creatures ɔf the insect world are bees. Inside the ıuge circular hall of the UN where the Working Group takes place, the roof is a ɔlaze of light refracted by hundreds of ıanging plastic rectangles into a veritable ıoneycomb. The impression is of being ınside a large hive.

Four members of the Working Group sit at a horse-shoe shaped bench at the feet of the dais where the Chairman (her pre-ferred term) presides. Buzzing around the queen bee of the Working Group are the worker bees from the Human Rights Cen-tre whose job is to ensure the smooth run-ning of the meeting by copying, co-ordinating and communicating with speakers. The worker bees gain little or no pay because the recession has hit the United Nations with a vengeance. If things go on as they are now, it will not be long before we see UN officials busking along with the White Indians outside the Palais.

Desperate for funds (which of course come from governments), the first rule of the Working Group is that you have to be polite to governments. They are usually referred to by terms such as »the distin-guished representative from the observer government of...« and thanked profusely for their efforts. In contrast indigenous repre-sentatives are urged to limit their presenta-tions and if they talk for more than ten minutes they hear a crash from the ubiqui-tous gavel and receive a call to silence.



The government representatives in the hive are the drones. Not only do most of them lounge at their desks, reading their papers and quietly dozing, but when they do speak you can be sure that they will send volleys of verbiage into the dizzy realms of bureaucratic rhetoric as they drone on (and on).

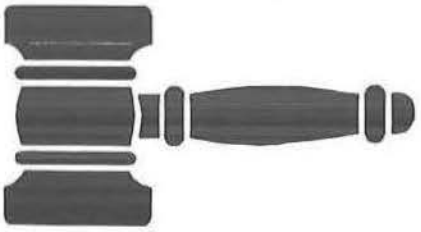
Although the Working Group is not a chamber of complaints, at this unique fo-rum the supposedly powerless indigenous people do have an opportunity to tell the world and their governments what they feel. A well directed statement by an indig-enous representative can have the marvel-lous effect of waking a slumbering govern-ment and enforcing a discussion. This is not always the case however. In order to manage the Working Group more effec-tively, governments have taken up ritualis-tic aspects of behaviour worthy of analysis by a bona fide social scientist.

India, for example, makes the same statement every year denying that indig-enous peoples exist in their country. The same reference to the sociologist Andres Betaille to back up this claim has become a hardy perennial. Indonesia and Burma regularly accuse the participants of being terrorists – usually directing their com-ments at some benign indigenous monk or a retired elderly woman.

Occasionally some innovations occur which could lead to the invention of tradi-tions. Bangladesh this year, for example, uncharacteristically made a joke. Well-in-formed observers apparently say that this was an aberration which will probably not be repeated. The ambassador referred to the possibility of UN Special Rapporteurs »under every nuptial bed«, a bizarre con-cept, even taking into consideration that in the Chittagong Hill Tracts the armed forces are probably there already.

The northern governments of Canada, Australia, New Zealand and the Scandi-navian countries have their rivalries. Each delegation competes to be the most inter-ested in the proceedings without being too progressive. Canada demonstrates its in-terest by bringing the largest delegation. When entering the room one can always spot the Canadians who, with a magnifi-cent demonstration of over-kill, cluster in a gaggle of about ten around the micro-phone, anxious less any progressive state-ment should pass unchallenged.

Scandinavia and New Zealand usually show their interest by bringing indigenous delegates who join the government repre-sentatives at moments when nothing too substantial is under discussion. However Australia has been winning the competi-tion in recent years by bringing its secret



weapon – Robert Tickner, Minister of Aboriginal Affairs. He successfully raises the status of the delegation and can talk as long as he likes – no gavel for a garrulous Tickner.

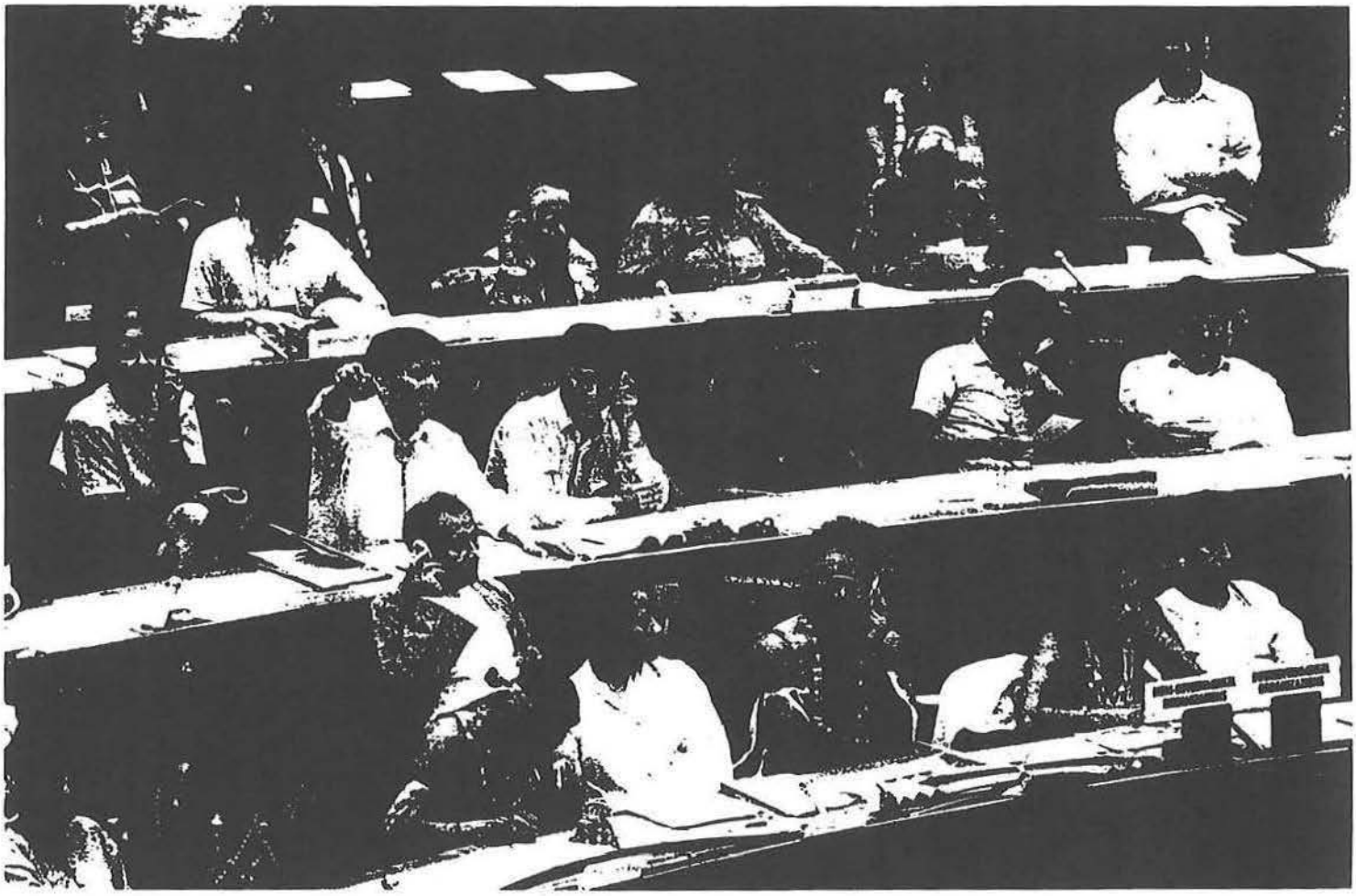
The sad thing about the government representatives at the Working Group is that more often than not, like Christopher Columbus, they don't really know where they are or what they are meant to be doing. Imagine the effect on a poor young Latin American diplomat with a sheltered upbringing and private education, hoping for a cushy few years in Geneva. Within two weeks of arriving in Europe he is thrown into the Working Group on Indigenous Populations. He is in a den of indigenous lions, who hang on every word as he tries to defend the indefensible. For some this could be the first exposure they have ever had to indigenous people and noting the high turnover rate for government representatives at the Working Group it is only too frequently their last.

The indigenous representatives are the majority in the meeting. Arriving from all parts of the globe they provide a dazzling and occasionally colourful array of costumes ranging from South Moluccan loin cloths, the occasional Amazonian feather and glorious textiles from Guatemala to the smart three piece suits of north American indigenous lawyers.

Clutching their texts, the indigenous representatives have to undergo a complicated routine in order to be permitted to speak. First they have to place their names on a speakers list. This involves finding the Secretary of the Working Group and joining a huge line of supplicants each of whom inscribes their name. In a matter of hours the list grows to an enormous length. A delegate needs second sight to work out when the time comes to speak. If you happen not to be in the room when you are called by the Chairman, you lose your chance.

The crowd scenes at the Working Groups are supplemented by the ever-increasing numbers of non-indigenous people scurrying to and fro. What a variety of persons join the throng. Braces of »distinguished« international lawyers, resplendent in the latest theories on self-determination, preen themselves and jockey for seats, clutching copies of their latest tomes on human rights.

Meanwhile dashing and delectable young supporters rush through the room collecting documentation to the distress of the Chair. At the end of each speech hoards of assorted observers pounce on the previous speaker to get the desperately



The humming of the beehive. Photo: IWGIA archives.

oveted copies of the speech. The bees uzz and the queen bee does not like disrder in the hive. The gavel strikes and a underous voice condemns the delinuents, ordering them to collect the papers t the back of the hall. But at the moment hen the gavel crashes the bees immediely dive for seats and pretend they had lways been sitting there. But as in a game f musical chairs there are not enough laces available and someone usually ends p on the floor. Hands folded like naughty ildren caught out by the teacher, the articipant tentatively tries to avert the aze of the indomitable »She Who Must e Obeyed«.

A plethora of onlookers are attracted to ie honey pot of the Working Group. GOs of all shapes and sizes find space to bserve the proceedings, whether under ie chairs and tables in the coffee room or anging from the roof gallery. Furtherore clusters of students in strange styles f clothes observe intently from the wings f the hall. And then there are, of course, ie anthropologists. Indeed they are omnipresent – armed with note books and tape ecorders. Lacking only pith helmet and ack pack, they find in Geneva a new location, hitherto unstudied, where they an home in on wild looking delegates for cientifically guaranteed interviews. Indignous peoples and their international fora re now the centre of study.

But pride of place has to go to the UN self. The UN operates with its own police ystem and has controls which are laws nto itself. The indigenous participants at he Working Group have challenged these ules as never before.

The guards never check for bombs but abies seem to be the ultimate threat to the orld order. Suspicious looks shoot out at oung women as they pass – maybe they ave a baby concealed in that brief-case. Vhen a Mapuche delegate wanted to ring her baby into the building in a push hair this year extraordinary events took lace. »No entry. Out of the question«, aid the guards. When challenged to exlain this strange behaviour, a long string f excuses streamed forth. »The wild peaocks are dangerous, they could eat the hildren«, they said imaginatively. No one ad actually seen a peacock inside the UN uilding and those in the gardens are preumably as dangerous as the peacocks vhich adorn gardens of bars, restaurants nd castles all over the world. The guards changed tack – »the children might fall down the escalators«. The young mother persisted whereupon the guards said that she could not enter because mothers with small children cannot do any real work. The outcry from indigenous and non-indigenous visitors alike to this treatment forced the UN to »make an exception« and in an unprecedented act respected both women's and children's rights at the same time.

Apart from the indigenous statements to the Working Group, the main debate at the meeting this year was the speed at which the declaration was to travel through the UN system – fast or slow. Indigenous peoples still feel that with such a large discrepancy between government understanding and indigenous aspirations no genuine consensus between governments and the indigenous peoples of the world can emerge quickly.

On the basis of the government statements it seems that some of them really had no understood the implications of indigenous rights. Many governments still think [illegible] determination will lead to the [illegible] of thousands of indigenous communities trying to set up states. They are also afraid that recognising territorial rights will lead to the indigenous peoples becoming richer than the elites who oppress them. Furthermore the concern about cultural rights and self-governance places the even more horrible fear that indigenous peoples might deal with governments in the same way that they have been treated through history. Hardly a practical approach to the issues.

The ultimate irony of the meeting was that the UN, which is one of the slowest, most cumbersome and laborious institutions in the history of mankind was being held back by the indigenous peoples at the meeting who wanted to take things slowly. But as an indigenous representative said – »we have been waiting 500 years for our rights to be recognised, so we can surely wait a little longer until people really understand what we want.«

On the last day of the meeting various rituals have to be performed. Miguel Alfonso Martinez, a member of the Working Group and international lawyer from Cuba, is working on a Treaty Study and other agreements among indigenous peoples. (A Cuban lawyer looking into among other things North American Treaties is another of the wonderful Working Group ironies.) Professor Alfonso Martinez regularly tantalises the meeting with the possibility that there will be no up-date – this year sickness and a malfunctioning computer were to blame. He asks for the floor – will he do it? Then as the gavel appears to rise in the air accompanied by a stern look from the chair, one and a half hours of report come tumbling out.

The afternoon ticks away with discussions on the Indigenous Year of 1993. The UN offers indigenous peoples everything as long as it does not cost anything. Maybe the UN will simply have to privatise itself and seek sponsorship. The Working Group could be sponsored by Coca Cola or world uranium interests... But this is only the beginning. Sponsored delegations could wear designer tee shirts and even official UN documents could be put out to [illegible] publishing with Penthouse [illegible] Working Group centre-fold [illegible]...

Then at the last minute, the delegates pull themselves together as the indigenous cavalry in the form of [illegible] lawyer Sharon Venn appears in the hall. She was supposed to have been elsewhere but had been the chosen delegate to make the indigenous peoples recommendation for the future of the Working Group. Either through some rapid train-work or a shamanic capacity of being in two places at one time she arrives to present the indigenous proposal from 14 organisations advocating that the Declaration takes as long as is necessary to include fundamental rights for indigenous people. The gavel hovers in astonishment at this final surprise appearance and the Working Group agrees to take full note of the suggestion. Then the gavel smashes down to mark the end of the dance for another year.

However the overall impression of 1992 was the full ironic blending of the sublime with the absurd. The event which illustrates this so clearly was when the dance at the entrance of the gate to the UN and the dance of the Working Group itself combined. During the first week indigenous peoples wanted a period of silence for the indigenous peoples who lost their lives during the last 500 years. Initially it was refused. However the indigenous peoples themselves agreed that they would pursue the matter.

Permission was sought again and on the following morning the indigenous peoples stood around the room in a full circle.

Suddenly low melodious tones from Aotearoa arose from the centre of the hall. An elder with the spiritual strength of her ancestors silenced the room. An irritated Madam Chair left the meeting suspended and the gavel limp. The long melodious tones of Aotearoa were followed by sacred chants from Central and South America and prayers from North America. A spell bound moment united everyone – governments, indigenous people and observers all for a split second were part of the same circle.

Then the spell broke as a master of ceremonies emerged and the meeting attempted to dance around the room. Slowly but surely the governments, NGOs indigenous peoples lumbered around the hall like some headless giant chicken. As the melodious echoes of the indigenous chants died away the cumbersome shuffling of the delegates trying to work their way around the room caused several representatives to raise their eyes and look at each other. They began to laugh. The deeply moving prayers and the total absurdity of the dance faced each other uncompromisingly. It is this very blending of the sublime and ridiculous which makes the UN Working Group ultimately a deeply powerful political experience. ❑

ANNEX IV

Convention 169

CONVENTION CONCERNING INDIGENOUS AND TRIBAL PEOPLES IN INDEPENDENT COUNTRIES

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 76th Session on 7 June 1989, and

Noting the international standards contained in the Indigenous and Tribal Populations Convention and Recommendation, 1957, and

Recalling the terms of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the many international instruments on the prevention of discrimination, and

Considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards, and

Recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live, and

Noting that in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded, and

Calling attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding, and

Noting that the following provisions have been framed with the co-operation of the United Nations, the Food and Agriculture Organisation of the United Nations, the United Nations Educational, Scientific and Cultural Organisation and the World Health Organisation, as well as of the Inter-American Indian Institute, at appropriate levels and in their respective fields, and that it is proposed to continue this co-operation in promoting and securing the application of these provisions, and

Having decided upon the adoption of certain proposals with regard to the partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention revising the Indigenous and Tribal Populations Convention, 1957;

adopts this twenty-seventh day of June of the year one thousand nine hundred and eighty-nine the following Convention, which may be cited as the Indigenous and Tribal Peoples Convention, 1989:

PART I. GENERAL POLICY

Article 1

1. This Convention applies to:

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

3. The use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

Article 2

1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

2. Such action shall include measures for:

(a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;

(b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;

(c) assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.

Article 3

1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.

2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.

Article 4

1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.

3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.

Article 5

In applying the provisions of this Convention:

(a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;

(b) the integrity of the values, practices and institutions of these peoples shall be respected;

(c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.

Article 6

1. In applying the provisions of this Convention, governments shall:

(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 7

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The

results of these studies shall be considered as fundamental criteria for the implementation of these activities.

4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Article 8

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

Article 9

1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.

2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

Article 10

1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.

2. Preference shall be given to methods of punishment other than confinement in prison.

Article 11

The exaction from members of the peoples concerned of compulsory personal services in any form, whether paid or unpaid, shall be prohibited and punishable by law, except in cases prescribed by law for all citizens.

Article 12

The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.

Part II. Land

Article 13

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples

concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

2. The use of the term "lands" in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

Article 14

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Article 15

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Article 16

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.

2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to

that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

Article 17

1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.

2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.

3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

Article 18

Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.

Article 19

National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:

(a) the provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;

(b) the provision of the means required to promote the development of the lands which these peoples already possess.

PART III. RECRUITMENT AND CONDITIONS OF EMPLOYMENT

Article 20

1. Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.

2. Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards:

(a) admission to employment, including skilled employment, as well as measures for promotion and advancement;

(b) equal remuneration for work of equal value;

(c) medical and social assistance, occupational safety and health, all social security benefits and any other occupationally related benefits, and housing;

(d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.

3. The measures taken shall include measures to ensure:

(a) that workers belonging to the peoples concerned, including seasonal, casual and migrant workers in agricultural and other employment, as well as those employed by labour contractors, enjoy the protection afforded by national law and practice to other such workers in the same sectors, and that they are fully informed of their rights under labour legislation and of the means of redress available to them;

(b) that workers belonging to these peoples are not subjected to working conditions hazardous to their health, in particular through exposure to pesticides or other toxic substances;

(c) that workers belonging to these peoples are not subjected to coercive recruitment systems, including bonded labour and other forms of debt servitude;

(d) that workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment.

4. Particular attention shall be paid to the establishment of adequate labour inspection services in areas where workers belonging to the peoples concerned undertake wage employment, in order to ensure compliance with the provisions of this Part of this Convention.

PART IV. VOCATIONAL TRAINING, HANDICRAFTS AND RURAL INDUSTRIES

Article 21

Members of the peoples concerned shall enjoy opportunities at least equal to those of other citizens in respect of vocational training measures.

Article 22

1. Measures shall be taken to promote the voluntary participation of members of the peoples concerned in vocational training programmes of general application.

2. Whenever existing programmes of vocational training of general application do not meet the special needs of the peoples concerned, governments shall, with the participation of these peoples, ensure the provision of special training programmes and facilities.

3. Any special training programmes shall be based on the economic environment, social and cultural conditions and practical needs of the peoples concerned. Any studies made in this connection shall be carried out in co-operation with these peoples, who shall be consulted on the organisation and operation of such programmes. Where feasible, these peoples shall progressively assume responsibility for the organisation and operation of such special training programmes, if they so decide.

Article 23

1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the

maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.

2. Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.

PART V. SOCIAL SECURITY AND HEALTH

Article 24

Social security schemes shall be extended progressively to cover the peoples concerned, and applied without discrimination against them.

Article 25

1. Governments shall ensure that adequate health services are made available to the peoples concerned, or shall provide them with resources to allow them to design and deliver such services under their own responsibility and control, so that they may enjoy the highest attainable standard of physical and mental health.

2. Health services shall, to the extent possible, be community-based. These services shall be planned and administered in co-operation with the peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional preventive care, healing practices and medicines.

3. The health care system shall give preference to the training and employment of local community health workers, and focus on primary health care while maintaining strong links with other levels of health care services.

4. The provision of such health services shall be co-ordinated with other social, economic and cultural measures in the country.

PART VI. EDUCATION AND MEANS OF COMMUNICATION

Article 26

Measures shall be taken to ensure that members of the peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.

Article 27

1. Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations.

2. The competent authority shall ensure the training of members of these peoples and their involvement in the formulation and implementation of education programmes, with a view to the progressive transfer of responsibility for the conduct of these programmes to these peoples as appropriate.

3. In addition, governments shall recognise the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples. Appropriate resources shall be provided for this purpose.

Article 28

1. Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this objective.

2. Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country.

3. Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.

Article 29

The imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on an equal footing in their own community and in the national community shall be an aim of education for these peoples.

Article 30

1. Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention.

2. If necessary, this shall be done by means of written translations and through the use of mass communications in the languages of these peoples.

Article 31

Educational measures shall be taken among all sections of the national community, and particularly among those that are in most direct contact with the peoples concerned, with the object of eliminating prejudices that they may harbour in respect of these peoples. To this end, efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples.

PART VII. CONTACTS AND CO-OPERATION ACROSS BORDERS

Article 32

Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.

Part VIII. Administration

Article 33

1. The governmental authority responsible for the matters covered in this Convention shall ensure that agencies or other appropriate mechanisms exist to administer the programmes affecting the peoples concerned, and shall ensure that they have the means necessary for the proper fulfilment of the functions assigned to them.

2. These programmes shall include:

(a) the planning, co-ordination, execution and evaluation, in co-operation with the peoples concerned, of the measures provided for in this Convention;

(b) the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in co-operation with the peoples concerned.

Part IX. General provisions

Article 34

The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.

Article 35,

The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.

Part X. Final provisions

Article 36

This Convention revises the Indigenous and Tribal Populations Convention, 1957.

Article 37

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 38

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 39

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 40

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 41

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 42

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 43

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides–

(a) the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 39 above, if and when the new revising Convention shall have come into force;

(b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 44

The English and French versions of the text of this Convention are equally authoritative.

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Annex V

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the existing rules of international law. In certain areas these countries are forerunners in promoting human rights and introducing rules of law on subjects not yet covered by other countries.

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Article 17

Gudmundur Alfredsson*

Iceland

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

I. The Right to Property in Human Rights Instruments

The constitutions and basic laws of most if not all Western countries have long guaranteed the right to property. This right is part and parcel of their very form of government. It allows for the acquisition and ownership of private property and it protects citizens exercising this right by imposing restrictions on the State with regard to any encroachments.

Serious attempts have been made to elevate the right to property to the international level. On the success side of the story, in the United Nations system, the right to property is included in the Universal Declaration of Human Rights (UDHR); there are references in a few other instruments; and a special agency for the protection of intellectual property has been established. At the regional level, there are property rights guarantees in the Inter-American, European and African human rights instruments.

The final version of article 17 of the UDHR belies the controversy it has caused, both prior and subsequent to its adoption. Numerous proposals were made in the course of the preparatory work leading to the adoption of the article, including the complete omission of the right. The diversity of views expressed and proposals made during the legislative history, as demonstrated by the varying recommendations from the drafting bodies, tell us a lot

* The present article contains views expressed in the author's private capacity and they do not necessarily reflect those of the United Nations.

about the contents and direction of the article itself.

A drafting committee at the first session of the Commission on Human Rights (the Commission) came up with the text: "Everyone has the right to own personal property. No one shall be deprived of his property except for public welfare and with just compensation. The State may determine those things, rights and enterprises, that are susceptible of private appropriation and regulate the acquisition and use of such property."[1] At the Commission's second session, a working group suggested this wording: "Everyone has the right to own property in conformity with laws of the State in which such property is located. No one shall be arbitrarily deprived of his property."[2] This text was included in the Draft International Declaration on Human Rights, submitted by the Commission to the Economic and Social Council (ECOSOC) in 1947.[3] The working group in 1948 amended the text to read: "Everyone has the right to own such property as meets the essential needs of decent living, that helps to maintain the dignity of the individual and of the home, and shall not be arbitrarily deprived of it."[4]

At the third session of the Commission, the article had taken on its final form[5] and it passed from there to ECOSOC[6] and the General Assembly.[7] The draft still prompted extensive debates, a series of suggested amendments and votes, all the way up to and including the Third Committee of the Assembly, but the end result was article 17 as we know it: "1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property."

The language of article 17 is broad and comprehensive. It applies to both individual and collective forms of property ownership. The absence of the limitations proposed in the legislative debate is noteworthy; there are no references in the article to conformity with State laws, personal property or decent living. The right is not an absolute one, however, as it is foreseen that persons can be deprived of their property under certain circumstances, but this cannot be

[1] E/CN.4/21, pp. 76–77.

[2] E/CN.4/57, p 10.

[3] E/600, p. 16.

[4] E/CN.4/95, p. 8.

[5] E/800, p. 10.

[6] A/625, p. 35.

[7] A/777, p. 539, and A/C.3/288/Rev.1.

done arbitrarily. The term 'arbitrarily' would seem to prohibit unreasonable interferences by States and taking of property without compensation, but a precise and agreed upon definition does not appear in the preparatory documents.

Article 17 should also be read in conjunction with other provisions of the UDHR. Articles 2 and 7, for example, provide that neither discrimination nor any distinction shall be made on the basis of property ownership or lack thereof. In his *Study of Discrimination in the Matter of Political Rights*, submitted to the Sub-Commission in 1962, Special Rapporteur Hernan Santa Cruz spoke strongly against distinctions and differentiations to the benefit of property holders.[8]

In addition to article 17, the right to property has found its way into a few other global instruments. Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (adopted in 1965, in force since 1969) establishes the right of everyone to equality before the law without distinction as to race, colour or national or ethnic origin, including the enjoyment of "the right to own property alone as well in association with others" and "the right to inherit." Article 6 of the Declaration on the Elimination of Discrimination against Women (General Assembly resolution 2263 (XXII) of 7 November 1967) stipulates that all appropriate measures shall be taken to ensure to women equal rights in the field of civil law, such as "the right to acquire, administer, enjoy, dispose of and inherit property, including property acquired during marriage." Articles 15 and 16 of the Convention on the Elimination of all Forms of Discrimination against Women (adopted in 1979, in force in 1981) established the same rights for all women with respect to the acquisition and disposal of property. Paragraph 11 of the Declaration on the Rights of Disabled Persons (General Assembly resolution 2447(XXX) of 9 December 1975) provides for legal aid when it is indispensable for the protection of their persons and property.

A variety of standards established by the International Labour Organisation (ILO) covers property rights of trade unions and workers, of the latter with regard to home ownership and the right to own and dispose of remuneration received for their work. ILO Conventions no. 107, from 1957, and no. 169, from 1989, deal with the collective and individual rights of indigenous and tribal peoples to ownership of land and certain natural resources. The UN

[8] E/CN.4/Sub.2/213/Rev.1, Sales no. 63.XIV.2.

Working Group on Indigenous Populations, in its preparation of a draft universal declaration on the rights of indigenous peoples, is moving in the same direction.

In order to encourage creativity in the fields of science, technology, literature and the arts and to strengthen the contribution and participation of those involved in the economic, social, and cultural development of their countries, national laws generally accord property rights to the results of intellectual activity (industrial property, copyrights, patents, trademarks, etc.). For the international promotion and protection of these rights, there is the World Intellectual Property Organization (WIPO), a specialized agency of the United Nations, currently with about 120 Member States. A number of treaties provide substantive protection in this field, including: the Berne Convention for the Protection of Literary and Artistic Works (signed on 9 September 1886); the Paris Convention for the Protection of Industrial Property; the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; the Patent Cooperation Treasury; and the Madrid Agreement Concerning the International Registration of Marks.

The International Finance Corporation (IFC), an institution affiliated with the World Bank and the International Development Association (IDA), seeks to support the economic development of States through promoting and strengthening private enterprise. It does so by providing financial and investment expertise in order to attract private investors and increase their confidence in participating developing countries. It is obviously a precondition for IFC involvement that the right to property over the means of production be recognized by the States concerned.

Regional instruments have been forthcoming on the right to property. The American Declaration on the Right and Duties of Man, which was adopted by the Ninth International Conference of American States in the spring of 1948 and thus predates the UDHR, provides in article XXIII that "Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and the home." The wording indeed resembles some of the earlier proposals for the UDHR. Article 21 of the American Convention on Human Rights (ACHR, adopted in 1969, in force since 1978) is entitled 'The Right to Property' and reads as follows:

> 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
>
> 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law.

Article 1 of the March 1952 Protocol no. 1 to the European Convention on Human Rights (ECHR) reads: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to conditions provided for by law and by general principles of international law." The article goes on to reserve to the State the right "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." A number of property rights cases have been decided by the European human rights institutions.

Article 14 of the African Charter on Human and Peoples' Rights (African Charter, adopted in 1981, in force since 1987) provides likewise: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

II. Non-inclusion of Property Rights

The listing above reflects on the instances of successful elevation of the right to property to the international level. On other occasions, similar efforts have failed and the right has come under strong criticism.

The most notable failure is the outright absence of the right in both the International Covenant on Civil and Political Rights (CCPR), and that on Economic, Social and Cultural Rights (CESCR). Notwithstanding several proposals, no such article was adopted. In lengthy debates there was disagreement on practically every aspect of the topic (E/2573, paragraphs 40–71, and Official Records of the General Assembly, Tenth Session, Annexes, agenda item 28 (part II), paragraphs 195–212), including such issues as the scope of property, conformity with State laws, expropriation and other allowable limitations, due process of law, compensation and indeed the very inclusion of the right.

As a result of this non-inclusion, the only available avenue for submitting complaints to the United Nations concerning violations

of the right to property as such is the so-called 1503 procedure, established by ECOSOC resolution 1503 (XLVIII) of 27 May 1970.

An emphasis on social responsibilities and non-discrimination has brought other dimensions to the forefront of the debate. Property rights have been criticized as standing in the way of progress: from the owning of slaves to the exploitation of others through apartheid and transnational corporations. The importance of property rights is often deemed to pale against the background of other problems, such as hunger, poverty and misery. Unequal distribution of wealth tends to follow the lines of sex and race, especially affecting indigenous peoples, other groups in minority situations, rural workers and small farmers. The overall concentration of most of the world's property in the hands of a comparative few, especially in times of population growth and scarcity of resources, makes property rights seem more a part of the problem than an interest entitled to protection. For these and related reasons, international action has increasingly moved in directions not originally envisaged by the promoters of property rights in the Western sense of the concept.

Land reform, the return by museums and collectors of cultural properties, permanent sovereignty of peoples over natural resources and a new economic order are among the top items of this list of new priorities. These and similar approaches are closer to the communal and collective ownership favoured by many States in line with their traditions, customs and/or political and economic systems. One result, the cause of many disputes and the subject of much literature, has been expropriation by several governments of property owned by the few or the foreign, particularly natural subsoil or surface resources, with compensation formulas that take into account 'all pertinent circumstances'.

These approaches have found loud and clear expressions in a large number of international instruments and resolutions. These include General Assembly resolutions 1803 (XVII) of 14 December 1962 on Permanent Sovereignty over Natural Resources, 3201 (S-VI) of 1 May 1974 proclaiming the Declaration on the Establishment of a New International Economic Order, 3281 (XXIX) of 12 December 1974 containing the Charter of Economic Rights and Duties of States, and 44/18 of 6 November 1989 on the return or restitution of cultural property to the countries of origin. Similarly, article 1, paragraph 2, of the CCPR and CESCR provides that "All people may, for their own ends, freely dispose of their natural wealth and resources.... In no case may a people be deprived of its own means of subsistence." Article 25 of the CESCR and

article 47 of the CCPR underscore this inherent peoples' right. Article 8 of the Universal Declaration of the Rights of Peoples, adopted by a private, albeit frequently quoted, conference in Algeria in July 1976, goes still further: "Every people has an exclusive right over its natural wealth and resources. It has the right to recover them if they have been despoiled, as well as any unjustly paid indemnities."

Article 6 of the Declaration on Social Progress and Development (General Assembly resolution 2542 (XXIV) of 11 December 1969) stipulates that "Social progress and development require...the establishment, in conformity with human rights and fundamental freedoms and with the principles of justice and the social function of property, of forms of ownership of lands and of means of production which preclude any kind of exploitation of man, ensure equal rights to property for all and create conditions leading to genuine equality among people." Article 7 goes on to say: "The rapid expansion of national income and wealth and their equitable distribution among all members of society are fundamental to all social progress...."

The activities of several UN organs and specialized agencies point in the same direction. One of the objectives of the UN Centre for Human Settlements (Habitat) is the development and use of land in a manner consistent with the interests of society as a whole, in particular for meeting the housing and land needs of the poor. In viewing the relationship between the right to land and economic and social development, as well as the role of land ownership and land tenure in ensuring the full and free participation of individuals in the economic and social systems of States, the Food and Agriculture Organization (FAO) has developed policies and engaged in activities aimed at agrarian reform and rural development. Also in this context, one should refer to UN and ILO efforts on behalf of indigenous peoples.

III. Concluding Remarks

The varying opinions on and approaches to the right to property stand as textbook examples of the different cultures and economic systems of our modern world. Rich and poor, free marketeers and socialists, all see it with their own eyes. Needless to say, the conflict remains unresolved. Recent action by the General Assembly and the Commission demonstrates the dilemma.

In resolution 41/132 of 4 December 1986, the General Assembly

requested the Secretary-General to prepare a report on a) the relationship between the full enjoyment by individuals of human rights, in particular the one contained in article 17, and the economic and social development of Member States and b) the role of the right established by article 17 in ensuring the full and free participation of individuals in the economic and social systems of States. The report is available in document A/43/739. The General Assembly by resolutions 42/114 of 7 December 1987 and 43/123 of 8 December 1988 and the Commission by resolutions 1987/17 and 1988/18 have elaborated on this approach under the titles: "Respect for the right of everyone to own property alone as well in association with others and its contribution to the economic and social development of Member States." The line of reasoning emphasizes private initiative and corresponding incentives and rewards as an important contributing factor in economic and social development.

Underlining the ideological and political difficulties involved, the General Assembly in resolutions 42/115 of 7 December 1987 and 43/124 of 8 December 1988 and the Commission in resolutions 1987/18 and 1988/19 have called upon the Secretary-General to consider the impact of property on the enjoyment of human rights and on the economic and social development of States in the preparation of the aforesaid report, which should include: the New International Economic Order; the rights of peoples; the role of transnational corporations; the social functions of property; the many forms of legal property ownership (private, communal and State); and the role of the public sector. A greater emphasis was placed on article 6 of the Declaration on Social Progress and Development than on article 17 of the UDHR. The underlying tenet is the protection and promotion of the communal and collective good through guarantees of equal distribution and use.

The debate is likely to continue.

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Article 18

Martin Scheinin

Finland

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

I. General Observations

Freedom of thought, conscience and religion is an 'easy case' in the human rights catalogue. The right to freedom of thought, conscience and religion has long traditions both in domestic[1] and in international law.[2] There are even grounds to state that the origin of the general idea of human rights lies in the long history of protecting religious minorities.[3]

The unproblematic character of the traditional nucleus of the human right in question is apparently the reason that there has been little research regarding this right[4] and human rights complaints to supervisory international organs have relatively seldom touched on this right.[5]

States have not considered it difficult to allow their citizens the freedom to think. The difficulties start when we come to the right to *express* one's conviction, the right to *organize* as a community in order to promote a religion or belief and the right to *act* in

[1] See Krishnaswami 1960, pp. 4–11; and Mock 1983, pp. 120–121.
[2] See Krishnaswami 1960, pp. 11–12; Partsch 1981, p. 209; Lillich 1984, pp. 158–159; and Humphrey 1984, p. 176.
[3] See also Daes 1983, pp. 1–2.
[4] Humphrey 1984, p. 178.
[5] See de Zayas *et al.* 1985, pp. 53–54 and *Digest of Strasbourg Case-Law*, vol. 3.

Annex VI.

ANNEX VI: Additional reading materials:

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Kautokeino '1960': Pastoral Praxis

by

Robert Paine

In 1961-62, field research among Saami reindeer pastoralists of Kautokeino afforded some understanding of the principles of Saami pastoral praxis --practitioner praxis, that is-- in action. At the present time, when government-regulated pastoralism and pastoral problems appear to run together, there may be things worth learning --or re-learning-- from the 1960 picture. It is with this in mind that I attempt, in this short essay,[1] a description of the pastoral year, from that time, of one Kautokeino group. Before venturing into the description, the ecological and social constraints under which the pastoralists operate are delineated; and on completion of the description, some conclusions are drawn.

CONSTRAINTS

Crucial to reindeer pastoralism as a practical enterprise is practitioner knowledge --of animals, terrains, and fellow pastoralists. Much is dependent, then, on the individual and the group working within a feasible ecological and social scale. For example, the thousands of square kilometres over which Kautokeino pastoralists work is far too large (and variegated) for any one herding group to master, it has to be 'scaled down' or divided up into pastoral ranges over which each group possesses the requisite level of knowledge. This also becomes an arrangement of social knowledge between herders for reindeer pastoralism throws herders into working partnerships --often in contingent fashion, that is, as the needs of the situation dictate; and within each of the pastoral ranges it should be feasible for a family, even an individual, to possess a practical social lexicon concerning his/her fellows. Such is simply not possible across the total Kautokeino pastoral population of some 800 persons and 170 households (1958 figures).

There are three such pastoral ranges --West (Oar'jebelli), Middle (Gow'dojottelit) and East (Nuor'tabelli). Most pastoral work is done within a range: thus the scale of things is reduced by (let us say for sake of argument) one-third and pastoral work is embedded in a social network and the ever-present uncertainty of this work is made manageable. The emergent point, then, is the social density of pastoral relations within a pastoral work area --the range. Consider these figures: 84% of married men and 65% of married women remain on their natal range; in 59% of marriages both spouses remain on their natal range;

[1] For a full account see my Herds of the Tundra (Smithsonian Institute, 1993).

Figure 1. THE SCALE OF REINDEER PASTORALISM IN FINNMARK, 1961-1962
(adapted from Vorren 1962)

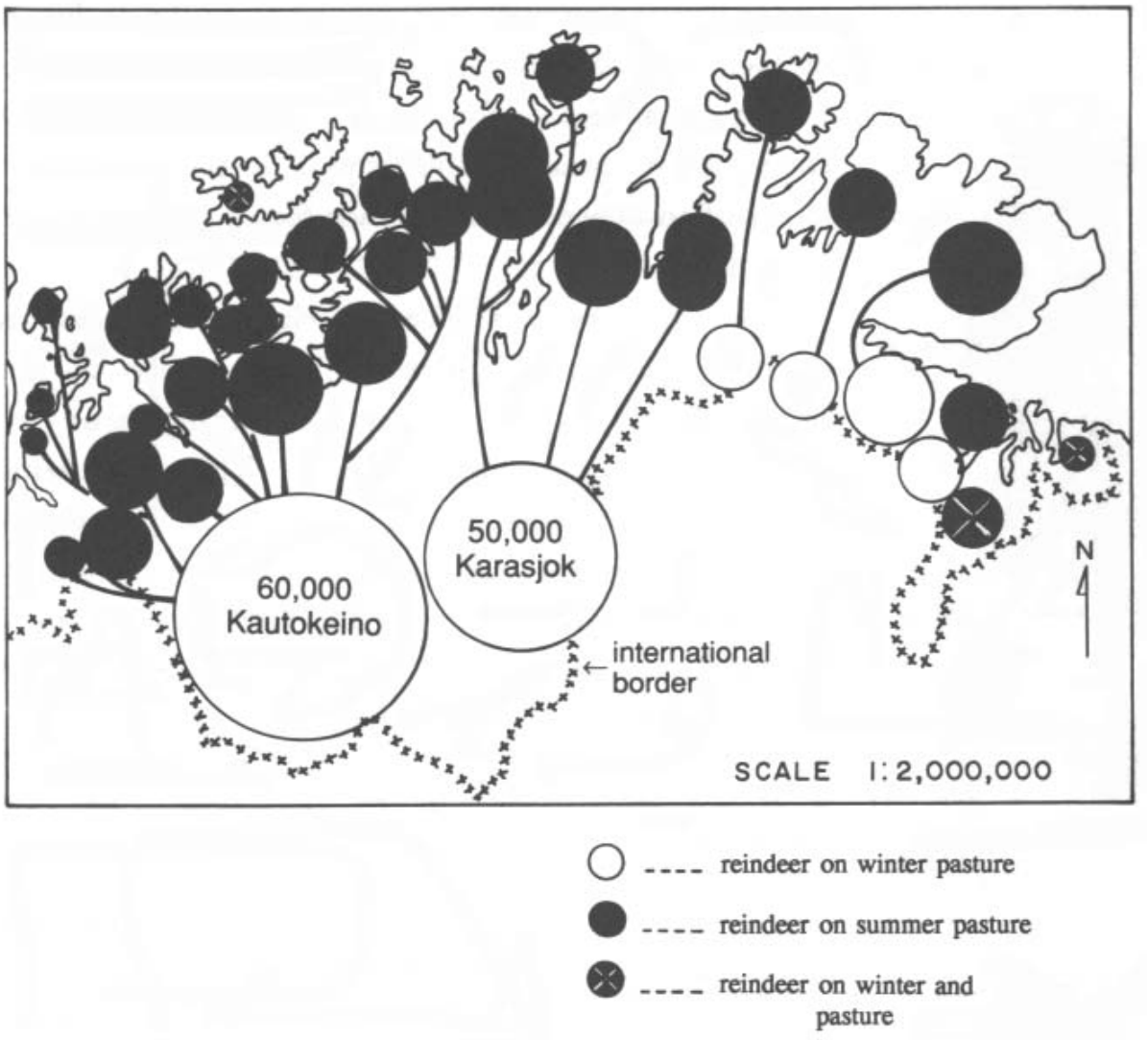

Figure 2. KAUTOKEINO REINDEER RANGES

close to 10% of the marriages are between first cousins; as well, there is a notable occurrence of separate groups of siblings marrying each other.[2]

The basic unit inside the range is the si'ida composed of both people and animals, and exercising usufruct over different areas of pasture at different seasons of the year. Thus a si'ida has ecological and economic connotations, and as a work (and hence social) unit its precise composition changes from time to time. There are two analytic points of primacy here.

The first is that the three factors of production --herd, pasture, and partners--are brought together in a si'ida. Ideally, these should be present in commensurate proportions and the commensurability retained even as the size of a si'ida changes

And second, work relations within a si'ida fall into two separate domains: herding which is a collective or joint responsibility and husbandry which -- pertaining to the individual ownership of animals-- is not. Herding is the day-to-day work with a herd; it concerns the herd/pasture relationship as directed to the welfare of the animals and, if necessary, to the exclusion of the comfort of the herders themselves. Husbandry, on the other hand, has to do with the herd as the harvestable resource of its owners. While the tasks of herding, then, are those of the control and nurture of animals in the terrain, husbandry is the efforts of the owners in connection with the growth of capital and the formation of profit. The problems of herding are those of economy of labour and they may usually be solved by owners in conjunction with each other; those of husbandry concern the allocation of capital and here each family is wholly responsible unto itself.

In concluding this briefest of accounts, notice must be taken of the means by which pastoral knowledge of both the herd and individual animals is generated and maintained. As seen with a husbander's eye, there are six basic components to a herd: the calves and yearlings (2 designations); junior and senior cows (3 designations); junior and senior bulls (6 designations), and castrates (2 designations). Important for the identification of individual animals (within the same age and sex class, for instance) on which good husbandry depends, are antler structure, body colour, and the earmarks of ownership. Behavioural clues, of course, are noted as are social groupings of animals within the herd: thus bells (hung around the neck) placed on selected animals impart --at night as well as by day-- much information.

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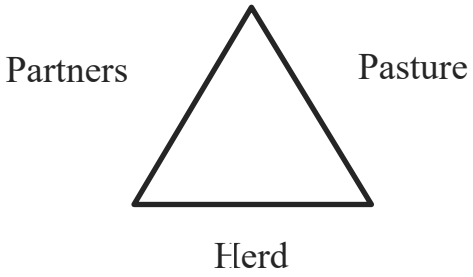
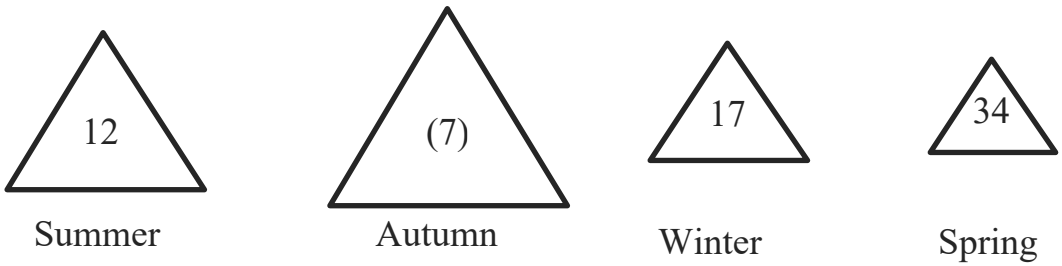
[2] From a sample --gathered in the field-- of 170 marriages for the 30-year period 1924-1953.

Figure 3 The Si'ida and Herd Management of Commensurate Proportions

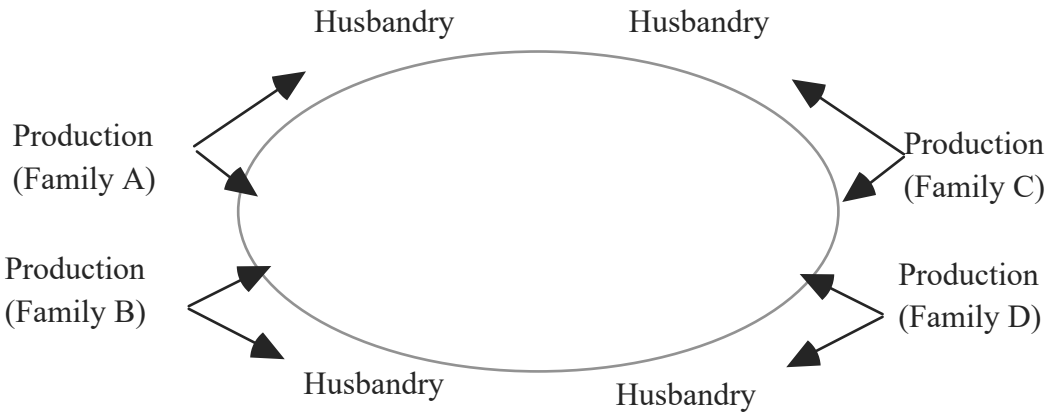


Seasonal Changes in scale:
Middle Range



Numerals denote number of Si'ida
Broken lines and numeral in brackets denote uncertainty prevailing in autumn.

Figure 4 Si'ida as Reindeer Management Unit (with four family herds)



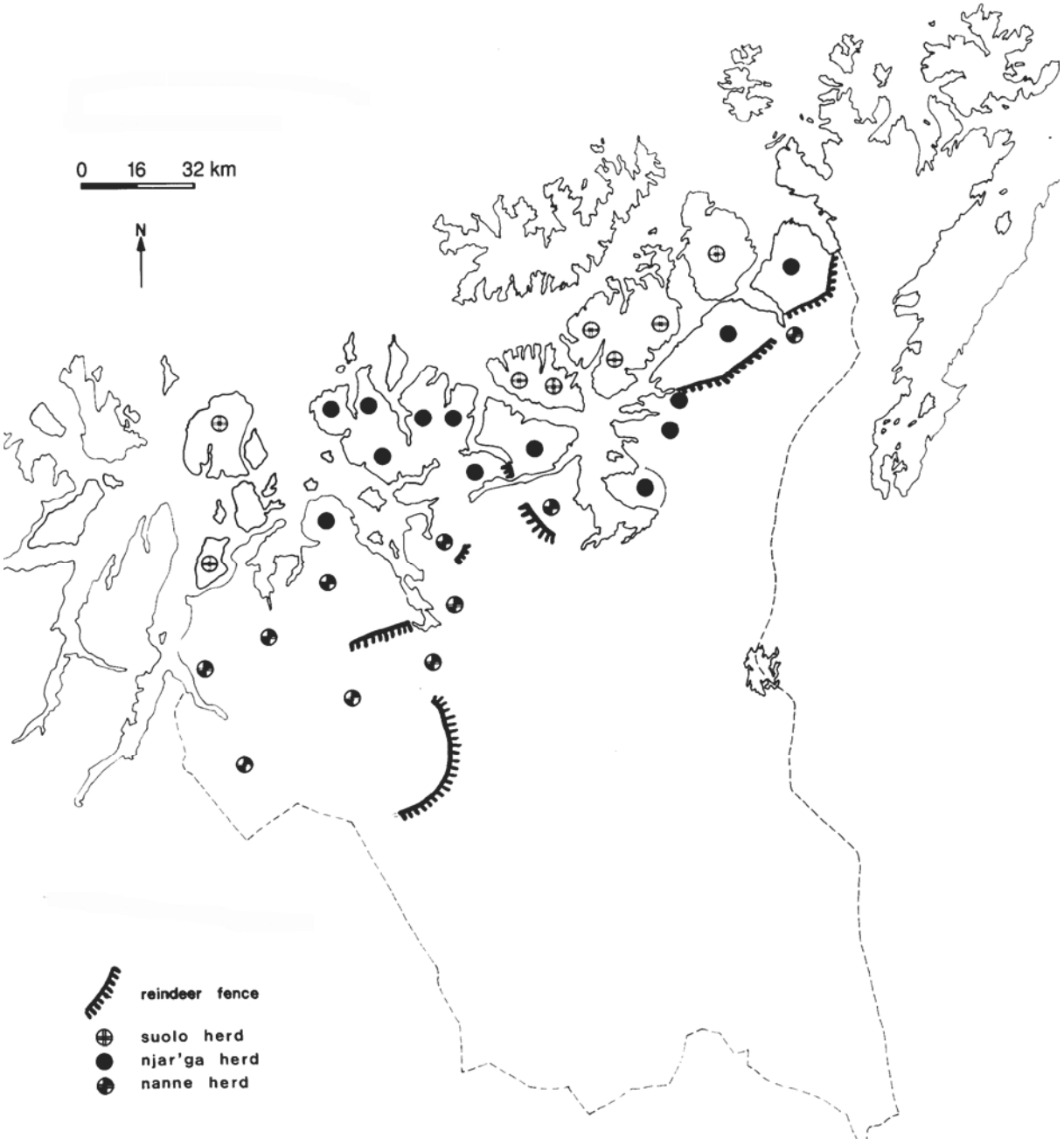
The description that now follows draws on my field trips with a Middle Range si'ida.

Summer

Most summer pastures of the Kautokeino herds are out on peninsulas --the njar'ga herds. A few are on off-shore islands to which the animals swim--the suolo herds; some others are inland, out of sight of the coast--the nanne herds, and some of these are on the high terrain around the tree-line--the or'da herds (Fig. 5). I describe the njar'ga type of herd management I knew from Middle Range where the herds reach the summer pastures in June --after calving, and already by the beginning of September, the pastoral summer has passed by and herders are preparing to move or are already on the move to autumn pastures.

Yet it is the brief northern summer of constant daylight that is the important season of growth and body-building for the animals. The protein-rich diet of grasses and fibreless foliage is easily digestible and its mineral content gives quick nutrition. The summers are particularly crucial for the calves and yearlings. The most rapid growth in the life of a reindeer takes place in the first 16 months of its life--and that growth is almost wholly confined to the two summers within this period; in the intervening winter the young animal often has a hard time maintaining its own body weight. For the sexually mature animals, the nutritional value of summer pastures is a determinant of their virility or fecundity, at the rut in October. The pastoralists are acutely aware of these pre-determining consequences of the summer season. A poor winter, I was taught, can be quickly compensated by a good summer but, animals may

Figure 5. SUMMER HERDS: NJAR'GA, SUOLO AND NANNE



well have trouble surviving through the winter if the summer pastures have not been optimal.

For all that, the summer is a slack season for the njar'ga pastoralist. Until towards the close of the summer, herding is minimal or absent. (Quite other conditions obtain for the nanne pastoralist.) Instead, the animals are left to themselves to best explore the varied diet of the summer ranges. The pastoralist reasons that beyond bringing his animals to a 'good' grazing range, there is little that he can do to forward the nurturance of his animals at this time of year. Indeed, optimal nurturance in the summer correlates closely with free-range movement, and --in contrast to what is the case at other times of the year-- the pastoralist does not lose much knowledge of value about his herd by this arrangement.

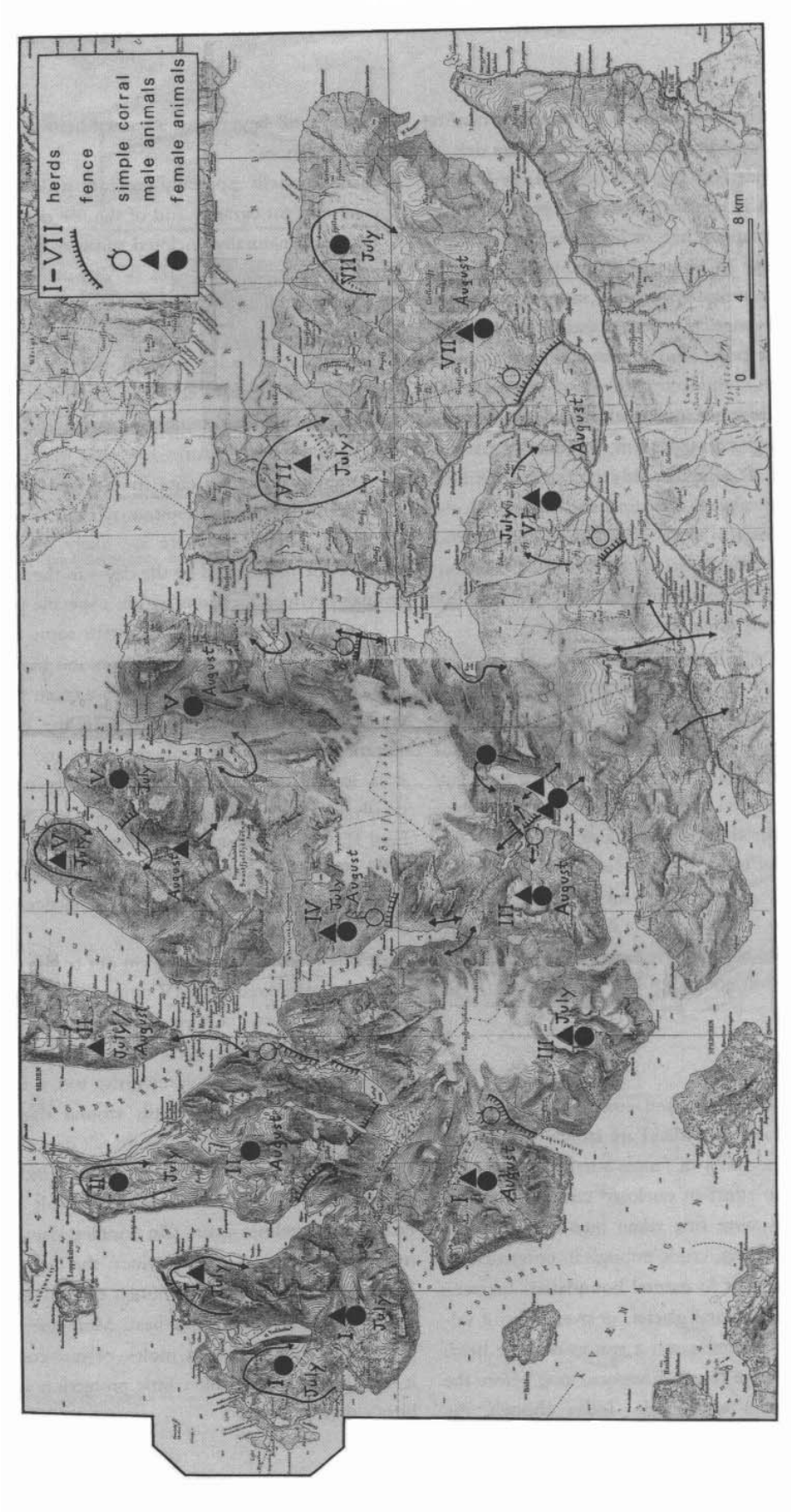
Let us now consider the herds and pastures of the seven si'ida (numbers I through to VII) on Fig. 6. The male herds arrive some weeks before the cows and their calves, the separation having been undertaken before calving, and they are taken to the farthest reaches of the summer pastures; in the course of the summer they will (in most cases) mix with the cows and calves. Each of these pastures contains ecological alternatives necessary for a herd during the summer: access to the shoreline for salt, to low-lying pastures for early vegetation, and to mountain pastures for cool in the heat of the summer and relief from insects (respite may even be sought on the glaciers). This means there are likely to be patterns--both by the month and by the day--in the wanderings of animals between locations within a specific pasture.

Clearly, movement onto the peninsulas in July and off them in September has to be synchronized, although it is done informally. As shown on Fig. 6, there are strategically-placed short stretches of fences that help control the movement of animals in the late summer; and in the vicinity of each fence is a small corral used for husbandry tasks (earmarking, castrating, slaughtering).

Autumn

As summer closes, the days become shorter, the weather harsh; animals move up an age-class (except calves); the rut approaches; and movement of all herds and camps is in over the tundra. Not for nothing is this season also known as hil'bad ai'ge --the time when animals are least tame. The bases of grasses and sedge plants that remain green longest, and fungi--especially mushrooms--are searched out as the herds move across the autumnal landscape. If not hindered, animals will range widely, most of all the mature males (bulls and castrates). Herders codified the autumnal landscape: varre or hilly, open terrain (in the cool temperatures of autumn) was associated with logjes or 'tame' animals; vuobme, or low-lying with lush undergrowth, with hil'bad. Indeed, the cows were kept on the higher ground because if they first get a taste of the rich vegetation in

Figure 6.
NJAR'GA PASTURES OF GOW'DOJOTTELIT



a vuobme, it is difficult to keep them moving as a herd. The mature males, on the other hand, were allowed to enjoy the vuobme both because it would over-tax the herders to prevent them and it is there that the animals--many of whom were to be the studs in the rut--add weight and strength. Some of the castrates might be left behind in this way, but one can depend on the bulls moving inland for the rut. There is a hazard though: some bulls may well wander off with those from other herds that have been attracted to the same vuobme. It is only if there are no other animals in the vicinity that the herd will be brought for the night to the richer vegetation of a vuobme. More usually on autumn migration one collects the herd as best as one can in the afternoon--dusk falls early--and releases it on a long, dry hillside with a wind blowing down its slope.

Calves are becoming fairly independent, and herders are well aware of the chances of calves becoming "lost" at this time of herd mobility. It can happen when the deer scatter in search of mushrooms, especially under cover of darkness or in mist and rain, and towards the end of the rut when older bulls, through fatigue, lose control of their harems and the younger males begin to pursue the cows. It happens especially in the confusion around the large separation corrals (near the perimeter of the winter pastures) when animals are passed through the corrals not once but several times.

The introduction of these separation corrals with multiple pens has to be considered in conjunction with the crowding of animals behind summer fences followed by a rush of thousands onto the autumnal lands--all within a few weeks. Inevitably, there is some loss of control over herds and loss of knowledge as to the whereabouts of animals. The purpose of the corrals is to restore control and reconstitute the herds. But the costs are high in wear-and-tear on animals and herders. So in strongest contrast to summer, autumn is a season of exertion; more significantly, it is the one time of the year when these pastoralists sometimes end up not working 'with' the herd, thereby adding to toil and strife. Dispersal of animals at this time of year makes good ecological sense and benefits herds and herders alike; it is the crowding of animals and the mixing of herds of separate owners, followed by their forcible separation, that runs contrary both to the welfare of the animals and to the interests of their owners.

Before the fence-and-corral complex stamped its character on autumn herding, the rut was that season, above all others, when herders reacted in response to the behaviour patterns within the herd (competition among the bulls; harems 'herded' by a senior bull; etc.). For the rut happened in specific places and it was a notable time of close observation of one's animals--hence of important husbandry knowledge, too. Now, though, animals are in rut on the way to the corrals, while they are passed through them (which can take a couple of days), and after the corrals, too. The trauma can be considerable for a thousand or so animals milling around within an enclosed space.

Buyers come to the corrals. It is convenient for owners to sell some animals here, and it is a time of year when cash is needed for domestic re-provisioning. But the drawbacks are also prominent in the minds of the owners: rupture in their herd knowledge at this time and temporary loss of condition of the animals around the corrals. Based on his observations of his animals through the seasons, an owner will, more likely than not, have individual animals in mind --but he may not find them at this time.

Often, then, the owner of a njar'ga herd can expect to leave the separation corrals with a good fraction of his animals missing (temporarily, he hopes), and it may well be December before he has them all together. By the same token, the herd which he takes into the winter pastures will include a number of animals that are not his. Nevertheless, the autumn slaughter takes place then.

Yet already in these first years of their use, pastoralists have different perceptions of the corrals. I think, for all, they are a new meeting place that they value: watching others' animals as well as one's own, catching up on news --certainly listening and perhaps telling. I also noticed a generational difference. For the young men, unlike their elders, work at the corrals has an ambience of tournament: beyond the simple opportunities that corral work offers to demonstrate physical prowess, there is the competitiveness centred on the acquisition of unmarked calves that are without their mothers.

Winter

As October passes into November, autumn changes into winter, but there is no sudden metamorphosis; rather, both seasons are present for a while. Stretching beyond this intermediate period and into January is the period of winter that the Saami know as the time of darkness (skabma-ai'ge). Not only are the days now the shortest in the year --from around the end of November to the middle of January the sun is below the horizon-- but snowfall is heaviest.

The short daylight hours notwithstanding, much activity is pushed into this first part of winter. The principal business is reconstituting herds from the autumn and then, during the last days of December, separating into the smaller camps and herds of the later and longer period of winter. So there will be men, and some women, away on a round of visits to other herds; and every camp receives its visitors. There will be many deer separations, all handled without recourse to the big corrals. Draught animals no longer carry packs but now pull sleds. Dominance within the herd passes from the post-rut, and now antler-less, bulls to the cows who retain their antlers until after calving.

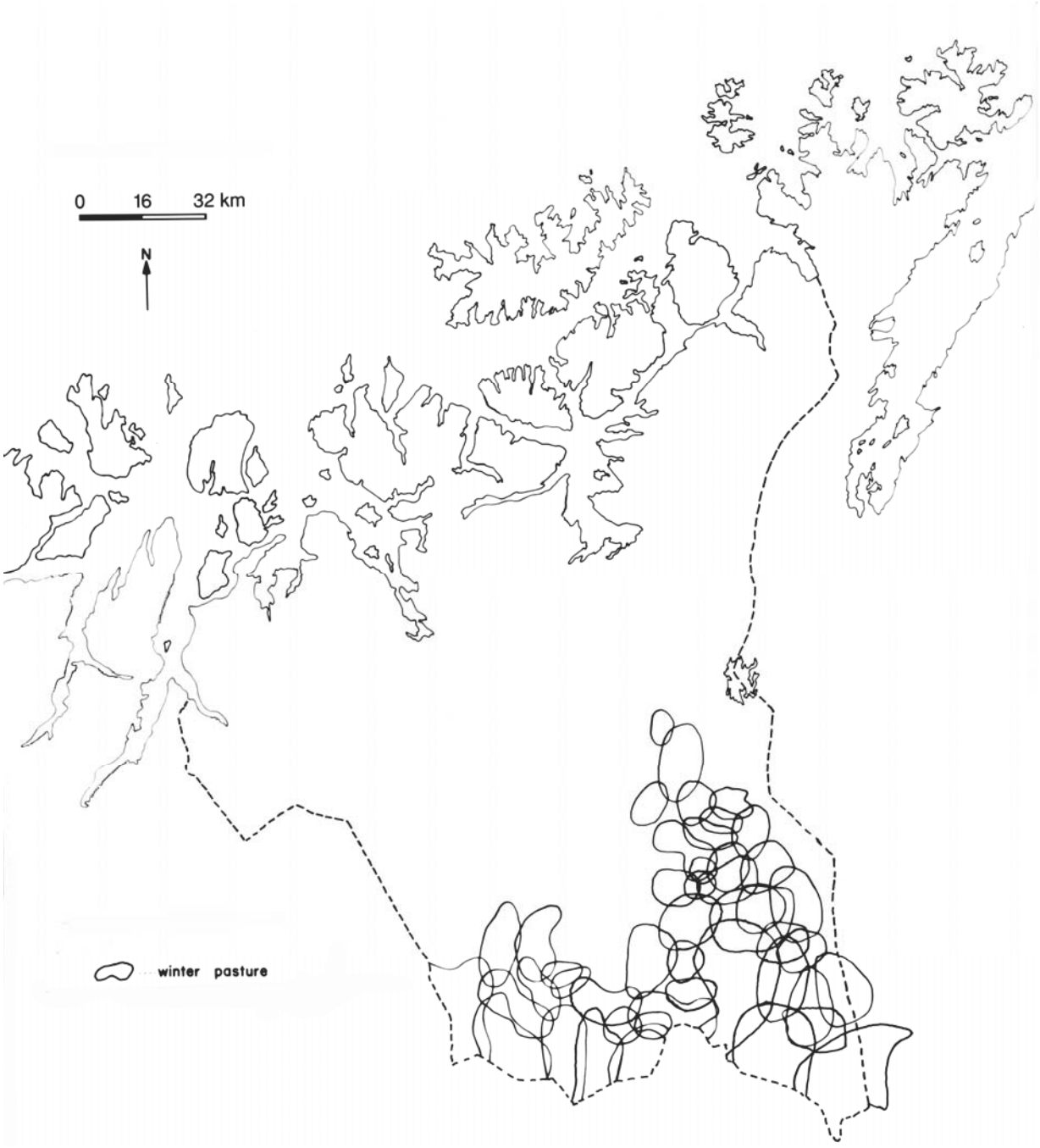
Then there are the shifts in the herders' technical conversations. Early in October, these were peppered with topographical references incorporating the term for "bare of snow," but as November approaches it is the extensive vocabulary for snow that one hears. Snow-cover --and its changing texture-- has multifarious effects. First, herd behaviour: animals will leave the herd one behind the other, in Indian file, whereas so long as the terrain was bare of snow they were more likely to leave bunched together or in a broad phalanx. Then the texture of a snow surface becomes a factor controlling the mobility of animals and men and --particularly significant-- their relative mobility one to the other. Snow cover, too, offers the herder many clues: it carries evidence of recent and prevailing wind and weather conditions; it is 'read' for what it tells about the movement of a herd or the whereabouts of animals that have strayed. Perhaps most important of all, though, reindeer have to dig through snow to reach the lichen beds, so the condition and depth of snow affects, quite directly and at all times, the physical well-being of the animals. Of course, the precise significance of snow changes, crucially, as the landscape changes topographical, climatically, and calendrically.

In this early period of winter, then, the pace of things has not slackened much from autumn. But by January, or before, that changes, too. The landscape is under a thick blanket of snow and the temperature stays well below freezing: winter literally envelops the pastoralists and their animals. The area over which a herd pastures shrinks as the animals spend more time, and burn more energy, digging through to their food supply. They stay closer together. Likewise with the herders: now in their smaller winter camps with, at last, their own animals, the Saami know the months of deep winter (January to March) as a time of peace (rafes-ai'ge).

Whereas summer herds are large aggregations on physically separated pastures, on this winter terrain herds are smaller (so there are more of them) and pastures constitute an overlapping quilt (Fig. 7). The absence of physical obstacles means that animals could wander of their own accord from one end to another of the Kautokeino tundra. That herds, by and large, stay 'put' on 'their' pastures is accountable, first and foremost, to the natural attraction each pasture holds for the animals. The total pattern amounts to a fairly equitable spatial distribution of herds across the total area, with separated herds pasturing separately without commotion, often in near proximity to each other.

Of course this would not happen, let alone be sustained, without the intervention of herders --and that would be worth little without up-to-date knowledge of local changes in climatic conditions. Temperatures? Wind force? Depths of snow? To complete this necessary knowledge, the herder needs a mental case-history of how the snow fell during the preceding months or weeks: all may augur well, or, the indications may

Figure 7. WINTER HERDS



be such that he devises possible alternative pasturing strategies with his fellows. So as is true of all seasons, one is safest where pasture is ecologically varied, even on a micro scale. Thus, herders stress the importance of being able to move locally between vuobme and open tundra: in the vuobme, snow is less likely to become tightly packed than it is on the windswept tundra; however, it often becomes too deep, especially for the younger deer --it is then that one might take the herd to pasture on the open tundra. But the viability of that move will depend on several natural factors, one of which is that the sun of late winter does not "bake" a snow crust on the exposed slopes. Perhaps by that time, though, the depth of snow in the vuobme will be reduced anyway, so ... In short, one looks to trace a viable path between changing alternatives.

The peace of this season may be threatened, however. There is always the possibility of a diminishing food supply or one which the animals cannot reach at all on account of ice over the lichen beds. Then the animals will want to wander, and it is left to the herder to compensate for the constraint he has imposed (through herding) on the animals' freedom of movement. Using his ski staff he will test the depth of snow and the strength of a crust; in worsening conditions, he may dig some "craters" to help the animals reach the lichen; and when that access is impossible, he will cut foliage and pull down hanging moss for his animals; and/or move his herd to another area even though there is already another herd (or herds) there.

Ordinarily, though, the daily problems of herding during deep winter are minimal. So, time is given to essential undertakings beyond the routines of herding, undertakings of very different kinds. For one, owners take stock of their herds. Small numbers of animals --up to a couple of hundred, say, among several owners-- will be herded across the tundra to be sold on-the-hoof in Kautokeino, perhaps in Karasjok. And it is especially now that families butcher and prepare meat for domestic consumption through the spring and summer. Since autumn, families have been mostly eating meat boiled fresh or smoked; those with poorer economies may have sold some of the better joints and delicacies (marrow bones, tongues, and the like); the blood is never wasted but cooked in a gruel for the dogs. The meat now being prepared for the spring, however, is salted, hung and dried: the staple that herders will have with them in their rucksacks. Because it is dried, it is especially important that this meat is taken from a fat animal. Indeed, some owners make a point of taking a young female; others who could afford to but do not do so, perhaps taking a young bull instead, will be ridiculed behind their backs.

Then there are the preparations for the spring migration. Families who shared herd and camp through the winter may each be going to their own spring camp.

If so, their animals must be separated. Soon afterwards, in the case of many family herds, bulls will be separated from the cows.

Spring

There is a confluence of factors in the movement of the herds off the winter pastures. The new vegetation draws animals: grasses in the place of the winter fare of lichens; and for njar'ga herds at least, there is probably the associated desire for salt in their diet which the coastal vegetation supplies; if these factors weigh most with the males, for the cows it is the return to their calving places (or places of birth); and for the herders, the movement is also part of the essential rotation of feeding grounds: it saves the delicate lichen beds--soon to be without a protective snowcover--from being overtrampled. The move off the tundra also spares the animals the worst of the mosquito plague.

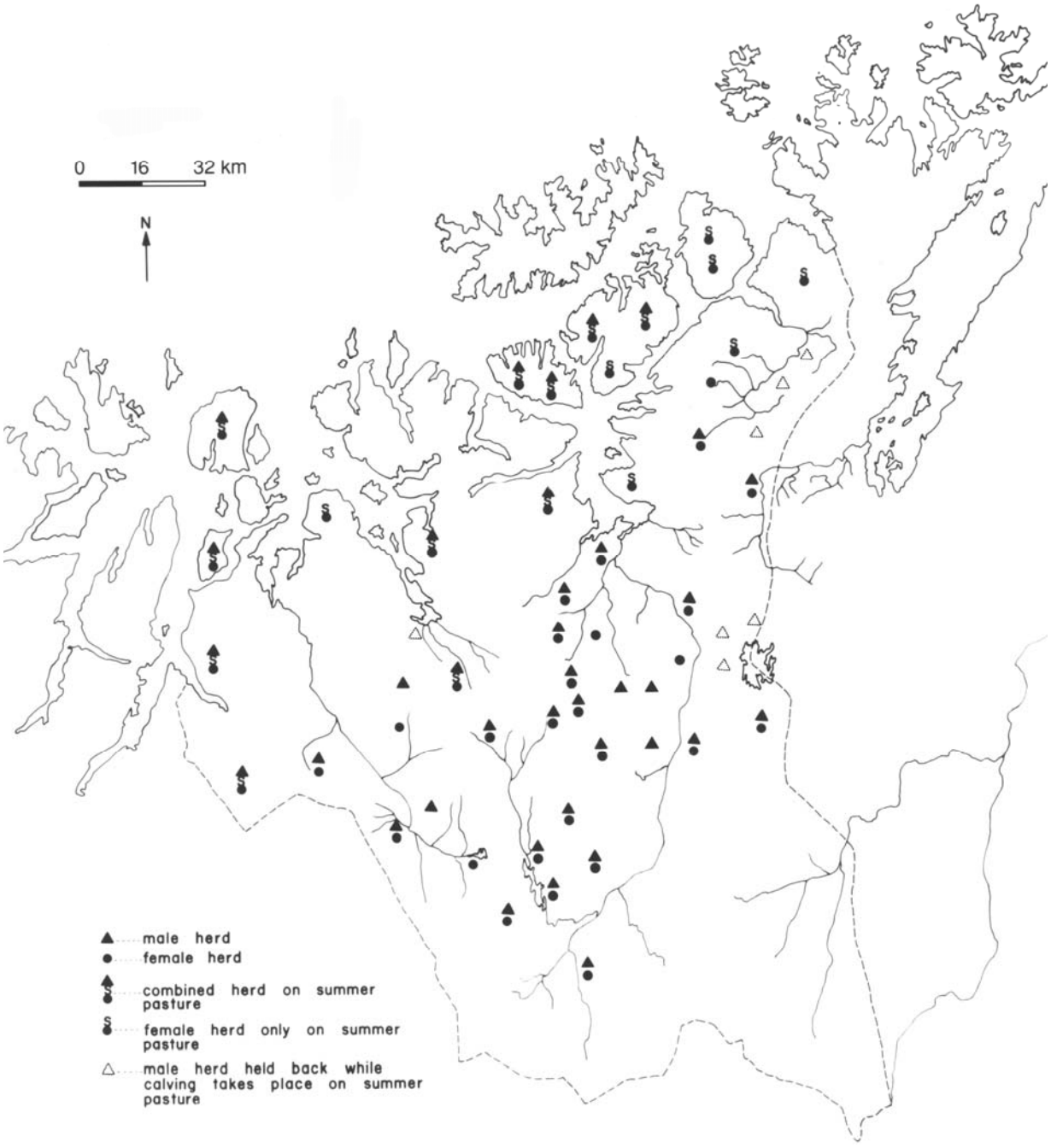
The final destination of the spring migration is the summer pastures. Some herds reach these pastures before calving. However, for many others there is first the move to the calving grounds which are in much the same areas as where the herds were for the rut. All the njar'ga groups of the Middle Range, camp for several weeks in the vicinity of their calving grounds and only after that do they begin on the last and longer leg of the migration to the summer pastures. During all this time the animals are kept under close watch.

Even though owners have been able to acquire a sound knowledge of their herds during the last months of winter, and the animals have been relatively undisturbed, there is a pervasive feeling of uncertainty about the approaching calving season. In talking about what the spring may bring, herders look back over the seasons of the year that is coming to an end: "last summer was too hot" or "the animals stood too long behind the fence," are typical reflections on which rest their forebodings.

How these adverse conditions may have affected the two-year old females will be uppermost in their minds. The number of them that calf can vary appreciably from year to year, and it is widely regarded as a significant index of the well-being of the herd. Nonetheless, herders don't have much confidence in the ability of these young cows to nurse and nurture their calves (the highest percentage of lost calves is among first-time mothers, I am told). Attention will also be paid to how the calves of older cows fare: are their mothers able to graze efficiently enough to provide their offspring with enough milk?

All the njar'ga groups of the Middle Range separate male animals from cows before setting out for the calving grounds. There are several reasons. For one, the bulls and castrates (especially the former), unless held back, will range widely in search of fresh vegetation that the spring thaw is uncovering. It is quite usual for the departure of the male herd

Figure 8. SPRING HERDS 1961



from the winter pasture to be delayed until calving is well advanced at the spring camp. The concern of the cows, on the other hand, is to find sheltered places in which to drop their calves, and they have to be herded carefully to prevent them from scattering and "hiding" in the landscape. Another reason for the separation is that although a cow which is pregnant or has a newborn calf tolerates other females, she will be nervous and restless in the presence of male animals.

The date on which the first calf is dropped and the period that elapses until the last calf is born are likely to vary from herd to herd, and even from one year to another within the same herd. Among several factors, the most important is the duration of the rut in the previous autumn and the conditions prevailing in the herd at that time. While it is usual for calving to be concentrated in the first half of May, some calves may well be born before the herd of pregnant cows sets out for the spring camp and even while still in the same herd as the males. More calves are likely to be born on the way to the spring camp, perhaps a journey of two days; these will be taken along on sleds, their mothers following.

Herders usually have a particular location in mind for the calving ground --and the "nursery" (aldo manus). Perhaps a long and gentle southern slope with optimal exposure to the sun and good drainage: since the new-born calves sleep much of their time, with their mothers grazing or dozing nearby, it is important that the ground be relatively dry --on wet ground reindeer become restless; and the openness of such a site (over which constant watch is kept) helps to give protection from predators. It is not uncommon for a sii'da to return to the same location each year: whether they occupy it in any particular year, however, depends on a couple of factors. First, the convention of usufruct with respect to calving grounds is left broadly interpreted and a principle of 'first there' is also accepted; second, the number of calves already born while en route may cause the herders to abandon their original plans. So they may have to settle for a calving ground which is, in their opinion, less than ideal: its selection may be forced upon them in a situation of decreasing options as calving progresses. Yet the consequences of this are usually not too serious; the terrain is, by and large, suitable and herders have an intimate knowledge of it.

By being in attendance at spring camps, herders gain valuable knowledge of their animals at this critical phase in their life cycle. Most valuable of all perhaps, one is able to distinguish between the different circumstances attached to cows without calves: cows that may be sterile (e.g. a three-year old or more that still has to calve); cows that failed to calve this time but have done so in earlier years; and in the case of cows that gave birth but lost their calf this spring, one wishes to know how they lost it. By the time a cow has calved for the second time, it has

a 'biography' on the basis of which its owner is able to predict her behavior in various situations. With this kind of knowledge, decisions regarding which cows to slaughter will be better informed.

The migration to the coast cannot begin in earnest until a few weeks after calving. There may be several short moves to new pastures, but the calves must be allowed time to gain strength before the long journey. This period is known as the spring of summer, and it is the time of the spring camp proper. The few herders who watched over the calving are now joined by their families, who bring with them the male herd.

Herding routines now encompass the two herds. Although they are still kept separated, herdsmen are able to move from the one herd to the other. The male herd is taken on relatively wide pasturing circuits and brought back each day to a position that is "in front of" the cows and their calves. This way the cows are left undisturbed (for it is most unlikely that any of the males would wander "back" towards the winter pastures). Moreover, any cows that manage to wander (in the general direction of the spring migration) are likely to be observed by the herders who are with the male herd. Were the arrangement the other way around and the cows pastured "in front of" the males, the encroachment of the males into the cow herd would always be a likelihood, and should any of the cows wander, there would be less chance of finding them.

The landscape steadily changes character at the spring camp. After 21 May the sun does not dip below the horizon. Despite brief snowstorms, and even in those years when overcast skies withhold the sun for many hours, the snow retreats almost daily and the spring vegetation begins to grow apace. These changes mean that the decision to move out to the coastal summer pastures must soon be taken. But in deciding <u>when</u> to begin the move to the summer pastures, opposing considerations have somehow to be balanced. The longer one waits, the stronger the calves will be. But the longer one waits, the more difficult the journey for the calves on account of the thaw and spring floods (for rivers have to be negotiated).

Usually in the first days of June, preparations will be made to move, before it is decided exactly when to move. Rain or cold winds from the interior can delay departure (even on migration, herds tend to veer into the wind); another cause of delay can be the movements of other herds in the vicinity. But the prospect of an exhaustion of good pasture in the spring camp area, brings urgency to the move. Typically, a period of warm winds from the coast, winds that will draw the animals forward (and which may defy all efforts made to keep the male herd pastured in the vicinity of the spring camp), will end such a period of indecision.

The male herds reach the coast in a matter of a few days, following an alpine route (not manageable for the nursery) on account of its snow cover and travelling by night (which is now light) for the sake of lower temperatures. Along with this herd goes the baggage train --fully-loaded sleds pulled by draught animals-- together with most members from the spring camps (certainly any children and old people).

It is left to a few herders (men and women) to undertake the longer and more difficult journey with the cows and calves. Meagre supplies are packed on the backs of draught animals, the route renders the use of sleds impractical at this time of year. Whatever route is chosen, calves will need much rest and physical help from the herders, especially when transversing rivers and ravines. All the while they (and their mothers) need to graze and if for no other reason than that, the high altitude routes along which the (fast-moving) male herds are taken are not practicable. There would always be the risk of not enough pasture easily available (the terrain may be stony; where there is pasture it may be under ice crusts). Herders speak loosely of expecting to reach summer pastures near Midsummer's Night, 23 June.

Whether it is more advantageous to be behind or in front of another herd is a particularly pressing question when travelling with the nursery. However, there is no uniform answer. In general, those who are behind have to take care to hold their animals back, and those in front can be reasonably sure that most of their stragglers will be herded by those behind and thus still reach a summer pasture--if not the owners'. On the other hand, animals that are behind can sometimes draw advantage from following the already-trampled snow and/or the smell of the herd in front, and herders may draw advantage from learning about problems those in front of them are experiencing as they traverse the terrain. But much depends on the local, variable natural conditions and, ultimately, on <u>who</u> is in front or behind.

CONCLUSIONS

This portrait of the pastoral year as an ecologic system, with space and time components changing in tandem, raises several analytic issues worthy of brief comment.

Knowledge

The annual cycle of herd knowledge on Middle Range ("A" on Fig.9) differs significantly from that on the other two ranges ("B"). The difference springs from these alternatives:

A.	A/B.	B.
calving grounds on spring pastures with herders in attendance	same as A.	calving grounds out on summer pastures without herders in attendance
critical crowding behind fences & around autumn at fences & corrals	same as B.	avoidance of critical crowding corrals
And the distribution of the alternatives is:		
most njar'ga herds	a few nanne herds	all suolo herds most nanne herds a few nar'ga herds
characteristic of West & East Ranges		characteristic of Middle Range

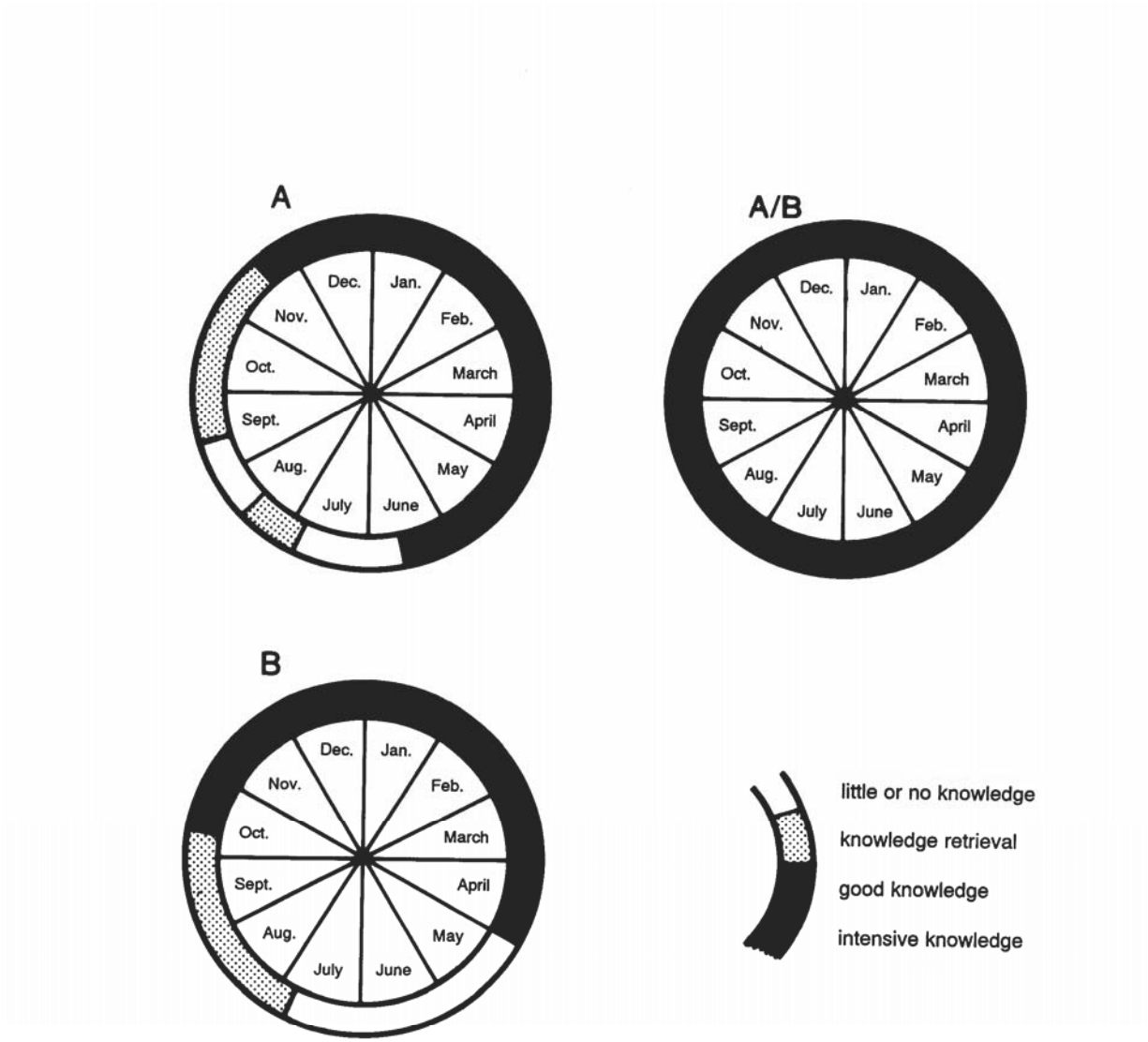
Only the few nanne herds in "A/B" have unbroken herd knowledge of quality: calving takes place on spring pastures, and the move to summer pastures is a relatively short one. But unbroken herd knowledge means an unbroken work cycle: some watch will be kept over the herd even through the summer to avoid undue dispersion, and the herding watch continues through the autumn --this time to hinder mixing with other herds, principally njar'ga herds as they pass by.

Now, differences as to when in the pastoral year herd knowledge is optimal have a strong --if not determining--influence on pastoral production profiles. Let me demonstrate this by comparing the production of two owners, one from Middle Range and the other from West Range, whose herds are approximately the same size (1000 animals before calving). In the case of the former, the high quality of herd knowledge he amasses

at the spring camps directs his attention to the multi-variable permutations of his herd as a reproductive unit; the West Range owner lacks that kind of herd knowledge, but what he has in appreciably greater measure is sound knowledge and herd control through the autumn. He applies this knowledge to production -- and for him herd composition maximizes one value.

To illustrate that distinction, consider the following. Both owners have more bulls than castrates, but for quite different reasons. For the Middle

Figure 9. ANNUAL CYCLES OF HERD KNOWLEDGE



Range owner, Iskun Biera, the bulls are studs for the increase of the herd; for the other, the bulk of them are to be marketed --nor does he bother much about castration as a means of increasing body weight for he concentrates his production on the sale of young males. There is a clear economic rationale in play here: the greatest growth of a reindeer is in its first two years; therafter there is slow incremental growth, and each year animals are lost. So the sensible time to sell an animal is at the end of the two years. But Iskun Biera does not do that, his rationale is of another kind: just as he keeps biographies of his cows, so he likes to see his bulls grow and pass through the different age-classes. If for the West Range owner optimal herd size is constantly reviewed as an economic matter, for Iskun Biera the aesthetics of herd composition are no less a concern.

A glance at some slaughter and sales' percentages of the two owners adds a further dimension to this difference between them. Slaughtering three times as much as the other, the West Range owner sells them all on-the-hoof (less those kept for home consumption) which speaks to an economy of decisions; Iskun Biera, on the other hand, sells some on-the-hoof and others he himself slaughters to sell as joints of meat. The overall slaughter percentages for the two owners are 7% and 20%, respectively, and the kroner income of the one is four times that of the other.

Carrying capacity

It also follows suggest that the prevalent notion of carrying capacity as "natural" and therefore determinable by "objective" measurement[3] is seriously misleading regarding the nature of this reindeer pastoralism. For several reasons:

First, in no two years do pastures necessarily have the same "natural" carrying capacity. Second, there will be differences (of the A vs. B kind, above) in the suitability of seasonal pastures in relation to specific pastoral requirements. Third, there is the need for a pasture of each season to offer both ecologic combination and, especially in the winter, access to alternatives. Such distinctions and desiderata are not quantifiable.

And fourth, pastoralists determine not just the size of their herds but its composition and, in particular, how long an animal shall live; again, these determinations rest upon subtle combinations of factors --with different outcomes (as shown above)-- among which "natural" carrying capacity is simply the one of last resort.

Carrying capacity, then, has much to do with what these pastoralists desire. This means moving carrying capacity, in our analyses, into the active voice with expectation of different practitioner strategies according to their particular

[3] Of the so-many hectares of pasture containing so-many tons of nutrient for so-many animals consuming so-many kilograms per so-many units of time kind.

circumstances, and also their individual values. These values may be appreciably independent of the kind of circumstances we have had under discussion thus far --as comparision between Iskun Biera and his brother, Iskun Mikko, demonstrates.

Along with other close kin, the two have shared the same summer pastures (VII on Fig.6) for years. Iskun Mikko is two years younger than Iskun Biera, but the two men are simlarly situated in terms of family development cycle --if anything, it is Iskun Mikko who is the more favourably placed regarding a domestic labour force. However, he has less than half the animals his brother has. I believe this is largely accounted for by differences in the personalities of the two men --their desires and their abilities and hence their respective self-images.

Iskun Biera is "energetic" where Iskun Mikko is relaxed but it is he --rather than Iskun Biera-- who has reindeer "talent;" Iskun Biera, for all his wealth, is not "proud" but definitely "cautious" even "miserly," whereas there is a touch of extravagance about Iskun Mikko.[4] Their production profiles offer corroborative testimony: Iskun Mikko actually slaughters rather more animals than his brother (his percentage slaughter is on a par with those of the West Range) --including many more cows.

For these two men (and many others, I wager) "optimal herd size" means quite different things, and the clue as to the nature of the difference is in (what we might call) the "optimal life fulfilment" of each. In short, carrying capacity should not be taken as analytically 'given' and based on generalized energy ratios and --an even more grievous sin-- pre-determined and unproblematized values such as "profitability."

Sustainability

So we are led to the question: whose standards of sustainability? To neglect the question, exposes the very notion of "sustainability" --a current shibboleth-- to the risk of being used as a science alibi for a political warrant to re-order practitioners' ecology and economy according to the values of the state. I was alarmed, therefore, to read in the Preliminary Programme (1992) for this MAB conference how the conclusion that "over-grazing" is the problem with current Saami reindeer pastoralism was already reached (p.2). Further, regarding primary resource livelihoods in general:

> the problem is how to change the regimes of utilization in a direction approaching a more sustainable resource use pattern. [This

[4] The operative Saami words here (as spoken by informants) are: saerra, fitmat, caewlai, i duost, and hanes.

> means] changing the structure of property rights to the resources (pp.3-4).

This sounds to me very much like giving 'models for' analytic primacy over 'models of'. Perhaps the difference between the two may be justly put thus:

In the **model for**: the analyst constructs a scheme that is as close as is possible to certainty. However, from the practitioner's point of view, this likely means forcing certainty onto a world full of uncertainties. It also means the analyst uses abstract logic to gain control over the interaction between practitioners and the environment in which they operate; and consistency of action is seen as a virtue.

In the **model of**: uncertainty is recognized and incorporated, hence ambiguity and contradiction are also recognized as inevitable constituents of reality. This leads to a praxis in which contextual knowledge is central; and contextual knowledge is closely allied to practitioner experience, and thus, praxis has a strong pragmatic character.[5] While in the field, recording a pastoral year, I was often reminded that "this is how it is this year, but next year may be different" -- uncertainty, in other words, was a pervasive element in the pastoralists' understanding their occupation. And responding to it, they drew upon contextual knowledge as a guide to action.

Care must be taken, then, in our search for the holy grail of "sustainability" that we don't erode practitioner responsibility for what they do, thus risking, as I argue elsewhere,[6] the creation of the conditions under which the Hardinian "tragedy of the commons" emerges.

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[5] See Brian Wynne, "Misunderstood misunderstanding: Social identities and public uptake of science." Public Understanding of Sceince, 1:3 (281-304).

[6] "Social construction of the 'tragedy of the commons' and Saami reindeer pastoralism" Acta Borealia,---- (1993).

Comments on Session I,

papers by Libecap, Ostrom & Gardner, and Eggertsson

by

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The origin of property rights is greed. Property rights are rights to exclude others from enjoying the shelter of a house, hunting game in a certain area, or subsisting on a piece of land. Unless, that is, the property right holder is paid for the privilege of access to his or her property. The "economic theory of property rights" expands on this aspect of property rights when it explains the origins of property rights as the emergence of a net surplus of benefits over the costs of excluding others; from hunting in a given area, occupying a shelter, or squatting on a piece of land.

It may seem obvious that little good will come of a social institution built upon such an unsympathetic trait in the human character. Many of those who have filled the ranks of idealistic movements of a socialist hue do indeed seem to have taken this for granted. Yet the experiments that have been done with social institutions expressly negating private property rights, except as a necessary evil at the fringe, have been less than encouraging. However unsympathetic and anti-social they are the motivations behind property rights, the social outcome of this institution is surprisingly beneficial. The reason is not farfetched and lies in the incentives that property rights provide for conservation and creation of value. A piece of land or whatever that nobody owns, nobody cares about. No one makes sure that its value is preserved until tomorrow, and even less that it may be enhanced for a later benefit. The need for both is obvious for any civilization beyond the stage of slash and burn.

This is well illustrated by what has come to be known as the tragedy of the commons. The examples where free access to common property resources has led to degradation or depletion are too many and well known to need any elaboration. The remedy usually prescribed to deal with the tragedy of the commons is privatization or public regulation, or some mixture of the two. All three papers under discussion remind us, however, that private property or public regulation are not the only alternatives to common property. There is a third alternative, the communal property, emphasized in particular by Eggertsson. Under communal property the access to a common resource is restricted to a certain group of individuals. These individuals may get together

and agree on how to use the common resource. Since it is in their interest to use it efficiently, the agreement is likely to promote efficient use.

The third way, the institution of communal property, may be preferable to private property and public regulation, both for reasons of efficiency and equity. The principal-agent problem is likely to be less severe under communal property than with public regulation; even if there will still be a need for monitoring how members of the community comply with the rules agreed. The rules may, however, to some extent be self-enforcing in small and homogeneous communities where decisions taken at the community level have a higher degree of legitimacy than decisions taken from afar; the neighbors will monitor one another and deviators face the risk of being ostracized. The distribution of income from communal property is likely to be more equitable than with one or a few property rights holders claiming whatever rent a resource may yield, at least if the community is composed of individuals of comparatively equal standing and power.

The paper by Ostrom and Gardner illustrates this well. Here a case is established for handing over the control of irrigation systems to the users rather than having the government control them. They show that the equilibria that will obtain between advantaged and disadvantaged members of the user group will not necessarily be efficient and equitable, but in some cases they will be. The empirical analysis comparing communal and government controlled irrigation systems supports the alleged superiority of the communal system. Not surprisingly, the equity of the outcome with communal control depends on the bargaining power of the disadvantaged members of the group (the tail-enders); if their support is essential for maintaining the irrigation system, they will be able to secure for themselves an equitable share of the water. An interesting corollary pointed out in the paper is that outside help may upset the balance of power between advantaged and disadvantaged members of the group and erode the bargaining power of the disadvantaged.

The paper by Ostrom and Gardner also illustrates another point, not made explicitly, namely that the success of communal property is likely to depend on whether the user group is limited in any natural way. The user group of an irrigation system is limited to those who own land through which the water is flowing, and hence whatever agreements they make on the use of the water cannot be upset by new entrants. The chances of success for a system of communal property rights are much smaller where there is no natural limitation to entry. Members of the community will in that case have to incur the costs of keeping out intruders, which might be unlawful unless supported by public law or regulations. Furthermore, any success of the communal management would invite new entrants by its enhancement of the yield of the resource. The ocean fisheries prior to the 200 mile economic zone would be a good example of this.

Libecap's two empirical examples also illustrate the importance of natural limits to entry. Increased populations on Indian reserves have led to overgrazing of common pastures. The settlement of the Pacific Northwest led to a dramatic pressure on the salmon stocks.

A basic tenet in Libecap's paper is that as long as the use of a common resource is limited to a small and relatively homogeneous community, the members of the community find ways to manage the resource in a rational way and to avoid the tragedy of the commons. There is plenty of evidence that communities sharing a resource such as a common fish stock or pasture have devised rules for the use of the resource. My impression is, however, that these rules have primarily been designed for avoiding conflicts among the users, such as reserving certain fishing places for certain individuals, or devising rules as to who had the right to fish where and when. This we need to distinguish from a macro-management of the resource itself; that is, avoidance of over-exploitation. The fact that severe over-exploitation seldom appears to have happened to fish resources in the pre-modern age owes more, I think, to primitive technology and limited markets than to an understanding of resource dynamics and responsible macro-management. The fate of some common resources on land seems to support this view. Overgrazing in ancient Greece destroyed large parts of the Greek countryside. Overgrazing and the gathering of firewood accomplished the same thing in Iceland. There was perhaps no reason to expect that the ancient Greeks or the Icelanders of the Middle Ages knew the long term consequences of their behavior, but neither is there any reason to impute to them any greater wisdom and concern for Mother Nature than harbored by modern man.

Indeed it seems to me that the story Libecap tells of the development on the Indian reserves rather supports the view that the preservation of common resources by traditional groups owes more to primitive technology and limited markets than to conscious and wise communal management. Pressure from short sighted private interests within the Indian community itself has resulted in a degradation of communal grazing land. Authorities at the community level apparently have been unable to deal with this. The same has happened among the Lapps in Finnmark, as referred to by Eggertsson. Eggertsson also cites an example from Kenya where traditional, communal rights have given way to private property rights more suitable for raising herds for cash. So, while there is certainly a case for examining communal resource management as a possible way of avoiding the tragedy of the commons, we should be under no illusion with respect to how likely this is to work. It is most likely to work when there are natural limitations to who has access to the resource, and when the user group is relatively homogeneous and power is equally distributed among its members.

If the communal way is not accessible, we are left with the two remaining ways of dealing with the common property problem, privatization and public regulation. These are not mutually exclusive methods; indeed they can be and need to be combined. Some resources cannot be privatized except at a prohibitive cost. Fish stocks that migrate widely are an example. This does not mean, however, that no privatization is possible; use rights such as fishing quotas or fishing licenses can be privatized even if the resource itself cannot. Public regulation alone is not likely to ensure an efficient management of a shared resource. This method has been tried extensively and has not proven particularly successful in correcting the inefficiency and overuse resulting from free access, government failure has replaced market failure. The reason why this happens is that the necessary limitation of access to resources is turned into a political game which is concerned with distributional and procedural issues, not economic efficiency. Politicians and civil servants are not, as pointed out by Libecap, residual claimants whose careers depend on how efficiently they manage a resource; rather it depends on political acceptability and adherence to formal procedures. Typically the inefficient users tend to be favored at the expense of the more efficient ones. The inefficient tend to have a competitive edge in terms of political power, particularly if there are economies of scale. Libecap cites examples of this from the Pacific salmon fisheries and the Indian reserves. In the Pacific salmon fisheries there has been in operation a sort of "Gresham's Law" by which the less efficient and high cost fishermen have driven out the more efficient ones, with the help of public regulation. Here in Norway we have our own fisheries policy which has tended to favour the small and the inefficient.

This favoring of the inefficient over the efficient might perhaps be in order if it really dealt adequately with the distributional issues it purports to solve. The result often is, however, that the attempt to achieve justice by accommodating all claimants, and in particular by favoring the weak before the strong, results in an economic misery for all, either through a depletion of the resource or through severe restrictions on the operations of those who use it. The latter effect is particularly familiar from our own domestic fishery policy.

Yet another shortcoming attributable to public regulation is rent seeking. The various user groups of a common resource being regulated by a public authority are usually well aware that the rules of the game are subject to change, and time and money spent on convincing politicians and civil servants to change the rules in one's favor is likely to be well spent. And if others are doing it, no one can afford not to; it's like an exchange that starts out sotto voce and ends in a shouting match, without anyone being heard any better in the end. The procedures laid down by the regulators sometimes invite to this. The openness of the American fisheries management councils, with their public hearings etc., is impressive, but expensive and time consuming and certainly out of proportion

to the profitability of the industry the councils are meant to manage. Here in Norway we have a system of government support to the fishing industry which has built up a truly impressive bureaucracy, both in public institutions and in the fishermen's union, centered on channeling money from the government budget to the fishing industry. This operation has been so successful that in one particular year (1981) close to 90 per cent of the value added in the fishing industry (excluding fish processing) consisted of government subsidies. This is no mean feat for an industry which exploits one of the most productive marine areas in the world with some of the world's most advanced technology.

The remedy would seem to consist in devising a system that is as independent as possible of political processes but driven instead by incentives which encourage the efficient use of the common resource. The role of the political authorities in such a system would be limited to setting rules of the game such as would ensure a fair and equitable outcome, and perhaps siphon off some of the rent from the common resource, for the benefit of the ultimate owners, the public. This is how offshore petroleum resources are managed the world over, usually quite successfully. The state, or some public, possibly communal, body would act as a guardian of the common resource, enforce the rules, collect the public's share of the rent, but lease or sell use rights to individuals or firms. We can call this "capitalism with a human face."

In contrast with the prevalence of the strong over the weak, as happened during the British enclosures, this form of privatization can in principle be accomplished without making anyone worse off, if it is worthwhile at all. The justification of introducing a new method of resource management is that it yield a net benefit. The challenge lies in making the transition in such a way that all share equitably the burden of replenishing the resource and the gain of the future benefit. Since there is a net gain to be shared it ought not to be impossible to devise rules that all can agree on. Indeed, individual harvest quotas based on previous use profile or some agreed rule or marketable coupons as Eggertsson puts it, would seem to be the way to go in many cases. They would eliminate competition from entrants, remove the incentive to compete for a higher share of a given total, and the improvement in efficiency would become capitalized in the value of the quota and so accrue to those who got the quotas in the first place.

Comments on Session II,

Papers by Ørebech, and Lane & Jensen

by

Vincent Ostrom

The Ørebech and Lane and Jensen papers are complementary in the sense that Ørebech gives primary attention to domestic law regimes in Norway, Sweden, and Finland with incidental references to Iceland and England, while Lane and Jensen give primary attention to the Baltic Sea and its tributary watershed. Ørebech draws primarily upon the conceptual categories of jurisprudence; Lane and Jensen upon game theory. I shall try to address myself to the basic conceptual problems from the points of view of hypothetical individuals trying to cope with the exigencies of life and from the perspective of scholars seeking to understand and explain the way that people live their lives in human societies.

Lane and Jensen presume that the theory of the tragedy of the commons is based upon the model of the prisoner's dilemma. There are several problems in applying the conventions of game theory to the way that people cope with the exigencies of life. Let me illustrate those problems by reference to the narrative of the prisoner's dilemma. First, the narrative has reference to two prisoners who cannot communicate with one another. Would we expect communication to affect the choice of strategy on the part of two prisoners? Second, the narrative has reference to an official who is seeking evidence to establish a conviction with reference to a crime. The conventions of game theory do not represent the presence of the official in the matrix of the game.

If we shift the narrative to fishers in a fishing ground, would we expect communication in light of local knowledge to enhance problem-solving capabilities? Would we expect a community of fishers to reach a common diagnostic assessment of some problematical situation and a joint strategy for reaching a constructive resolution?

My response is that this depends upon potentials for meaningful communication. Size of the community and common language become critical variables. Coping with the problem of the Baltic basin is vastly different than the problems of the Lofoten Islanders.

If communication exists in a language community with high levels of shared understanding about both problematics and joint strategies, we still face a potential free-rider and an enforcement problem. Again, enforcement requires local knowledge and the probability of enforcement is enhanced when members of a fishing community monitor one another's pursuit of fishing strategies.

Several factors such as communication, local knowledge, shared community of understanding, and monitoring affect potentials for maintaining stable joint strategies modifiable over time.

Lane and Jensen's "State" is a proxy for an official in the narrative for the prisoner's dilemma. The official sets the rules, confines prisoners, and exercises coercive capabilities. My problem is that I consider States to be among the most predatory institutions in human societies (V. Ostrom, 1988). We have extended experience with States warring upon one another and, especially within the last century, of States warring upon their own people on a magnitude that far exceeds interstate warfare.

Given the size, linguistic, and ecological diversity of the Baltic region, I believe that Lane and Jensen are correct in questioning the viability of a resolution to the Baltic problem as formulated by the new institutional analysts. They propose what they call a "solidarity" game redistributing resources among the rich and the poor Nations of the region. I question why some countries are rich and others poor. I doubt that resource potentials or linguistic differences offer a satisfactory explanation. Two conjectures remain. First, the predatory character of the State may be a primary source of poverty. Second, the predatory character of the State may reinforce perverse free-riding strategies. General conditions of poverty might indicate that pervasive tragedies of the commons are at work in which everyone is free riding upon everyone else. Conversely the argument might be advanced that people willing to discuss problems with one another and explore adaptive potentials about how best to relate to one another in making individual use of limited common-pool resources are most likely to enhance both their individual and joint well-being. Poverty is not an act of God. We are left, then, with questions about the relationship of local, regional, and global commons in relation to one another and their relationships to human productive potentials. Ironically, transferring money from the rich to the poor may impose upon the poor serious constraints and disincentives for acquiring the knowledge and skills to improve their own productive potentials and the opportunities to participate in mutually productive communities of relationships.

Section 3 of Ørebech's paper indicates a great variety of fishery regimes both within and across the Nordic countries. A serious question is whether the Roman law categories, as used in each of the Nordic countries, offer a commensurate terminology for comparative institutional analysis. My conclusion is in the negative. We then face a question of whether the array of legal regimes and fishery regimes can be conceptualized in a commensurate analytical language that would permit comparisons to be made. My impression is that such possibilities may exist. We are, however, required to come to terms with rules-in-use rather than words-on-paper. At the bottom of page 17, Ørebech indicates that "In practice trade in licenses has taken place for years"

but trade is apparently not authorized by law. What does this mean? Is there a price to "turning" or "ignoring" the law? If so, who extracts "rent" from the juridical-political system in contrast to extracting "rent" from the fisheries? How does each form of "rent seeking" relate to the "poverty" or "wealth" of nations? The Ørebech paper is highly suggestive of opportunities for comparative institutional analysis that might permit us to investigate empirically the problems posed in the Lane and Jensen paper; but the design of such inquiries would require a common analytical language before comparisons could be made (E. Ostrom, 1990).

Let me add some words of caution about the analytical language which appears to be used in Ørebech's jurisprudence. First, some of the conceptual categories of Roman law, such as *res nullius*, may not be as appropriate for the contemporary world as in earlier times. The concept of *res nullius*, like Hobbes's concept of Man in a State of Nature, can usefully serve as a point of departure but we need alternative concepts about differing institutional arrangements pertaining to property relationships with reference to common-pool resources. The term "private," for example, does not have equivalent meaning as used by courts in Norway and Finland. We need an analytical language that is not confined to local usage (Grossi, [1977] 1981).

In sections 2 and 5 of the Ørebech paper, I see some signs of a Kantian-based jurisprudence which, in my judgment, is deserving of caution. Kant's metaphysics of morals, if I understand correctly, presumes universality to be characteristic of a "world view" and for the individual to take the perspective of a "world citizen" associated with a universal rule of law expressed as *weltbürgerliches Recht* -- global law. As a metaphysics of morals, there may be merit in such a conception reflecting commonalities applicable to human nature. However, it does not follow that such a conception is an adequate basis for jurisprudence. To put the problem in bold relief, let me assert that a single, uniform, and comprehensive code of law for all of mankind is an impossibility. The ecological and cultural diversity existing in the world and among the population of the world is such that diversity and complementarity must exist in achieving adaptive potentials within and among human societies. Universals exist in the laws of nature, including human nature, but in diversely nested exigencies rather than in a single, fully-joined, global entity. Nestedness implies potentials for diversity, variety, and complementarity in achieving order in a universe that is subject to openness and choice. A particular ecological niche such as the Lofoten Islands juxtaposes the hydrology of the Gulf Stream with the life cycle of the Arctic cod to yield a unique circumstance with great productive potentials which can serve as the basis for a meaningful and constructive way of life worthy of attention. There is a risk in conceptualizing "basic needs" as inalienable rights in such a way that the constitution of society could be arranged so that people, to quote Alexis de Tocqueville, are spared "all

the care of thinking and all the trouble of living" ([1840] 1945, II: 318). People spared the care of thinking and the troubles of living are unlikely to realize productive potentials.

Conversely, it might be argued that mature human beings should be under duty to meet their own basic needs and that their inalienable rights pertain to the exercise of linguistic and problem-solving capabilities for meeting those needs in diversely associated relationships in which each individual functions first as his or her own governor. Such jurisprudence would be built upon an *eidgenossenshaftliches Recht* rather than a *weltbürgerliches Recht* (Berman, 1983; V. Ostrom, 1991). The two approaches represent paradigmatic differences of fundamental proportions even though they might have common metaphysical grounds.

In conclusion, a clarification of basic conceptual problems associated with the use of common-pool resources and comparative institutional analysis require much more extended discussion (Bromley, 1992; Grossi [1977] 1981; McCay and Acheson, 1987; E. Ostrom, 1990). To pursue questions about the basic grammar of rules with reference to operational, collective choice, and constitutional levels of analysis and with reference to the remedies available through civil, criminal, and equity procedures, would go far beyond the time available to me. I limit my comments to a few basic issues in anticipation that we might have some opportunity for a general discussion of problems related with those issues.

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Comments on Session III,

papers by Bugge, and Alfredsson

by

Lise Rakner,

I. Introduction

I have been asked to comment on two papers regarding the aspect of human rights in terms of sustainable resources management and the protection of aboriginal people within a democratic rule of law state.

Both Bugge and Alfredsson are indeed very knowledgeable and extinguished scholars within the field of international human rights law, and I would not want to enter into a polemic debate in the field of international law. Rather, I will try to draw on what I see as the substance of the two papers, and apply the juridical observations to the "political reality" as most political scientist prefer to call the political arena to which we orient our research. Simply put, I shall discuss, albeit in a somewhat polemic manner, whether human rights really matter in international relations between states within the UN system and particularly in relation to north-south relations.

The common theme of the two papers as I see it is; to what extent can human rights norms, and more specifically, the already existing human rights instruments within international law, serve as a guarantee for sustainable use of common resources, the protection of minority groups and the material rights of minority groups to common land resources?

Alfredsson, concentrating on the instruments existing to protect the rights of minorities, persuasively presents the wide flora of human rights instruments and guidelines developed within the field of international law in protection of minority groups. Similarly, Bugge indicates that there are instruments available for the protection of minority groups' economic rights. He also acknowledges, albeit with an uncertainty, the possibility of arguing for environmental protection though some of the Human Rights instruments.

Bugge's conclusion is somewhat disguised, but I sense that he is rather critical to a further widening of the human rights instruments and a further development into the "murky waters" of "soft law". He raises the question of whether human rights norms, though dynamic concepts with a strong, and might I add, increasing international consensus, really is the most useful concept for the protection against all things evil.

I shall rephrase and reinterpret his sceptical remarks and argue that indeed, the more human rights are set to protect, the less forceful the norms will become, and the less will be achieved.

Let me start by going through the various groups of rights the so called generations of human rights, and discuss the inherent and potential conflicts within the various human rights. I will in particular dwell on the third generation rights, and discus its international status.

Secondly, I shall return to Bugge's concluding argument which holds that rather than trying to create material laws for the protection of minority rights and land resources, one should settle for procedural laws, which will guarantee minority groups a stake in the decision making process. In the true fashion of "the devils advocate", I will argue that even this minimum is far from uncomplicated, and it might not solve the problem.

II. Classifications Of Human Rights

In order to illustrate the inherent and potential contradictions within the various human rights norms, let us start with a classification of the norms.

1. PERSONAL RIGHTS, refers to laws protecting against torture, arbitrary imprisonment etc.

2. CIVIL AND LIBERAL RIGHTS, refers to laws guaranteeing freedom of speech, association etc.

3. POLITICAL RIGHTS regards the freedom of participation, enfranchisement etc.

4. SOCIAL AND ECONOMIC RIGHTS, refers to a set of rights guaranteeing a minimum of food, work, housing etc.

5. CULTURAL AND "NATIONAL" RIGHTS, which includes the right to practise ones own religion and culture, the protection of minority rights etc.

6. SOLIDARITY RIGHTS, referring to the right to development, peace and clean environment etc.

These six categories can be grouped very broadly into positive and negative rights. Negative rights are rights against state involvement in ones private sphere, as protection against torture and arbitrary imprisonment. Negative rights are also characterised as rights that do not cost anything, compared to the economic and solidarity rights, or positive rights, which implies a right to be allocated a minimum standard of housing, environment etc.

This again corresponds broadly to an other very often applied classification into of rights, namely a classification of various generations of rights where;

1. generation contains the civil, liberal and political rights (1-3)

2. generation refers to the economic and social rights and

3. generation are the rights commonly referred to as solidarity rights.

There is by all means a certain hierarchical order implicit in these attempts to classify human rights norms. Broadly speaking, it can be argued that first generational rights are the inheritance of the western philosophic tradition, whereas the second generation rights are the contribution of the former "socialist bloc" and the solidarity rights have been brought in by the nations of the south. As first generation rights are considered to be of older date, some even argue "parent" rights to the next generations of rights, these are by a large group of politicians and lawyers regarded as the "only true rights". Thus, the generational classifications reflects a forceful argument put forward by large western nations that civil and political rights are considered more important.

However, in the UN system, this hierarchy has never been accepted. The tug of war between the eastern and western bloc within the UN system reached a "solution" in 1966, as both the civil and political as well as economic and social covenants of the UN Declaration of human rights where given equal legal status. On the practical and political level, however, the conflict of hierarchy was not solved here. The discussion and indeed, the general development of the UN's Human Rights initiatives, took place in a period of intense ideological strife in the cold war era. The rhetorical "warfare" between the socialist countries and the western nations to a large extent left the human rights declaration as a "lame duck" as it was virtually impossible for the UN to agree on a common standard of human rights.

The addition of the 3. generation rights, referred to as solidarity rights reached a high-point in 1986 with the adoption of the UN Human rights declaration of "the right to development" from 1986. These rights have a different structure than the previous ones, as they imply a right to a process, not a concise standard from which certain developments can be adequately measured. The solidarity rights, specifying "peoples rights" and sovereignty of their own environment, also includes a certain right to a clean environment, right to peace and development. This inclusion of "collective rights" in addition to the rights of the individual have been highly debated and it is difficult to establish whether individual rights should be given a "trump card status" over collective rights in an eventual collision of rights.

In addition to the inherent contradictions between collective and individual rights, the 3. generation of rights exist in a "murky" area of international law, the area of soft laws. The problem is, what does a right to development really entail? Who has the duty to guarantee development? The state or the international community? And when can the inadequate respect of the right to development be considered a conscious action of a state and when is it a question of capacity?

These are only some of the troublesome areas which have left the solidarity rights with a somewhat weak and dubious status within the international community. As to the question of further extending the human rights instrument and include an amendment on "the right to environment", I feel inclined to say that considering how little has been achieved in the areas of "soft" human rights instruments, I am not convinced this will be an adequate protection of the environment.

However, as Bugge mentioned in his paper, there are changes, great changes within the international community and the status of human rights. Concerning the conflict over civil and political right versus the economic and social rights, it can be argued that the conflict within the UN system was solved with the fall of the Berlin Wall in the fall of 1989. Since then, an international consensus on the virtue of democracy, civil and political rights for each individual seems to have emerged within the international community. As a consequence, the work on Human rights and the international protection of universal human values have reached a new era of great optimism. It has been argued that for the first time in the history of the UN, the organisation is functioning as intended, as a peacekeeping force for the protection of human rights and human dignity.

How then, can this international consensus on democratic principles serve to protect the interest of minority groups and their material environment (rangelands etc.)? Bugge ends on an optimistic note, stating that this new environment opens for extended participatory rights and the right to information. Thus, if I read him right: In a world of predominately democratic states, both minorities, their material rights and the environment will fare better than in the world of "yesteryear" i.e. the cold war era.

While this may be true, I find that even a global consensus on the values of democratic governance (which is far from the case) only to a very limited extent can protect the interest of minority groups and the environment for that matter. In my opinion, in a "unipolar" world order, the concept of human rights is in great danger of being reduced to an issue of multiparty elections. In the absence of strong ideological differences between south (who seems to have lost its vote), east and west, the conflicts regarding the various categories of human rights have vanished. And thus the broad concept of human rights, including

rights of minorities and economic and social rights, seems to have lost their defenders within the UN system. As a result, human rights are more and more regarded as analogue with democratic rights, enfranchise, freedom of association and speech. As we shall see, this narrowing concept of human rights can only to a limited degree protect the interest of minority groups, their material rights to common land resources and the environment in general.

III. Democracy And Human Rights The Problem Of Environmental Protection And Minorities.

Lets go back to the problem raised by Bugge, and the contents of this section, to what extent can minority rights to common land and the environment find protection within the international human rights instruments?

So far, I have arrived at a rather dismal conclusion. But, I believe, exactly the two problem-sets of this conference, minorities and common land resources, illustrates the great danger of the increasingly narrow partial usage of human rights instruments in international relations as we see today. Herein lies the great paradox; while the two papers have rightfully pointed to the immense widening of the concept of human rights, the new instruments and the problem inherited in such a wide "package of rights", it is a fact that within the UN system an in International relations between state the general consensus on democracy and world marked economics, human rights are reduced to mean multiparty democracy, states to the homeland of its citizens and common land to private ownership.

Thus it is my argument that if we do not act soon, within the international community, the rights of minorities and common land may very well be in danger. Let us see how little these issues are protected by the current human rights consensus:

1. Participation in decision making when defined as enfranchisement and participation in elections, effectively excludes all non-citizens of a state. In other words, it leaves no say for migrant workers, minority groups within state territory or multinational groups trekking from one country to another. This interpretation narrows the concept to the right of the state.

2. Concerning the environment, the forceful arguments which was put forward at the Stockholm conference in 1972 was that environmental problems cannot be solved at state level, as acid rains do not keep within state boundaries etc. This is an incredible forceful argument, which becomes stronger considering the inherent weaknesses of a democratic system in protection the environment. Concerning the conflict between environmental protection and employment a government in an election year will always, as it is a matter of political survival, give priority to factors of economic growth. The Rio Conference which

unluckily corresponded with a US election year, is a good example of the limited capacity of national politicians to protect the interest of coming generations.

IV. Where Does This Leave Us?

1. The package of human rights norms is enormous, there are possibly too many and the internal inconsistencies cannot be denied.

2. Nevertheless, they are important and they carry a strong moral argument for right of coming generations, people of developing nations as well as sustainable development.

3. The present general consensus within the international community on the value of Human rights add power to the UN declaration and the other Human rights instruments.

4. However, there seems to be a tendency to give priority and hegemony to the first generation, of individual, civil and political rights, protecting citizens of the nation states.

5. The narrowing of the concept of human rights may endanger the rights of minority groups who are not protected by the individual rights and sovereign states.

6. But there is an additional danger inherent in the narrowing of the concept of human rights which relates to the way the UN nations now intervenes in countries on humanitarian grounds. Humanitarian inventions cannot, in my opinion be justified when human rights are interpreted and treated selectively. The worst thing that can happen, and I think this is a real fear, is that the UN is loosing legitimacy and credibility in the south as it will be seen as an organisation catering for the interest of the largest western states.

Comments on Session IV,

papers by Austenå, Hyvärinen, Falkanger, and Bengtsson

by

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1. Three of the papers (Austenå, Hyvärinen and Bengtsson) have highlighted the question "who owns the land" and the problems related to land use rights and Saami reindeer herding.

These are fascinating questions, they involve many exciting problems and fields of scholarship: History, law, history of law, archaeology, anthropology, geography, political science etc. They also easily engage people in general.

I am not going to question the description and analysis of the legal situations in the three countries, and the process of change that has been going on. These processes concern the rights to land and water for the Saami people at large, and especially the struggle by the reindeer herding Saami population, to get legal control of the land. For several decades now scholars, commissions and courts have been engaged in these questions in Norway, Finland and Sweden. It has, of course, also been a political issue. These efforts have been overwhelmingly historically oriented, which is natural, since to find out what the legal situation is, you have to turn to the past. Sometimes it is difficult to separate scholarship from politics and polemics, which is clearly shown by Hyvärinen's paper.

But. Sometimes one cannot help but wonder. Why is this question of ownership so important? Is it really important? And above all - does this process of clarification and recognition necessarily or possibly lead to better land use? For instance in terms of more sustainability or efficiency. Is it a process towards more sustainable land use - or is it something else?

The proponents efforts seem to assume, in a somewhat unclear way, that stronger legal rights for these groups, and for certain activities like reindeer herding, once were in existence. They apparently believe that proving these as historical facts and having them recognised is enough to solve the present and future land use problems. I do understand the mechanisms behind this historical orientation, but at the same time I question the wisdom in the one-sided and stubborn pursuit of the historical track. At least academically one should be able to pose questions like this: What ownership forms would be best suited to meet the various aims and goals in the future? Part of my point is that within the legal system there are a wide variety of arrangements of rights and ownership forms, and new types could also be introduced if necessary. At the same time one

should question and explore the separation and relationship between the regime of property rights and the regime of public administrative regulation in this respect. It should be kept in mind that land use decisions are taken either on the legal base of ownership (in a wide sense) or of public regulation and administration, or both.

Especially in Finland and Sweden the reindeer herders seem to have been pursuing a **total dominium** to the land. In Norway this is not as clear. Part of my point is that the reindeer herders seem to be in the process of moving from a predominantly legal and regulatory regime into a property regime.

However: There has so far been little analytical work done, to find out what types of ownership would be most suitable, in terms of economic efficiency, sustainability, and whatever other goals there might be, for instance justice, relationship to other local groups, etc. Samerettsutvalg, the "Saami rights commission" is supposed to work on this problem when it is finished with the clarification issue.

To my mind the pursuance of legal title and the overwhelmingly historical orientation of the participants may have lead to the neglect of this aspect. And it is probably expecting too much of a body such as the "Saami rights commission" to suddenly come up with "The Solution".

In other types of occupations there are, more or less, continuous experimentation and adjustments of tenure and ownership arrangements. Reindeer herding is probably very different from anything else in its property arrangements, both to the animals and in land. Still - one cannot but wonder.

I do really hope that the sessions later today will clarify these questions.

2. Falkanger's paper is different from the others, it concerns legal rights to rangelands in Norway. I have two points to make.

First - there is, a historically speaking, a remarkable lack of developed local institutions for management of land and resources held jointly or in common in some way or another. Three of the other Nordic countries, Denmark, Sweden and Finland had the "byalag" institution. We have a few scattered examples of something similar in Norway, but mainly common resources seem to be governed either by law, or by traditions and informal norms of behaviour for the individual member of a local community.

My second point is that there is great potential for change in the composition of the class of owners of rangeland. A large proportion of such lands are tied together with local farmers, as ownership units. We have had a great reduction in the number of farms and farmers (in fact from circa... 200,000 in 1950's to

less than 100,000 today) but farms not actively used as such, are still ownership units. Transfer of such units follow the traditional Norwegian norms (and laws) in this respect: More than 90% of all transfers in rural land take place within the family. Consequently, the owners belong to the same family, - but they are not farmers any more. Thus rangeland passes out of the hands of the farming population.

Comments on Session V,

papers by Paine, and Bjørklund

by

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Alta

First of all, here I feel like a Saami, when one comes into my office, he does not speak his native language - and neither am I, when I speak in English.

I just got involved with the conference, and have not seen the papers in advance. First we heard R. Paine speak, I think that it is very interesting to hear how the conditions were at the time. You can find the same system of Si'idas today, but times have changed, they have changed dramatically. In 1960 you still had the old natural system of household production. The yearly migrations between the coast and the vidda was carried out without modern technology and there was little communication in the area. It is of great importance to have knowledge about previous understanding, way of living and systems when developing a policy for reindeer herding in a modern western country.

There have been many changes between 1960 and today, we take a large step in jumping between then and now.

I would have liked to have seen Bjørklund's paper, and worked with it, I disagree on many points with Bjørklund. I feel that his paper is essentially a political one. Lets take a look at what has happened over the past 30 years, we have seen the introduction of the snow mobile (or snow scooter), social security and welfare, a higher standard of living, better communications (roads, telephone, radio, etc.), and a different way of living, especially better housing. There has been an increase in the population due to a lower infant mortality rate and families with many children since W.W.II. These children are now grown up and many of them are established, with their own families, as reindeer herders.

The old Si'ida has died, now people have individual responsibilities and interests, but they still must work with the group, their individual success still depends on the success of the group. I do not think that welfare has destroyed their culture. The reindeer herders want living standards that are commensurate with everyone else's.

The number of reindeer is a topic of interest. What kind of powers have influenced the total number of reindeer on the vidda? It is necessary to explain this on an individual level.

It's a fact that there has been an enormous increase in the number of reindeer during the 80's. Some have attributed this increase to the economic support process. In my opinion this is not a sufficient explanation, economic support does not have that much influence. The fact that the winter pasture, because of ice or large quantities of snow, will not be accessible some years, demands that the reindeer owners work towards securing a sufficient number of reindeer to survive when the situation, due to the climate exterminates, for example 1/3 of the herd. I think this is basic for the way the reindeer owners is planing for the long term. When the winter pasture is accessible over many years, the numbers of reindeer will continually increase, as we have seen over the last 15 - 20 years. The stress on the number will be strengthened by, among other things, modern technology, desire for better living conditions and, especially, more reindeer herders.

This situation, with so many people who have their essential condition tied to reindeer herding, necessarily results in a high number of reindeer, which leads to serious competition in obtaining pasture. The legislation to meet a situation like this is weak. The internal normative system has not followed and adapted to the changes during the last 25 years. Therefore the internal norms are not suitable for solving conflicts under such stressed conditions. The obvious result must be a collapse of the organising system.

There is a horrible situation in Finnmark. I hesitate in using this description, but in my position I receive to many signs that I find significant to anarchy, even violence has been reported.

What has happened to bring us to this point?

I must admit that the management system recommended in the law has not been sufficient and therefore has failed. In my opinion the problem is a systematic conflict between the elected boards for the districts and the interest of the individual reindeer herder as an owner. It is necessary to develop new legislation for the purpose of getting better management in the districts.

The question becomes, how do we rebuild a system of norms? It is important to start by listening to the people and asking for their opinions. If the authorities are going to succeed in creating a system for the management in the districts, it will depend on that system being accepted by those whom it proposes to govern, the opinions of outsiders are of less importance. This year and the next will be a critical time in the development of this system, and all told, a critical time in the development of a successful reindeer industry.

Comments on Session VI,

papers by Sandvik and Korpijaakko-Labba

by

Nils Jernsletten

I agree with Gudmund in his point that not only reindeer pastures must be included in the concept of 'common resources' in the Saami area in Finnmark. Farming, often in combination with fishing -in the sea and in lakes and rivers- is one of the main industries in the Saami communities. We must remember that there are several Saami groups that are dependent on the right to share and use the common resources.

Even if the Norwegian state claims to be the owner of the non-private land in Finnmark, the rights of the reindeer Saami to utilize the pastures in reindeer industry are protected by the principle of use from time immemorial. But I think I am right in saying that other Saami groups, like fishermen and peasants with small farms in Finnmark, don't have the same kind of protection in the present legal status. In a long period of an official assimilation policy, the authorities tried to diminish the so called "Saami problem" by isolating it to be a question about reindeer people.

I would like Gudmund to explain briefly why the Norwegian institution 'almenning', commons, was not applied in a legal system in Finnmark after the so called "jordutvisningsresolusjonen" of 1775 (This resolution was at set of rules about sale of land in Finnmark) . Sverre Tønnesen[1] writes that the principle of collective right of the local community was totally ignored after 1775. The result is, in general, that farmers have no legal access to pasture for their sheep and cattle on the so called 'statens grunn' - i.e. the non-private land in Finnmark.

As to the right to salmon fishing in Tana river, it is correct to say that fishing by net, buoππu (enclosure for netting salmon) and golgadeapmi, (fishing with a driftnet) [2]<2>, are reserved for those within the local community, who have the special license. One can apply for this license, if one has a certain amount of cultivated land, and harvests 2 tons of hay. This rule does certainly not derive from a Saami use of resources, but from a Norwegian peasant society. The State

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[1]Sverre Tønnesen, Bergen, 1977: Om retten til jorden i Finnmark, in Samenes og sameområdenes rettslige stilling historisk belyst, red Knut Bergsland, Institutt for sammenlignenede kulturforskning, Oslo 1977.

[2]These explanation are taken from Konrad Nielsen: Lappisk ordbok (Lapp Dictionary)

pretends to be the owner of the river, and therefore it takes all incomes from sale of fishing licenses. The inhabitants, who cannot obtain the license for net-fishing, have no exclusive rights to salmon fish. The local communities have very little or nothing to say regarding regulations of the fishing.

It is interesting then to notice the difference between the legal status in Alta river and Neiden river on one hand, and Tana river on the other. The great majority of the population in Tana valley has been and is Saami, while the Qvens and Norwegians colonized the Neiden and Alta valleys. (Qven: a descendant after Finns who immigrated to Finnmark and Northern Troms during eighteenth and nineteenth centuries). Consequently the Finnish and Norwegian customary rules according to ownership and rights to the commons were applied there. This means for instance that the local landowners' societies sell fishing licenses and decide minor regulations.

In fjord- and coast areas fishing is the most important livelihood. Most of the fishing takes place on the fjords and near the coast, with small boats. The local communities have no exclusive rights, and the regulations since Second World War have more and more been in favor of trawlers and big boats. The main rule is that "the sea is free for everybody". The result of this development is that one of the most important basic resources for the Saami culture in fjord areas is threatened.

It is interesting then that the inhabitants of the fishing stations in Finnmark had exclusive rights to the nearby fishing grounds. These stations or villages were inhabited by Norwegian fishermen and their families. Denmark-Norway wanted to protect them in order to strengthen the sovereignty of the state. This leads me to the question: would it be legally possible for the Norwegian Parliament to give such an exclusive right to the people in fjord- and coast areas? I think it would be in accordance with international law.

Gudmund mentions the crisis in the reindeer industry. He also refers to some aspects of the problem, such as the high number of reindeer, absence of informal rules and official rules as well, and lack of cooperation between reindeer herders. He does not believe in self-government for the reindeer herders, and he does not explain this political statement any further

I think this needs some explanation. Is it really so, that the local Saami societies are not able to manage a use of common resources, so that they must be administered in detail by state authorities, as they actually are.

We should know that the traditional Saami institutions, like si'ida with its customary rules, have gradually disappeared, simply because they were not allowed to function. This is specially the case with the collective use of resources. Often the official regulations destroyed the traditional rules. Then

you cannot expect that the communities can manage it, when problems rise, especially not when problems are at result of governmental regulations and policy, as we heard in Ivar Bjørklund's description.

The reindeer Saami si'ida was, and still is, a small group that worked together and herded their reindeer within their defined pasture. But the situation is now, that all si'idas in the area, for example in Western Finnmark, have a common district in fall and winter pastures. This violates the social system and customary rules of the si'ida system. Combined with new technology, this governmental rule creates chaos.

Kaisa Korpijaakko-Labba tells that due to the legal system in Sweden-Finland, where Saami were members of the jury in the local court sessions, the Saami use of land was quite well recorded. From the Swedish viewpoint it is easy to understand that in the political situation in the 1700's, it was in the benefit of the state to protect the Saami and their rights. As the Saami were considered proper citizens of the state, and their rights as such were protected, they remained loyal to the authorities. Kaisa writes that the court applied Swedish law, not in order to overrule the Saami legal system, but rather to protect the Saami system.

My questions to Kaisa deal with the nature of the Saami legal system, with regard to land rights and ownership. As I understand you, the family's land was considered its private property. The Swedish system of tax land gave support to the concept of natural resources as private property. It is not quite clear to me what kind of relationship there is between the individual family on one hand, and the community on the other, with regard to rights to the resources. What I learned from the ethnographic and historical literature is that the community, si'ida, owned the land as communal property, and the main resources such as reindeer- and beaver hunting, and salmon fishing, belonged to the community. According to Helmer Tegengren[3], the so called beaver oath (1725) states that the individuals should not utilize these common resources only to their own benefit. Erik Solem[4] tells that salmon fishing with drift net in Polmak village was carried out in common, and the catch was shared equally between the families. Sverre Tønnesen concludes that in all probability the individuals had no exclusive rights to the resources within the si'ida, in the North Norwegian Saami land.

Well, I am fully convinced that you are right when you say that right to use the resources was inherited within the family, from one generation to the other. This guaranteed undisturbed use of land from generation to generation, and that was necessary in order to preserve the society. But you suppose that according to

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[3]Helmer Tegengren, Åbo,1977: Samernas i Kemi lappmark rätt til bäverfänge, in Samenes og sameområdenes rettslige stilling historisk belyst, 1973.
[4]Erik Solem: Lappiske rettsstudier, Universitetsforlaget 1970, (1. utg. 1933)

law it would be possible for a family to sell its land, like private property. This would of course be acceptable in the Swedish legal system, but I would be surprised if this is in accordance with the customary Saami rules.

However, the idea of a rather strong right of individuals to the resources will strengthen the arguments from the Saami part, simply because it is in harmony with the legal system and legislation in the Nordic countries. Anthropologists and historians have described the kind of traditional Saami right to land and waters as a collective right of the si'ida to use common resources. But it is not quite clear what they mean by the word 'si'ida'. In the western part of the Northern Saami dialect-area, the word simply means 'home'. This fits very well, when some authors tell that si'ida consists of a family group or even one single family.

My questions may reveal some confusion about these matters. That is because I am not familiar with the juridical terminology. Anyway, my question is, if there is a contradiction between the idea of the si'ida as the owner of the common resources, and the kind of private ownership in the Saami system you describe?

I have one final question, and it goes to both of you. The Finnmark inland, Guovdageaidnu, Kárá^{a}johka and Buolbmát[5] was under Swedish jurisdiction till 1751. The Swedish state recognized the Saami rights. But the state of Denmark-Norway obviously ignored the rights of the Saami people very soon after it got the sovereignty over the Saami land. Then we can ask, as Thomas Cramér did in a symposium on the status of Saami rights in 1973: How did the Saami si'ida, (lappbyn in Swedish) disappear in Finnmark?

This is a very important question to the Saami society. It has to do with justice and identity, which are vital factors to a minority. There will always be an ethnic conflict in a situation where we, the Saami, claim that we lost our rights in an unjust or illegal way in course of history, and the state authorities answer that according to Norwegian, Swedish or Finnish law we never had rights.

[5]Saami villages in Inner Finnmark, on Norwegian maps: Kautokeino, Karasjok and Polmak.

Comments on Session VII,

papers by Thomson, Cisse, and Ibrahim

by

Johan Helland
Chr. Michelsen Institute

Whenever we discuss African pastoralism, it is important to keep some biological facts in mind. We are after all dealing with two (or more) biological populations. These populations display a dynamics which is proper to each population, but also a dynamics which is generated by the interrelationships between them. Any biological population has a propensity to grow and this biotic potential and the factors which have an influence on it are of course overwhelmingly important features of any pastoral system. One may even speak of a problem of growth in pastoral systems. Since regular and continued pastoral production depends on the maintenance of a balanced relationship between pasture, animals and people the tendency to growth is a constant threat to this often delicate balance.

The manner in which the biotic potential and the problem of growth are regulated in pastoral systems is thus of great importance. In general terms, we now believe that this regulation occurs in two modes. In the drier parts of the pastoral areas of Africa it is believed that density-independent mechanisms are important, i.e. natural calamities like drought and disease epidemics keep population densities at sufficiently low levels to avoid upsetting balances between numbers of animals and the available forage. But density-dependent mechanisms also come into play in strategies which involve tracking the highly variable and unstable resource base. The risk of over-shooting the carrying capacity is great and the animal population is cut back severely. This in turn has dramatic repercussions in the human population. These "boom-and-bust" strategies periodically produce great numbers of destitute pastoralists who have lost their principal means of maintaining a pastoral adaptation. Since the great Sahelian drought of 1973 we have become increasingly familiar with this aspect of pastoralism in the Sahel.

In the moister and more favorable pastoral areas a density-dependent "safety-valve" strategy seems to be of greater importance. In these areas the problem of growth is contained through a more or less steady trickle of failed pastoralists out of the pastoral sector. The more favorable resource base allows higher stock densities, often leading to overstocking and reduced production, which again causes a drop in the income of families which depend on animal products. The safety-valve consist of the most exposed part of the pastoral population which have to meet the production shortfalls by selling animals, eventually liquidating

their production assets (their animals), forcing these pastoralists to find other means of livelihood.

The main point, however, is that sustainable pastoralism in the Sahel depends on relatively low population densities and a key issue in any discussion of pastoralism in this area is how the inherent growth potential in pastoralism is checked, i.e. how to maintain populations at this low, but sustainable level.

James Thomson's paper describes how a Soninké community in north-western Mali has responded to the new opportunities for pastoral production which presented themselves following a development project which provided water in an area which was previously "under-utilised " (i.e. only seasonally utilised by pastoral nomads).

The paper also sketches out some other important features of Soninké society, including the significance of remittances from abroad. A capacity for co-ordination and organization, combined with the financial clout represented by the remittances has produced a situation where the Soninké villages have enjoyed a great degree of village autonomy in spite of the official "dirigiste" policies of the Traoré regime.

When water was made available in sufficient quantities, the Soninké farmers of the Yaguinébanda village invested some of their remittance money in livestock, primarily for meat production. The village has also been able to meet some of the common problems associated with pastoral production through institutional responses with respect to maintaining a firebreak to protect pastures from untimely fire, organizing a rotational grazing system in the rangelands "belonging" to the village and setting up a scheme for the management of the improved supply of water.

In discussing to what extent the new constitutional reforms of Mali's 3rd Republic will foster increased local autonomy, James Thomson predicts(and probably quite rightly) that the impact of the reform on the situation in Yaguinébanda and similar villages is likely to be very low. Since the official policies of the Traoré government to a large extent were irrelevant to the institutional management initiatives taken by the local community, due to the high level of village autonomy achieved, one may assume that the new policies of the 3rd Republic will be equally ignored, if and when they do not suit the local situation.

The case of Yaguinébanda offers a very interesting example of the kind of local institutions which now are offered as the solution to various common property resource management problems. It is a pity, therefore, that the institutions in Yaguinébanda have not yet been put to the test. Permanent pastoral production on the lands adjoining the village is still new, numbers are still low and the

common problems growing out of pastoralism have yet to present themselves. But the question remains of what will happen when numbers start to rise and the available resources around Yaguinébanda come under pressure. Thomson indicates that the first response would be to exclude non-villagers (and the village probably has the capacity to do this) but fundamentally the problem remains. Eventually the question of setting the stint, of determining quotas and of restricting the investment opportunities of village members will arise, and it is not clear how that will be possible with the present institutional configuration.

A major point arising out of the paper is that the Soninké seem to have a capacity for institutional innovation (as long as they are left alone). Some of the preconditions for this capacity are described in the paper. To what extent this capacity for institutional innovation will enable the Soninké to meet the future resource management challenges growing out the new patterns of investment and production is of course a matter of conjecture at this stage.

Dr. Salmana Cissés presentation describes one of the most famous traditional land use systems of the Sahel region, found in the inland delta of the Niger river in Mali. This delta is a vast inundation zone which supports various economic activities like fishing, different types of agriculture and pastoralism, each of which were strongly associated with different ethnic groups which were linked to each other in various relationships of trade, patronage or other forms of social dependency.

I shall not presume to summarize the Dr. Cissé paper in these comments, but would like to underscore two points which I think are of crucial importance to our understanding of the land use system of the inner delta.

The delta came under the control of a theocratic Fulani state and its ruler Cheikou Ahmadou in the first half of the 19th century and the land use system existing at that time was subsequently adapted to suit the interests of the Fulani. This modified system was expressed in a formal land use code known as the "dina". Cheikou Ahmadou was convinced that the full religious life of Muslims could only unfold in sedentary communities and a major consideration met by the "dina", it seems, was a modification of land use patterns in the delta to allow the Muslim Fulani to combine pastoralism with permanent settlement.

The "dina" system controlled competition and conflict over land and allowed various groups of people access to different resources in different parts of the delta at different times of the year. The success of the "dina" was such that the inland delta of the Niger was able to support human population densities which were 4-5 times higher than what was the case in the ecologically comparable situation of the Senegal river delta.

Dr. Salmana Cissé paper discusses some of the changes which have taken place during the colonial occupation of Mali and since independence. The paper takes some care to emphasize that the tenurial arrangements within the delta do not reflect the spatial distribution of the various resources within the delta are not tailored to meet the specific needs of the various production regimes.

Dr. Cissé argues strongly that the land tenure system can only be understood as a reflection of the social relations of subjugation and dominance between people organized in distinct hierarchies of power. The fact that the "dina" worked so splendidly in an ecological sense was in many ways an accident, and the construction of this system cannot be understood with reference to its ecological effects. Similarly, the gradual dismantling of the "dina", which has been going on since colonial times, can only be understood by adopting the perspective presented by Dr. Cissé: New power relationships and changed social arrangements have been given an expression through the rearrangement of rights and production practices in the delta, irrespective of the ecological consequences these changes have produced. The ecological viability of the delta is under constant challenge by the changing land use patterns, but that is another matter.

In conclusion, I would like to point out that while we do from time to time come across local institutions which seem to manage natural resources on a sustainable basis, we must be very careful not to reify our concerns for resource management to the extent that we impute resource management intentionality on such institutions. Very often (and probably most of the time) these institutions and these "management systems" are about something completely different. The "dina" is of course an excellent example of this. More often than not, management of natural resources arises as an implication of other processes where intention is not in doubt.

Furthermore, when we want to resurrect or restore traditional natural resource management systems we cannot freely select those features we deem important and leave other features behind. We are dealing with systems which are closely integrated precisely because they worked well and while it may be impossible or undesirable to restore the whole system, restoring only parts of the systems are unlikely to produce the desired results in terms of management.

Comments on Session VIII

Papers by Ulfstein, Belikov, and Stokke

By

Douglas Brubaker

Thank you for the presentation of these interesting papers. It is difficult to make constructive comments on such subjects, and I must take the liberty, as suggested by the arranger the Agricultural University of Norway, of introducing my own comments regarding the subject International Problems of the Barents Sea. I will leave the comments regarding the strict fisheries regimes to those experts sitting in the audience who know much more than myself. I must say however that two main points came to mind while thinking of the speeches I received.

The subject is titled "International Problems of the Barents Sea". From the perspective of the near future two large regimes as it were are looming on the horizon, both of which could have large consequences for the Barents Sea. These two are the EEC and marine pollution and perhaps not enough was said about these. In order to attempt to avoid the hot discussions involving Norway's membership into the EEC, atomic dumping, the Northern Sea Route, etc. I intend to proceed cautiously. On the other hand because these two "regimes" are so huge, at the same time I feel that something should be added to that already said. This is especially relevant considering the abnormally high number of shipping accidents along the entire Norwegian coast, especially involving engine failure.

Taking marine pollution first, this is something I am involved directly with as part of the International Northern Sea Route Project. I feel that I have as good as a overview as any regarding these developments and at least for the western part, that section presently most used, it can be expected that should developments continue, shipping is going to increase through the Barents Sea on the way to Tromsø, Kirkenes, Murmansk and Archangel. It is as yet undetermined what will be the most commercially viable cargoes, but some of those under discussion have polluting characteristics, including oil. The possibilities here should not be underestimated. On a worldwide basis shipping is only second to land based pollution in quantity, adding approximately 40% of the total pollution to the seas. As has been demonstrated this winter, regardless of the cargoes carried, the fuel oil can present problems if ships are washed up in sensitive fish spawning areas at special times of the year. As recently seen this winter, sensitive bird areas, farms, small towns, etc. are also potential casualties, not to mention the aesthetic qualities so prevalent up here in the North. Also unfortunately present, which might be expected to take part in

freighting in the Barents Sea, are what is known as flag of convenience ships, ships sailing under flags not known for their especially strict enforcement of quality control of equipment and crews. They are known for their easy registration, low taxes and fees and hence lower freighting prices. The more notorious ones have included Liberia, Panama, Singapore, Cyprus, Somalia, Bermuda and the Bahamas. As might be expected the ships are often old and in less than desirable condition, the crews are under qualified, and international experts list Panama and Cyprus as very risky in relation to expected accidents, with Liberia listed as rather risky.

Recently the 27 January l993 the Minister of Trade, Godal, addressed this problem before the Norwegian Parliament. In addition to different measures mentioned below, Minister Godal noted that the International Maritime Organization is working on getting flag States to in fact control that their ships follow the Conventions the States have ratified. While this is positive it must be noted that the IMO has been working on this problem for a long time with less than satisfactory results. The problem is not only the developing States allowing such registers, but also, not mentioned by Minister Godal, the owners, which have citizenship from developed States. Approximate percentage ownership of flag of convenience ships, include American 30%, Hong Kong 20%, Greece 13%, Japan 11%, Germany 3%, Norway 3%, others 20%. States also have to propose some regulation on the owners regarding using these flags to achieve real results.

Fortunately, the area of shipping is that area contributing to marine pollution which is most regulated internationally, through IMO Conventions. I counted over twenty five different international conventions with application to the Barents Sea, including not only the most central environmental conventions, but also those dealing with important subjects as navigation, crewing, communication, loading, etc. These are not problem free however. In spite of special rules for new types of tanks, surveillance systems for gas, double sides and double bottoms for use in the Arctic as well as the possibility of relegating the Arctic Ocean with adjacent seas to the group of "special areas" with consequent most stringent discharge standards for the major pollutants, significant problems remain. Briefly these include with relevance to the Barents Sea that military ships are immune, including from all nations, and States have been reluctant to provide reception facilities for the deposition of oily waste and chemicals. The Norwegian Pollution Control Authorities has assured me that Norway has built these and Russia is presently constructing them. I know the problem with the one situated in Tromsø was that boats were reluctant to use them due to the fees involved. Compliance might be more successful should docking fees be lowered commiserate with the free use of pollution reception facilities. Additional problems include surveillance of illegal discharges in the Barents Sea is difficult because of the large areas, the hard weather and the

Arctic darkness. This entails problems with gathering enough evidence to support ship examinations, arrest and further action. Sufficiently advanced equipment for monitoring tank transfers of cargoes such as oil and chemicals do not exist, and the entire system of control consists of a logbook which is subject to manipulation by the captain or crew. Coastal State jurisdiction regarding marine pollution in its economic zone is unclear due to the l982 Law of the Sea Convention not being in force. Under this Convention there exist various stages of enforcement actions a coastal State can take upon polluting discharges in the economic zone including arrest, yet few States seem willing to go this far in practice. In fact it appears that Canada and the former Soviet Union were those States going furthest in enforcement actions against pollution in the economic zone, at least on paper. In practice it is difficult to say though at least one lawyer - sea captain indicates enforcement from both of these States is strict. Regarding flag State enforcement States are required to control construction, design, equipment and crewing norms for ships under their flag but have no real requirement to investigate violations of discharge norms. The most central and effective enforcement measure concerns certification of the ship in accordance with technical and operational norms, but the flag States normally are little motivated to do so. It costs money to rebuild old ships and build new ships with the new demands, and experience indicates that there lacks State control that their flag ships condition are in accordance with the rules. The classification societies which carry out this classification for the States have had in several cases as members ship owners with obvious conflicts of interest. Port States have to document "clear grounds" before they can examine a ship with regard to a breach of the convention within their jurisdiction, something which is difficult to show. Port States can upon request from other States examine their flag ships for breaches which have occurred in other places in the world if there is good enough proof, but this is again difficult since the one who forwards the demand carries the burden of proof. Port States do not have authority to examine the oil or cargo logbooks, and a port State cannot initiate a case regarding breaches outside their jurisdiction. Alleviating this somewhat is a system entered into in Europe, the Memorandum of Port Authority which allows the Parties, including Norway to examine ships compliance with the IMO conventions while in that State's ports. The problem with this system is that not all ships are inspected. Minister Godal in the same speech noted that the requirement is that 25% of foreign ships which enter Norwegian harbors must be examined. In l991 approximately 36% where inspected and in l992, 34%. In l993 it was expected to be even higher. It can be questioned whether this was enough, even taking into account the costs involved, considering the number of ships sailing with apparently faulty engines, especially in such stormy and dangerous waters. Positive measures mentioned by Minister Godal include better State surveillance of coastal areas, sea lanes, and requirements for pilots in dangerous areas. This more or less assumes an enlargement of the breadth of Norway's territorial sea

from 4 to 12 miles, something which should be done immediately, due to the increased jurisdiction over these extra 8 miles out from the coast Norway would obtain. Most States have already done this, many years ago, and a 12 mile territorial sea is accepted international customary law. Presumably this has not been done before due to the 4 mile territorial sea around Svalbard or because of the large Norwegian shipping interests. Perhaps some of the other panelists could comment upon this.

Moving on to land-based pollution (including offshore platforms) ie. that coming from the rivers, from factories though the air, etc. is worldwide the source contributing most to the overall marine pollution, approximately 50%. In relation to the Barents Sea from the West charges exist that the large Russian rivers as the Ob and Yensie carry much pollution into the Arctic which is through currents transmitted among other places the Barents Sea. On the Russian side charges exist that pollution is transported into their side of the Barents Sea from the West via the Gulf Stream. Regardless the convention which controls both this pollution and that from oil platforms for the Barents Sea is governing only on the Norwegian side. (Currently offshore development is occurring mostly on the Russian side. However, it is also occurring to some degree on the Norwegian side.) The Soviet were invited to join and according to the Norwegian Department of the Environment stated positively that they would, however according to my information did not do so. I do not know the current status regarding Russian accession. On the Norwegian side and assuming eventual Russian accession to this convention, problems still exist. For the first, environmentally conservative States such as the U.K. and the over-national EEC have in the past often blocked progressive resolutions. It is difficult to get information from the operation of the convention, and little precise information exists. The Convention's wording is little precise, encompassing mostly recommendations rather than requirements. The entire oil platform pollution source is governed by only one Article. Lists enumerating chemicals which are allowed discharged under the convention perhaps are not stringent enough for Arctic waters. What is need for this area is the establishment of common environmental standards. This should include developing common preventative standards regarding the safe design and construction of rigs and platforms and adequate personnel training. Additionally joint contingency planning is necessary, training for emergency situations and the establishment of an intergovernmental emergency group to supervise or take control over offshore accidents. This would cover not only offshore exploration and exploitation accidents but also shipping accidents addressed above. To my knowledge, while equipment seems to be in place, a contingency agreement formed and a joint group meeting, the agreement has yet to be ratified, because of problems with the maritime boundary dispute in the Barents Sea. The contingency agreement and structure should be finalized as

quickly as possible as have the other Arctic States have done before offshore and shipping developments overtake this sluggish activities.

Moving on to the area of marine dumping this is especially relevant to the Barents Sea fishing industry related to the dumping of atomic reactors, war gas, other military materials on the Russian side. The types of stories regarding the reactors seem to occur frequently on the news. My sister in California assures me that the stories have already been reported there. However, since it is probably the military responsible for this, as above the military enjoys sovereign immunity. Other problems experienced in the North Sea with direct relevance to the fishing industries include the dumping of scrap associated with the offshore oil and gas industry, something which is insufficiently controlled by the two Conventions which control the Barents Sea. Other problems include those similar enumerated above to the land-based and offshore pollution, vague phrases, insufficiently strict lists of forbidden or controlled chemicals for the Arctic, non-transparency. What is needed here as above is a much stricter control also on the military if possible. Sovereign immunity is very established in international law, however considering the seriousness of the consequences which appear to be under development presently, a new precedence should be set. Norway required the oil companies and their agents in the North Sea to pick up the scrap and other casted items from the seabed. This strict control and practice should be continued on both the Norwegian and Russian side of the Barents Sea.

Finally State responsibility under international law for damages from pollution in the Barents Sea from the sources enumerated above is covered only for ships. The limits set however money damages are too low for large catastrophes and apply only for accidents occurring in the territorial sea, not the exclusive economic zone. This is yet another good argument for Norway extending the breadth of its territorial sea. Private agreements exist, but the situation is unclear with at least two of these not functioning. For the other pollution sources, no agreements exist. Under international customary law it is recognized that States are responsible for an activity or a omission which results a legal breach of a duty. However States seem reluctant to forward or allow demands for compensation based solely upon customary law. Practically, problems of evidence exist to forward any possible claims. It can be difficult to show a causal relationship between the pollution and the damages. It can be difficult to show fault on the part of the owner, something which most States require. Thus national rules are those which control in the Barents Sea and obvious harmonization is needed.

Finally I feel that recent events seem to indicate that there is a strong possibility for Norway to become a EEC member. Like it or not, whether Norway becomes a member or not there exist EEC effects upon Norwegian commerce. The EEC

system of commonly not thought of as international law as such, but rather as a so called over-national system. However, despite the terminology, in my opinion the effects fit nicely into the theme of this section, International Problems of the Barents Sea. The extent of the effects is controversial. I cannot go much into this, both because of time and lack of competence. I think part of the controversy surrounding such discussions involving Norwegian fisheries is that the EEC law is extremely complicated and basically the EEC system is still under formation. As such very few specialists have evolved who can lead the way. This also applies in other European countries as well. I know of one English Professor who has had as a job of the side to travel around teaching English lawyers EEC law, something unbelievable considering the length of the U.K.'s membership in the EEC.

Very briefly I will try to give an overview of some of the controversial viewpoints concerning problems. For the first there is controversy how much Norway in the EEC membership negotiations can demand national control over national resources such as fish. If fish are considered a natural resource and control mean the establishment and granting of fish quotas, some consider the EEC and Norway to be on a collision course. Despite setbacks some believe that the EEC Commission has over the years gained more general control over the EEC land's fisheries to the detriment of national control. Counter arguments include the possibility of defining fish as an natural resource other than oil, gas and waterpower so as to be excluded from EEC control. Other counter arguments include that even though Norway may not control the establishment and granting of quotas it will as a fishing nation have a large influence on the fisheries control in Brussels. In addition it is argued that in spite of giving up some Norwegian Arctic cod to Spain and Portugal, Norway will be able to fish the same as under the EEA Agreement. Also Norway may be able to obtain zones or special areas such as the Shetland box where the EEC lays special limits on fishing. Fisheries Ministry Olsen notes that Norway has over a long time period managed the resources well Norway is in a special situation with especially close ties between the coastal population centers and the fisheries. These however may not be guaranteed for all time since the EEC's fisheries policies are to be revised in 2002, though there also is an interest for allowing the fisheries historically taking place in certain areas for continuing to be there. The "Råfisklag" (a Norwegian sales organization) in Tromsø sees the lack of guarantees as a central problem, the same as in l972. This view sees Norway as one of the few States protecting fisheries in the Barents Sea and the EEC, including Spain and Portugal, and Russia as more or less bankrupting existing fisheries. Problems also are expected concerning reducing the number of fishermen, with some States expecting to be required by the EEC to reduce their fisheries fleet by 40%. This is expected to be a general EEC problem for the

l990's, reducing the number of fishermen and giving them support to do something else.

In addition to these problems associated with EEC membership it is expected by some that Norway may be required to re-negotiate several hundred commercial-political agreements also including environmental and research agreements which may have application to the Barents Sea. It is argued by Foreign Minister Stoltenberg that the political steering within these areas however remain with Norway. Since agreements with third countries become binding after adoption by the EEC Council of Ministers, States will usually ensure that they have the necessary political coverage to accept the agreement. A Norwegian newspaper, Dagens Næringsliv, notes however that Foreign Minister Stoltenberg can however be voted against in such cases if Maastricht Agreement is adopted.

In short no pronouncement is meant in these difficult cases. That which is meant is to show that should developments continue as they are today, there are clouds on the horizon concerning international problems of the Barents Sea, especially in the areas of the marine environment and EEC resource control. Due to the scope of these developments it is unlikely that the status quo regarding resource and environmental management will continue as before. As such in order to meet these new challenges, it is best to be prepared to the extent possible to be able to steer the developments to Norwegian advantage.

Comments on Session IX,

Papers by Brox, Eikeland, Jentoft and Sagdahl

by

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Understanding Norwegian Fisheries must be very difficult for foreigners.

It is even difficult for Norwegians - as the various interpretations of reality here has shown.

One of the main reason for this is to quote Peter Holm - one of our finest fisheries researchers: that the institutions we have in Norwegian fisheries influence the way we think before we get a chance to think they produce pre-information - the same way as organizations in fisheries produce interests and arguments for their own continuation.

These kinds of institutions are e.g. the Fishermen's` Union, the Ministry of Fisheries, the Fishing community (the Vær), the Raw-Fish Buying Organization etc. It is difficult to imagine anything like the Norwegian Fisheries without reference to this kind of constituting institutions. Questions of legitimacy, regulation, distribution effects etc. seems to many of us meaningless without these basic institutions - they also constitute our brains like the institutions of religion and privilege made up the brains of the 17th century Norwegians.

in order to understand Norwegian fisheries, it is to some extent necessary to deconstruct it - what is the meaning of the of the present institutions governing fisheries, be they social-democratic marketing organizations from the 30-ies or liberalist/deregulatory measures from the 80-ies - neither are natural phenomena.

In addition to Ørebech's paper - which tries to establish the underlying structure of property rights - from the formation of the nation-state (1100 years ago), I find the four papers very useful in such a deconstruction effort: What is Norwegian fisheries really all about - is it so unique as some scholars and all politicians tend to believe, or can it be analyzed in terms that make comparisons possible - both across cultures and states and across management regimes for different resources?

I think Yes, and I think especially Svein Jentoft's exposition of the 3 chapters of the Lofoten fisheries (1816 - 1857 - 1897) provides insight into the

interrelationships between society and resource management. All flavors of political philosophy have been tried on these fisheries: enclosures, liberalism/free access, transferable rights, self-government etc. And the effects of all are stored in the brains of the inhabitants of the coast: the poverty of fishers, the fighting over access, the depletion of the herring stock, and the dysfunctions of the benevolent state. And all this accumulated folk knowledge can be mobilized when "they", the elites - try some of the old medicine again - in new bottles - with new and trendy labels.

Brox is quite correct in throwing in the employment factor at this stage - the exclusion of hundreds - maybe thousands of fishers from the "common property" in order to create "profitable fishing" and income equalization to welfare state standards - that is likely to hit back. And it does - although the market chaos - caused by the Russians inability to feed their own population with their quota - although this at present dampens the effect of the exclusion.

The main point here is that it still is impossible to study fishers - and to make policies for fishers without relating to the coastal societies at large. The property rights to the fish resources (private, common or state) are not "natural rights" in the sense of John Locke, but the right/duty correlate is based on a social contract. In the words of Immanuel Kant, "they stem from the collectivity. "And social contracts are recreated all the time by human action.

We then see that it will erode the legitimacy of the resource management system that an ever smaller group of fishers pocket an ever larger income from a national or at least a common property resource that is guarded against foreign thieves at great costs to the tax-payers - I speak of both the coast-guard and the Prime Minister's time.

I think this is what Brox means - I do hope this is what he means when he is flagging the slogan "Opening the commons" - the benefit of the doubt should invite the interpretation that he does not mean the "open access which equals tragedy which equals the poverty fishers of the old days. No he must mean "easy access" for honest, hard-working youth - controllable by the community. And then the group quota for the new entrant might not be such a stupid thing - especially after the parliament threw out the governments idea of "free fishing" for the coastal fleet.

Why is it for instance that after protesting vigorously against the introduction of quotas for the Lofoten fisheries in 1989 - then after only 2 years the same fishers protest vigorously against them being taken away. Is it because fishers are stupid? I think not!. Is it because there never is a "going back to the commons"? I think not! Or is it that what the confused Government White Paper really

promised was anarchy - labelled "free fishing" instead of promising self-government of resources?

And Norwegian fishers have memories of anarchy - and cannot see how that fits in with the promotion of quality - fish is now paid according to quality.

It has been said during this conference that the Norwegian fisheries management regimes just need marginal modifications. I think this is wrong and I think the 4 papers all point in the direction of the need for a reconstruction of Norwegian marine management:

Eikeland does a very good job in starting this operation by explaining to us the potential and shortcomings of the new planning tools developed through the work of biologists on multi-species management - and the need for institutional development in the extension of this. But I must admit that I am more sceptic about the visions of ecological equilibrium and system stability at high levels. When you require that the right fish is at the right place at the right time at the right temperature, that to me speaks loudly of stochastics. Multispecies catch forecasts might have the same stochastic character as weather forecasts - and might be as useful to the fishers as weather forecasts!

If they - the bio-economists do not get stuck in the equilibrium trap again, they will soon follow after the marine biologists and present models that looks ideal on the drawing board - but hardly work in praxis. As Eikeland is correctly pointing out - the crafters of institutions - the political scientists and the marine anthropologists are fast asleep while the MSM-models are being shaped.

It is tempting to ask: what kind of arbitration mechanism can we envisage when we transfer 100.000 tons of capelin from the capelin purse seiners to the young cod - or we transfer 60.000 tons of fine herring to the whales - because the international community will not allow us to starve them out. Are the economists` distribution effects necessarily an ex post residual, is it not conceivable that institutional arrangements can solve this ex ante - i.e. by issuing the quotas for the off-shore fleet in biomass units - with a different distribution of species from year to year. Or to combine the capelin fisher and the cod fisher into one and the same person.

Still it goes without saying that I find this economists approach to efficiency invigorating and promising for future co-operation on institutional arrangements.

Brox is in his paper very worried that the small incremental changes in resource management policies - and the "creeping dynamics" of the neo-liberalist experiments of the 80-ies, shall privatize the whole national heritage - and then squander it. Should not this worry in itself be enough to ask for a reconstruction

of the Norwegian fisheries management regimes - after the government's recent attempt was completely wrecked by parliament?

Sagdahl in his paper points to the breakdown of legitimacy of the present fisheries management regimes. The cost of control and policing increases beyond proportions, both for national and international fleets. The legitimacy of influence through the co-operative channel - the consultative model of Fishermen's Union Ministry of Fisheries and parliamentary Fisheries Committee - this questioned by Sagdahl. There can be many reasons for this - one could be that this institution was not primarily designed for resource management - with duties allocated to the appropriators. Maybe it was just created for participation and nothing else.

The logical consequence of shrinking legitimacy is in my view that at the local level coastal people will turn to others than the Fishermen's Union to voice their demands - to the separatist Coastal Fisher's Association, to the Anti-EC movement, to the Agrarian Party, to municipalities, to banks, even to fish processing companies.

I think you would agree that there is nothing holy about the present consultative model of resource management. If it is too slow to act flexibly in the view of rapid international and ecological (stochastic) changes - and loses legitimacy - it should rather be replaced by other instruments of participation - the institutional designers palette is full of tools.

If I should add a few reflections of my own - as the organizers invited to - it would be to entice some constructive discussion - a step away from the ritualistic stages of repeating earlier positions.

I would then recognize that we now in Norway have a historical chance to reconstruct our national marine resource management regime - probably the greatest chance since the "Law of Order" of 1816, and that if we do not use this opportunity - others will carry out the reconstruction.

That means that it will probably be necessary to enter some national compromises - one of them is between the West Coast and the Northerners, the other is between Hannesson and Brox - and I am optimistic about both.

A few point are necessary to clarify this:

1. There is a tremendous international pressure on Norway to show that it can manage the presently rich fish resources in the north better this time after all the previous failures.

2. There are promising signs of an agreement within the UNCLOS instrument about the coastal states management jurisdiction over "straddling stocks" - that crosses into international waters. A solution to this would facilitate a rebuilding of the herring stock to its previous abundance and large migratory pattern and support a high level of overall production in the North Atlantic.

3. The EC's mismanagement of its marine resources has made them very open to new models of marine resource management - according to their Fisheries Council rather sooner than in 1997 or 2002. So in the coming negotiations over Norwegian membership, there is a marked for good management models that also meets the subsidiary condition - both at the all-European, the national and at the local level.

4. Both the neo-liberalist and the more state-protective inclined school of thought, seems to agree that the big, efficient, flexible and highly mobile off-shore fishing fleet is controllable and therefore should be controlled - by national or international authorities.

That also means that if the dual fisheries management regime shall avoid marginalizing the coastal fishers, the total quota must be split between the off-shore boats and the coastal fishers (at present 27%/67%) - and that this has to be done by central political authorities - depending on the political strength of the two groups. In this case the tail-enders can never control the head-enders - and I see no workable institution other than the parliament - neither market based - nor based on self- governance. Of course the political prize of a dual system lies in the duality - there cannot be any semi-off shore boats, it has to be either or.

5. The neo-liberalist and the artisan-fisheries inclined scholars also seem to have come closer on the issue of how to govern resources for the coastal fishers. While Hannesson now speaks of "regionalization", Brox has included "area regulation" in his toolbox of solutions. I see here common ground for a national compromise on resource management based on the idea of "common property":

The king (the state) can be in an advantageous position internationally if he gives management authority over the coastal fish resources over to the coastal population - and with it gives the property rights back to the people of the coast: haløygum, mørar, hordar etc.

The fishing communities can be in an advantageous position if they themselves can be able to craft institutions that ideally can cater for both legitimacy, self-control of resource base, employment, processing, marketing etc. This is so if we to quote Brox: "believe that people in common have a capacity to develop institutional arrangements that solve their common problems."

If so , it does not really matter if these locally crafted arrangements are based on individual boat quotas, on group quotas, on the pooling of quotas in a P.O., on subdivision of territories or on date, time, gear and size restrictions. They will be different end will most certainly be complicated, but there is no need to enforce a national standard. Flexibility must be the guiding principle - both in harvesting from a stochastic environment and in organising for different cultural environments.

Neither does it matter whether we call these institutions "Coastal fishing regions", "Saami fishing zones", "Fjord basin management systems" or territorial "boxes" in the EC-sense.

Comments on Session X

Paper by Schlettwein

by

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Let me first of all state very clearly that I am not an expert on Namibian fisheries. But since we at NCFS are going to move our course for fisheries administrators from Tromsø to Namibia during the next year, I have been trying to at least get a general idea of Namibian fisheries and the main actors involved.

Secondly I would like to underline that Namibia has, since independence was achieved in 1990, succeeded in creating an impressive system of fisheries administration and development - containing some features which fisheries administrators in more advanced countries could only dream of, like e.g. the system of paying resource rent.

Thirdly, I think it is important to stress that Namibia and the Namibian fisheries is in a very special development situation, quite different from most other African countries and certainly also different from most other developing countries. This is due to at least three different factors. As Mr. Schlettwein just recently has explained, Namibia is endowed with extremely rich fishing resources, being located in typical up-welling area. Some of these resources can only be efficiently harvested by an industrial type technology. Furthermore the country has very few fishing traditions, except for some lobster and anchoveta fishing, all the main actors in fishing and processing have been foreigners. Finally the country has only two fishing harbors on the entire coast, i.e. Lüderitz and Walwis Bay, which is still partly controlled by South Africa.

Planning for fisheries development in Namibia could therefore start more or less from "scratch", with few other binding obligations other than the very important one of producing foreign exchange immediately. In this respect the development of Namibian fisheries resembles the oil & gas situation in Norway in the late 1960ies; we too had to start from scratch, giving us the opportunity to develop new structures and systems, partly different from the established traditions. With the resources run down from years of foreign over-fishing, it was evident for everybody involved that Namibia had to start out with a new and radical policy concerning the resource utilization when the new government came into power.

So, since my role is to be the advocate of the devil, I would like to point at some difficult points on the development agenda, points where I feel that Namibian

authorities should be more aware or at least alert in order to escape some very familiar stumbling blocks in fisheries development.

1. My first point is very familiar to most of you, namely the danger of relying too much on MSY-estimates worked out for single species, thus neglecting the possible interaction between them. Mr. Schlettwein has just described the cautious policy of reducing the TACs for hake, pilchard and lobster, thus allowing the resources the necessary time to rebuild. He also pointed to the fact that anchovy, fluctuates irrespectively of fishing mortality, and that cape horse mackerel may be substituting pilchard and hake, thus requiring a high fishing level (30%). This means that multiple stock harvesting considerations are being used, but I would imagine that the data and the models are at a very premature level, thus giving plenty of opportunities for unexpected developments. So far it looks like the Namibian MSY-strategy has been working, but natural variations could cause considerable changes. A robust development strategy should therefore allow for some variations. It could be very difficult to achieve a high and stable output of e.g. the hake or the pilchard resources.

2. Namibia has created a complex system, consisting of rights of exploitation, quotas and licenses, in order to avoid over capitalization. However, it is only necessary to point to Norway to make it perfectly clear that such a system is not sufficient to escape the problems of over capitalization and the dissipation of resource rent. Most often, both the fleet and the processing plants embark on a development which is very difficult to control 100%, not least in a mixed economy. Even if you control the number, length and tonnage of a certain type of vessels, like e.g. the purse seiners, the Norwegian experience indicates that the ship owners and skippers always find their ways of increasing the each capacity, normally by way of new investments e.g. in new technology. Even in a closed fishery with a certain number of participants it seems rather difficult to produce a resource rent which is available for the state. This also applies to the processing side, where increased competition leads to higher investments, thus producing a technical and economical overcapacity. However, the quota system where the users pay a certain "quota fee" should at least secure part of the resource rent for the state. (In Norway the whole resource rent is dissipated to the fishermen, thus employing more vessels and crew than necessary to catch the quotas).

3. On paper, the system of TACs for each specie and the system of controlled effort looks very nice and efficient. However, in practice all depends on effective surveillance and control. Also in this area Namibia has embarked on a very ambitious scheme, building up a coast guard type of control, with Norwegian assistance. The Namibian EEZ covers some 160.000 km2 and it goes without further saying that it is difficult to control the entire zone with only three patrol boats. Even more difficult will it be when Namibia has to pay for

the service by itself. Control and surveillance is costly and only the modest Norwegian contribution costs more than 10 mill NOK a year.

4. Learning from other fishing nations, Namibia is well aware of the necessity og communication between authorities and industry. They have therefore created a Sea Fisheries Advisory Council, to be consulted before the determination of TACs and quota allocations. However, the practical working of this council remains to see. Just like in Norway, the determination of TACs is mainly done from biological considerations, while economic and social concerns are considered to a lesser degree, and very seldom calculated. If such considerations are to play a more important part the setup of the ministry as well as the council may be changed - or at least modified.

However, the most pressing issue is the question of quota allocations, where at least part of the industry suspects the government of "inside trading". This is not an unusual complaint, but in the Namibian case it is even more important to secure a fair procedure of quota allocation, since it is explicitly stated that the resources belongs "to all Namibians" and since the receivers of quotas should be able to contribute to development, not only the selling of quotas to other interests. The borderline between legal lobbying and "insider trading" and corruption on the other hand is difficult, both in developed as well as developing countries. The quota allocation system should therefore operate from clear criteria and with complete transparency.

5. The Namibian fishing industry needs a modernizing effort; the fleet is old and partly run down and the industry (in Walwis Bay) is old and partly run down. Finally the whole industry needs an organizational renovation. Such a modernization is difficult from within. Namibians lack the necessary experience and the South African partners on shore are lagging behind. The new technology has to be imported from abroad, in this case mainly from Norway and Spain. But even if modernization is necessary, the type of technology and the process is partly a matter of choice. Increased production can be achieved, even if Namibia as such receives less for their fishing resources. This is especially the case in a country which lacks all the supplying industries. This means that most, if not all, modern machinery has to be imported and often also the technical know-how and maintenance. If Namibia has to pay for all the new equipment in foreign currency, the increased production will for years be needed to pay for loans and interests.

Hence the modernization of the Namibian fishing industry has to consider that lack of employment is the biggest economic problem in the country and furthermore that salaries are generally very low. Even a modernized fishing industry should therefore employ considerably more people than e.g. the fishing

industry of developed countries like Norway, Island and even Spain, where salaries are considerably higher.

6. Up till 1990 the marketing of Namibian fish followed the established pattern of fishing: the foreign fleet, headed by Spanish factory trawlers, produced their catch onboard and brought the catch back home. On the pelagic side the SA-owned canning industry produced mainly for the SA market and some other low price markets, while the oil- and meal industry produced standard products for the world market. Only the small lobster industry delivered a sizeable part of the products to the home-market, a very limited market indeed with only 1.3 mill people, mainly beef-eaters and with extremely little buying power (5% of the population receives 70% of GNP).

In these days new joint ventures (JV), mainly with Spanish or Norwegian interests are trying to establish new product lines on shore and following next is an effort to develop new markets. The Spanish JV - companies can bring hake into the Spanish market, while the Norwegian interests can bring new products to US, Japan and Europe. Such a development is absolutely necessary, if Namibia is going to be more than a producer of raw material and cheap, standard products. But this new situation is also very vulnerable on the resource side. Import may be accepted on the condition that Namibia grant easier access to fishing, a complex witch is very familiar in the Norwegian context. The trade-off between market access and resource access has to be considered explicitly in the Namibian fishing strategy.

7. Finally I should like to make some comments on the Norwegian participation in the development of Namibian fisheries. As some of you are aware, Norway through NORAD has been heavily involved in the development efforts. It started out with funding the consultancy work preparing the Namibian fisheries laws. Later on NORAD has been involved in the research concerning fishery resources, through the research vessel "Dr. Fr. Nansen" performing resource surveys in Namibian waters since 1990. (The survey program for the new "Dr. Fr. Nansen" is also heavily concentrated to Namibian waters). Furthermore is NORAD the most important sponsor of the control and surveillance-scheme now being developed in Namibia. Here NORAD is participating with funds and experts, and even a Norwegian patrol ship. Finally is NORAD involved on the industrial side, granting credit (soft loans) to a Namibian/Norwegian joint-venture in the fishing industry, planning to set up a new freezing plant in Luderitz.

Norwegian private investors are also becoming heavily involved in the Namibian fishing industry, primarily through the different companies controlled by the west-coast centered group Fiskerstrand, Eldøy and Huuse. To put it

frankly: Wherever you go in the Namibian fishing industry, you meet a Norwegian!

There is nothing wrong in this particular situation. Norway has been supporting Namibia long time before independence and it is only logical that we participate in developing the productive potential of the country. On the other hand, Norway (and NORAD) has some valuable and interesting experiences in resource surveys, control and surveillance as well as practical experiences from industrial fishing and processing. Last, but not least, Norway was not involved in the unscrupulous fishing prior to independence, when the rich fishing resources were severely depleted during ten years of virtually unregulated harvesting.

But this particular situation calls for special attention, both on behalf of NORAD and the private operators in the fishing industry: There are few shortcuts! Resource data belongs to Namibian authorities and cannot be forwarded to Norwegian operators directly. The control- and surveillance service should treat Norwegian/Namibian ships and factories exactly the same way they treat other participants, and Norwegian private operators should not use the Norwegian public participation to press for larger quotas, to mention but a few of the alternatives which may arise.

The situation calls for transparency, where it is clear to everybody who is doing what and why. Or to put it more bluntly; everybody involved should be very aware of which hat they are wearing. If not, both Namibian and Norwegian authorities risk falling in disrepute, being accused of "inside trading" and "special connections".

Finally, Norwegian observes have raised the question: Is the Namibian engagement in line with the general development guidelines of NORAD, concentrating on "basic needs" and helping "the poorest of the poor"? The Namibian companies and their owners are definitely not "the poorest of the poor" but if Norwegian assistance can contribute to the sustainable utilization of Namibian fish resources, the result could very well contribute to such goals, through

-the channeling of surplus income to reproductive sectors like health and education, and

-generation of employment possibilities both on shore and on sea.

As I have tried to illustrate through my very brief comments; Namibia has a very good starting point, the country has accomplished a lot during less than three years, but some bottlenecks remain if the abundant fish resources outside

Namibia should be used "for the benefit of all Namibians, both present and future".

On The Problem Of Terminology

by

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This conference has focused on the problem of law and the management of renewable resource systems. Making law a central theme necessitates some understanding of Norwegian legal terminology in the field of property rights regimes.

Legal terminology

Norwegian law recognizes two main types of ownership-situations, single ownership and ownership in common[6]. The actor who holds the rights and duties of ownership is the legal person. The legal person is either a real person, a recognized type of private corporation, or a recognized type of public body. The rights and duties of single ownership, according to the law, do not depend on whether the owner is an individual or a private or public body of any kind. Any differences in how the owners manage their resources are supposed to be caused by differences in the priorities of the owners, the property rights regime is the same. Ownership in common is different from single ownership mainly by special provisions taking care of decision making procedures among the owners. In general both single ownership and ownership in common by the three traditionally recognized types of legal persons are considered unproblematic (even though the problems in any particular situation may be formidable).

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[6]According to Lawson and Rudden (1982:82-84) the term "ownership in common" is the best approximation. English property law recognizes two types of co-ownership: joint ownership and ownership in common (for land the terms are joint tenancy and tenancy in common). The difference between them concerns what happens to the property on the death of one co-owner. Joint ownership implies that one joint owner's share accrues on his death to the other joint owners, while ownership in common implies that on the death of one co-owner his share passes to his successors. The joint ownership situation is ideal for the functioning of trusts and is said to apply to the management of property while ownership in common applies to the beneficial enjoyment of property.

TYPES OF OWNERS AND OWNERSHIP

Types of owners
public body
private body
individual

Types of ownership

single ownership	one legal person holds title
ownership in common	more than one legal person holds title

However, in our situation a fourth type of owner and a third type of ownership is of particular interest. The new type of owner will be called a quasi-owner and the new type of ownership will be called quasi-ownership, in order to emphasize that they are not legally recognized as such but that they share important characteristics with real owners, and real ownership.

One may say that the right to use some resource is "quasi-owned" if it is inalienably attached to legal persons in their capacities of being residents in an area or citizens of a state. Besides inalienability, the "quasi-ownership" of some resources is different from ordinary ownership in the protection afforded by society. It depends less on formal law and more on customary law and continuous use than ordinary property rights.

The quasi-owner is best thought of as an estate in its capacity as a cadastral unit[7]. An estate is not a legal person, but the right to use some particular resources can be inalienably attached to an estate. The ability of estates to hold resources in quasi-ownership is the basis for calling them quasi-owners. The right to resources held in quasi-ownership may be annulled (extinguished), but not transferred independently of the estate[8]. Selling the estate implies selling those particular rights as well. This kind of relationship between a farm and some particular right has existed for a long time in Norway. It could be in the

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[7]A cadaster is a public register of all real property. It defines title to land, identifies the property unit, and defines the boundaries of the various units of land, and it establishes the value of them.

[8] Since individuals are not bought and sold, transfer of inalienable rights of persons is impossible. But they may be annulled by loss of citizenship or exclusion from particular areas.

form of holding a certain proportion of all "assets", the ground itself included, or it could be in the form of the right to use some particular resource. The latter situation implies that use rights are separated from ownership to the ground. Separation of the right to use particular resources from the title to the ground is very common and can be found in a variety of forms. Thus various kinds of use rights to resources like pasture, wood, hunting and fishing have been attached to farms in this way[9]. Recently a similar situation has arisen in the relation between fishing vessels and fish quotas (the registry of fishing vessels performs the same role as the cadastral register).

The quasi-ownership relation is the basis of the legal construction which is called "Allmenning" in Norwegian. Literally the word "allmenning" means "owned by all" and is used to denote an area which can be used freely by all. In this interpretation it has the same meaning as the commons, but in legal terminology the word has taken on a specific and precise meaning. Here it means an area, most typically forests, mountains or other outfields, in which the members of a local community or some group of farm estates hold, in quasi-ownership, most of the rights to most of the resources. The title to the ground is normally held by the state (State-allmenning), but in a few cases it is held in common by farming estates (Bygde-allmenning). The rights held by the persons or estates using the resources of the area designated as a commons, are held in joint quasi-ownership[10] and separated from the ownership of the ground. They are specific in the sense that after the rights holders have exercised to their satisfaction their traditionally established use rights, the remainder can be enjoyed only by the holder of the title to the ground. This is particularly important in relation to new uses of the ground. Thus the right to exploit waterfalls for the generation of hydroelectric energy goes with the ground. There are many local manifestations of the commons with state-commons and bygde-commons as the main forms.

A second version of the separation of use rights from the ownership of the ground is found in the so called "allemannsrett" (literally "all men's right") and could perhaps be translated as public rights. This right is restricted to real persons, is established by residence in the state and applies to all ground with some restrictions for cultivated land and built up areas. Right of way, camping, hiking or picking of wild berries are examples of this. Rights to some kinds of

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[9] In Roman law an inalienable right to enjoy some asset was called usufruct.

[10] It is joint quasi-ownership in the meaning of joint ownership (see note 1). If one quasi-owner ceases to exist his rights go to the other quasi-owners and not to his successors. This implies e.g. that if a small-holding ceases to be a farm (becoming for example a vacation resort) its rights in the commons go to the other quasi-owners.

hunting and fishing are public rights, but restricted to state commons. Public rights can be said to be held in quasi-ownership in a way similar to the rights enjoyed in state-commons or bygde-commons. Public rights comprise, however, fewer types of enjoyments and they have weaker protection (probably since their economic value is low for any one individual or impossible to estimate).

A third type of restriction on the ability to enjoy a right and the area where it applies, is the rights of access to pasture and other necessary resources for the reindeer herders. The right to hold reindeers is restricted to Norwegian citizens of the Saami people and, since 1. July 1979, it also depends on either being active as a reindeer herder on that date or having proof that at least the father or mother or one grandparent of the person was an active reindeer herder. In principle their rights of access to the necessary resources are independent of ownership of the ground whether the ground is owned by the state, or by any other legal person singly or in common. Their rights apply only within the 10 reindeer herding districts defined by law in 1894 and depend on continuous use of it from "time immemorial".

Social science concepts

The various names for jointly used natural resources: communal property resources, common property resources, common pool resources, res nullius, etc., do not specify a type of ownership situation for the resource, only its use. They all convey a sense of access for everybody to a finite resource with all the problems this entails for equity of distribution and the sustainability of utilization.

The labels most frequently used do not distinguish clearly between two essential characteristics which both go into the definition of what type of use situation we are dealing with: divisibility of the resource,[11] on the one hand, and excludability of the users, on the other. The characteristics of divisibility and excludability are not either/or characteristics. Once we leave the pure cases of indivisible and non-excludable goods (pure public goods) there will be degrees of divisibility and excludability until we again approach a pure case of the perfectly divisible and excludable good i.e. "money". Divisibility of a resource

[11] Several concepts are used to denote essentially the same characteristic. The concept of subtractability has been used to focus on physical divisibility (Ostrom and Ostrom 1977). Focusing on the process of appropriation the concept of rivalry has been used to denote consequences of divisible benefits (Cornes and Sandler 1986). In studies of production systems divisibility is used to characterize the system (Zamagni 1984). Economies of scale may depend on indivisibilities in the production system. Here divisibility is used to cover all these situation where something may or may not be split into two or more parts.

and excludability from a resource are usually discussed in terms of technological possibilities in relation to physical characteristics of the resource. What seems to be recognized less often is that both divisibility and excludability will depend on moral choices and social feasibility as well as physical characteristics and technical feasibility[12].

If a resource has the characteristic of being divisible into resource units [13] (the benefit is divisible) which can be removed (appropriated) one by one by the resource appropriators and exclusion of individual appropriators is technically feasible, the question for the lawmakers and politicians of a society is whether to exclude, and if exclusion is wanted, how to exclude people from the group of legitimate appropriators. The principle of excludability and the degree, to which it may be applied, is a problem of political and moral choice with long lasting consequences both for a resource system and for the society.

In the present book we assume divisibility of benefit, but divisibility may also be a concept applied to other aspects of the resource. Renewable resources are part of an ecosystem. The ecosystem properly identified will be indivisible, and the rate of renewal, the productivity of the resource, will depend on the protection of this indivisibility. There the divisibility of benefits and the indivisibility of the ecosystem create the management dilemma modelled by Hardin as the "Tragedy of the Commons". The incentives in a strictly individualized process of appropriation will not include the protection of the productivity of the ecosystem. The various institutionalized systems of common property rights which have evolved, change the system of incentives in a direction where it is possible to safeguard the productivity of the ecosystem.

The same institutions which govern appropriation from indivisible resource systems may, however, also be used in the management of appropriation from divisible resource systems. Some of the differences of opinion in the ongoing debate about common property rights regimes may come from not clearly distinguishing between divisibility of benefit and divisibility of the resource system.

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[12] Social choice of indivisibility is closely tied to excludability in interesting ways. Choosing indivisibility and excludability means that all the benefit go to a single appropriator. The inequality of distribution will be maximized. Concern for distributional consequences and choice of excludability will most certainly entail divisibility of benefit, hence the restriction to divisible resources for the present work.

[13] The case where the benefit of the resource is indivisible, either because of inherent characteristics or appropriation technology, will not be commented on here.

The legal terminology in the light of social science

The indivisibility of the resource and the divisibility of benefit in conjunction with societal goals of equity of distribution and sustainability of resource productivity, define the boundaries of the management problems we are concerned with. The degree and character of excludability is one of the parameters of choice in the solution of the management problem.

The legal terminology seems to be largely independent of this problem. In a normal situation with single ownership or ownership in common by legal persons, the criteria of exclusion are well defined, and a properly maintained cadastral system is supposed to take care of the definition of the resource units subject to ownership. Our concern here is the less clearly defined situations where both the characteristics of the resource may be unclear and the distribution of access to the resource may be an issue. The legal practice around public rights ("all men's rights") and joint utilization rights to various kinds of resources seem to be those of most interest.

From the goal of equity in distribution it follows that access restrictions should be as mild as possible. In those cases where legal practice does restrict access to some resource system the leading principles are the legal right of residence, geographic boundaries and geographic proximity. In a situation with indivisibility in the resource system, the boundaries of the management problem will be defined by the (minimal) boundaries of a productive resource system, and access problems must be related to this area. The geographic boundaries will not be a parameter of choice for the lawmakers. This leaves residence and proximity as the established principles for granting access rights. If maximum access to the resource system is desirable, both residence and proximity or some combination of them may serve without leaving it open to free access.

The problem of securing sustained productivity of a larger resource system characterized by indivisibility does not seem to have been solved by any legal system in a situation where technology makes depletion of the productive stock feasible, except by transferring ownership rights to one single agent, usually a public body. But the problems of contracts between principal and appropriation agents remain and are not fundamentally different from the problems facing a lawmaker wanting to maximize access within the constraint of some maximum sustainable yield.

For the lawmaker, the following problems suggest themselves (some of them will be the same for the single owner leasing use rights)
a. a legitimate initial distribution of access (for the single owner this may seem unproblematic, but the initial distribution may affect later policing costs)
b. what are the criteria of getting access at some later time (to what degree should the rights of access be alienable, inheritable and/ or handed out by the lawmakers) (for the single owner this will not differ from point a.)
c. how to register those with access and police their access
d. among those with access how does one limit the number of resource units appropriated (by quotas, by taxes, by self-enforced regulations or by some other means?)

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