UiO : Det juridiske fakultet

Fisheries Legislator Approach (FLA)

- A Framework for Developing Sound and Coherent Fisheries Legislation – a Norwegian Case with a Canadian Outlook

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Doctoral Thesis submitted November 2021

For the Degree of Philosophiae Doctor (PhD)

Acknowledgements

This doctoral thesis marks the end of a long journey from my childhood growing up and surrounded by the ocean and seaweed, dried cod, fishing boats and hard-working coastal people in Lofoten, up to studying statutes, regulations and theories on how our common marine resources should be managed for future generations and submitting a doctoral thesis at the historical grounds of the Law Faculty in Oslo. It also marks the beginning of a new journey.

I have at the same time not travelled alone. There are many people that in different ways have supported me, inspired me and made every day enjoyable and filled with laughs and silliness. First, this project would not have been realized without the vast support and supervision of Kjersti E. T. Busch and Kriss Rokkan Iversen and SALT. You believed in me and the project, and you gave me the opportunity to follow my dream to move home to Kabelvåg and continuously learn new things. Thank you both, and a thank you to all my friends and colleagues in SALT, not least my creative partner in crime, Niclas Risvoll, who helped me transform my ideas and sketches into visually innovative figures. I look forward to future endeavours with you all. I also would like to thank the Norwegian Research Council for the support through the Industrial PhD program and scholarship for field work in Canada, and the Faculty of Law at the University of Oslo for supporting this project.

The thesis, and my academic expansion into legal method and research, would not have been possible without my supervisor Jon Christian Fløysvik Nordrum. I am deeply grateful for the support and dedication during my master thesis work, for sparking my research joy and curiosity, and for inspiringly, patiently and generously guiding me through four years of exploring theories and methodology during the doctoral project, but also with an eye for nitty gritty details, relevant criticisms and the value of mixing disciplinary approaches. Inger Johanne Sand has also been an indispensable and motivating support to the project from the very beginning. Thank you for your mentoring and for adding theoretical perspectives that made the thesis find its foundation and direction, but also for keeping my ideas grounded and reminding me of the real-world relevance and our common future challenges.

My gratitude extends to the Evaluation Committee, professors Jørn Øyrehagen Sunde, Nigel Bankes and Irene Dahl, for their thorough assessment and valuable criticism, and to the fruitful comments by Malcolm Langford at my midway assessment that made me rethink the theoretical direction of the thesis.

Many people at the Law Faculty at the University of Oslo made this project happen. Thank you Øyvind Henden for all the indispensable support and flexibility over the four years. I also would like to thank Kirsten Sandberg, Guro Frostestad, Charlotte Aslesen, Ketil Frantzen, Katrine Hoel Paulsen, Gørill Arnesen, Karen Danbolt and Rebecca J.F. Bergstrøm for administrative, librarian and technical support. Thank you Synnøve Ugelvik and Anders Løvlie for motivational annual PhD-candidate conversations and other fun stuff.

Many people in the broader natural resources academia have inspired me throughout the project. Thank you Kirsti Strøm Bull for your warm guidance and support. I am grateful that you and Hans Jacob Bull contributed to the project and participated at an interdisciplinary seminar on fisheries governance hosted by SALT in Svolvær in 2018. Also thank you Jannike Falk-Andersson for participating at this seminar and for nice years and support working together in SALT. I would also like to thank Jahn Petter Johnsen, Bjørn Hersoug and Gerd Kristoffersen for other valuable input and discussions relevant to my thesis. My gratitude further extends to Endre Stavang for the hosting of a Ostrom seminar at the Law Faculty and other support in relation to the Research Group on Natural Resource Law, and to Marit Halvorsen for giving me an opportunity to present my material in a legal historical lunch that was important for the thesis direction. I would also like to thank Benedikte Moltumyr Høgberg for informal mentoring and fisheries policy discussions and Jukka Mähönen and Ivar Alvik for valuable comments to my essays. Thanks to Froukje Platjouw for nice conversations and introduction to your research interests, and to Bjørn Kunoy at the University of the Faroe Islands for fueling my academic interest and reading and providing input to the thesis introduction.

During the thesis years I got to know many other PhD Candidates. Thank you Gunnhild Storbekkrønning Solli for valuable discussions and providing input to my thesis introduction, Bård Sverre Tuseth for your guidance on formal requirements and introduction to legal historical sources and Tomas Midttun Tobiassen for providing important reflections relevant to my concluding chapters. I would also like to thank Ingrid Birgitte Lund, Birgit Hellesnes, Ingvild Bruce, Nils Gunnar Skretting, Henriette Tøssebro, Nora Naguib Leerberg, Rose Manzo, Karl Inge Rohde and Jørgen S. Skjold for nice companionship during the PhD-period. I would also like to thank master student Shahin Fashkhami for helping me with the bibliography and some other formalities.

In the project period I got the opportunity to spend six months as a visiting researcher at Peter A. Allard School of Law at the University of British Columbia (UBC), in Vancouver. This would not have been possible without the support of Professor Douglas Harris. Thank you for the welcome, generosity, inclusion and valuable conversations during my stay. My gratitude extends to Associate Professor Jocelyn Stacey for giving me valuable insights into Canadian administrative law, and to Dale Marsden for valuable support. To my respondents in Fisheries and Oceans Canada (DFO) and the fishing industry, this would also not have been possible without your generous participation and dedication to future fisheries management.

Also, gratitude and love to my Canadian family of Elaine, Toby, Erika, Kevin, Rudy, Stale, Kalle, Luciette, Ila, Robert, Glenda, Dane, Kevin, Meghan, Makai, Chad, Lynne, Maureen, Rick and family for all the joy up through the years, and for including me in your lives and making me feel partly Canadian. There are also many lifelong friendships made from my Canadian years, but I especially would like to thank Roxanne LaBoucane, who sadly left us too soon, for her friendship.

I have also had the opportunity to learn fisheries, legal method and gain vast experience of the diverse Norwegian fisheries through eight years in the Norwegian Ministry of Industry, Trade and Fisheries. There are many persons to thank in the Ministry, but Jan Frederik Danielsen gave me the opportunity to work there and introduced me to the fisheries administration, and Vidar Landmark sparked my first legal interests and included me in complex legislative processes. Thank you both for the support and inspiration. I would also like to thank Ingrid, Martha, Kjersti, Lisa, Hilde, Sverre, Rune, Dag Ove, and Bernt for all the good times in the Ministry, and later adventures outside of it. My move from the government to the private sector and corporate law for a few years would not have been possible without the support of Bjørn Sørgård and Ida Espolin Johnson. Thank you for believing in me and providing me with valuable perspectives and many laughs. I would also like to thank Sarah-Anne and Lilly for our great adventures during those years, after and for more to come. My studies in Tromsø also made me the person I am today. Thank you Ola Flåten, for the excellent supervision during my first master thesis. I also made a lot of friends that in different ways have supported me and shared moments up through the years, so thank you Marianne, Carina, Hege, Reidun, Heidi, Tone, Øystein, Maiken and not least Signe, who has also been my personal mentor and inspiration for a long time.

My family and friends growing up have always been my foundation in life. So many thanks to all, especially to my Hanna, Jostein, Julius, Mille and Gustav, and the whole Walsøe family, who have always been around. Thank you to all my aunts, uncles and cousins and extended families for easter-competitions and other childhood memories, dinners and special occasions, with a special thank you to my cousin Karianne for our Oslo-time together, and to my cousin Lindi for our nice visits up through the years. Also thank you to my US family for nice visits and encouragements after you entered my life, with a special thanks to Colleen, Dennis, Geof, Erin, Bear, Locke, Beth and Taha.

A big thank you to my mother and father, Anne Kari and Bernt Sofus, for their endless love, support, sharing of wisdom and encouragement. This gratitude extends to my brother Sven Herbrand and sister-in-law Olga, her family and little Emma.

Lastly, this project would never have been finished without my husband John and Dyrekatt patiently by my side. Words cannot express what you mean to me, so I conclude by thanking you for the unconditional love and support while I have been in the PhD-bubble, and I look forward to our future life together.

Kabelvåg, April 2022

Guri Kristin Hjallen Eriksen

In loving memory of both
Olav Eriksen (Kabelvåg, Norway)
and
Martin Eriksen (Prince Rupert, Canada).

Overview contents

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List of abbreviations

BC	British Columbia
CAD	Canadian Dollars (currency unit)
CBD	Convention on Biological Diversity
CPRs	Common Pool Resources
DFO	Department of Fisheries and Oceans Canada
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EEZ	Exclusive Economic Zone
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FLA	Fisheries legislator approach
ICES	International Council for the Exploration of the Sea
IMR	Norwegian Institute of Marine Research
ITQs	Individual transferable quotas
IUU-fisheries	Illegal, unregulated and unreported fisheries
IVQs	Individual vessel quotas
MEY	Maximum economic yield
MSY	Maximum sustainable yield
MPAs	Marine protected areas
NEAFC	North East Atlantic Fisheries Commission
NGO	Non-governmental organization
NOK	Norwegian kroner (currency unit)
OECD	Organization for Economic Co-operation and Development
PTD	Public Trust Doctrine
RFMO	Regional Fisheries Management Organisation
SDGs	UN Sustainable Development Goals
SQAs	Structural Quota Arrangements (Norway)
TAC	Total Allowable Catch
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNFSA	United Nations Fish Stock Agreement

Central terminology, expressions and translations

Activity requirement: A statutory requirement of a previous activity on or with a fishing vessel to be issued a commercial licence in Norway. Has similarities to **owner-operator policies** in Atlantic fisheries in Canada. These two terms are used to differentiate the two arrangements.	Aktivitetskravet
Administrative vessel owner: A term for a vessel owner that fulfills the activity requirement without working physically on the vessel	Administrerende reder
Annual permit: A permit to access limited entry coastal fisheries in Norway	Deltakeradgang
Basic quota: A term often used when referring to the quota entitlements of a concession or annual permit in Norway	Grunnkvote
Bill Proposition: Document where a Bill is presented to the Parliament that has authoritative weight in Norwegian legal method	Lovproposisjon/Odelstingsproposisjon
Catch logbook	Fangstdagbok
Coastal vessels (fisheries): Smaller vessel of diverse lengths, but that fish with nets, line, hook, Danish seine, and mostly inshore fisheries in Norway	Kystfartøy/kystfiskerier
Co-management/participatory governance: These terms are used interchangeably in the thesis regarding user participation when referring to various forms of operational involvement and delegated responsibilities to the harvesters in the management of the fisheries.	Co-managment/medforvaltning
Commercial permit: A mandatory licence for all commercial fishing in Norway	Ervervstillatelse
Common shared resources: A term used in the thesis to express the right to the wild-living marine resources under the Marine Resources Act section 2	Begrep brukt i avhandlingen om havressurslova § 2 som har ordlyden: "Dei viltlevande ressursane ligg til fellesskapet i Noreg."
Concession: Licence to limited entry offshore fisheries in Norway	Konsesjon/tillatelse havfiskeflåten
Delivery duties: Certain trawlers have obligations in licence conditions to deliver raw material to certain regions	Leveringspliktene
Duty to land catches: Norwegian specific rule of conduct	Ilandføringsplikt

Ministerial Executive Orders (Executive orders): Legally binding orders to a subordinate agency in Norwegian law	Regjerings- og departmentsinstrukser
First-hand sales: All sales from vessels in first-hand	Førstehåndsomsetning
Fisherman Registry: A registry of Norwegian commercial harvesters	Fiskermanntallet
Fishery licence: A new unified licence for both coastal and offshore vessels in Norway	Fiskeritillatelse (etter lovendringer i 2021)
Fishery Registry: A registry of all Norwegian commercial fishing vessels	Merkeregisteret
Hearing: A formal consultation procedure under the Public Administration Act secton37 where relevant stakeholders are notified and heard when new regulations or amendments are proposed	Høring etter forvaltningsloven § 37
King in Council: A weekly meeting by the whole cabinet as a collective decision-making organ and chaired by the King or Queen	Kongen i statsråd
Landing note: A mandatory document filled out upon landing of catches.	Landings- og sluttseddel
Licences: Referring to a system in which public permits to harvest are used more generically (can include commercial licence, concession and annual permit)	Tillatelser fra myndighetene til å fiske kommersielt mer generelt
Nationality requirement: A Norwegian specific requirement of majority ownership of vessels	Nasjonalitetskravet
Norwegian Coastal Fisherman Association	Norges Fiskarlag
Offshore vessel (fisheries): Larger vessels that fish with trawl, purse seine and some longliners	Havfiskefartøy
Order in Council: Decisions made by the cabinet as a collective decision-making organ in the King in Council (see above)	Kongelig resolusjon
Parliament Committee: Relevant committee in the Parliament addressing a Bill proposition or other matters	Storingskomité
Preparatory works: A general term for documents in preparation for a Bill in a Norwegian context that have authoritative weight, including Bill propositions and Parliament recommendations	Forarbeider

Policy advisory commission: A special appointed commission mandated to examine specific questions/issues for the Norwegian government	Offentlig nedsatt utvalg til å avgi utredning om spesifikt tema i form av en Norsk offentlig utredning (NOU).
Primary legislation: The statutes adopted by the Norwegian and Canadian Parliament	Formelle lover
Purpose clause: A provision in a statute setting out the purposes of it.	Formålsbestemmelse
Recommendations to the Parliament: Recommendations from Parliament committees to the plenary of the on a Bill proposition, White paper or other cases	Innstilling fra stortingskomiteer
Regulations: Secondary legislation with authority in statutory law in a contemporary context, but also referring to various form of rules laid down in the Norwegian historical context.	Forskrifter (nåtid), men også brukt som betegnelse på rescript, anordning, forordning, motbok og kongebrev i den rettshistoriske delen.
Residence requirement: A residency requirement of certain share of crew and captain in Norwegian participation legislation	Bostedskrav
Resource base: The actual fish that can be harvested with a specific vessel on background of the share it is entitled to specific species in the concession/annual permit	Ressursgrunnlag
Resource control: A generic term for monitoring, control and enforcement of resource outtake and compliance with regulations	Ressurskontroll
Regulatory Council: The former advisory board with stakeholder participation discussing annual regulations	Reguleringsrådet
Regulatory Meeting: The annual meetings hosted by the Directorate with broad stakeholder participation to discuss regulations	Reguleringsmøte
Royal Assent	Kongelig sanksjon av lov
Quota factor: A licence holder's share of group quotas (quota factor group) after amendments of fisheries legislation in 2020. It also has a historical origin. It generally refers to quota shares, but the term will be elaborated on in the different contexts in the thesis.	Kvotefaktor (etter endring av fiskerilovgivningne i 2020)
Quota accounting: The checks and balances of harvest of fish under a total allowable catch (TAC)	Kvoteregnskap
Quota ceiling: Limits how many structural quotas that one vessel can hold with use of structural arrangements	Kvotetak

Secondary legislation and practice: Subordinate decision making	Forskrifter og enkeltvedtak
Structural quota: A previously basic quota that becomes a structural quota under the use of structural quota arrangements (SQAs)	Strukturkvote
Structural quota arrangements (SQAs): The market-based arrangements for merging licences and quotas in a Norwegian context	Strukturkvoteordninger
Supervisor (used interchangeable with overseer): Personnel appointed to oversee and control fishing activities. Terms are mostly used in the legal historical chapter. Will be specified when from within the industry or public officials.	Oppsynsmann/tilsynsmann
The Directorate: A subordinate agency under the Norwegian Ministry of Trade, Industry and Fisheries	Fiskeridirektoratet
The Ministry: Any Ministry in Norway responsible for fisheries management	Departementet som til enhver tid er ansvarlig for forvaltningen av kommersielt fiske
The Minister: Any Minister for Fisheries, Oceans and the Canadian Coast Guard in Canada	Fiskeriminister i Canada
Captain/Vessel master: These two terms are used interchangeably for any responsible person on a vessel. I will point out when the Norwegian terms have a specific legal significance.	Skipper, fartøyfører og høvedsmann
White paper: A document from the government to the Norwegian Parliament presenting new policies	Stortingsmelding

Figures and tables

PART I EQUIPPING THE SHIP FOR THE JOURNEY

1 Introduction to topic, objectives, theory and structure

1.1 The study object and main thesis objective

The *study object* of this thesis is domestic fisheries legislation, with *the legal framework* for *commercial fishing in Norway*[1] as the case. A main focus will be on the function of the legislation and the mutual interaction between the different norms. Fisheries legislation will be studied as a set of rules, consisting of many sub-systems. In this monograph, the Norwegian system will be more thoroughly dissected through different perspectives, but the main components are rules on *how*, *where* and *what* to fish (mainly pursuant to the Marine Resources Act), how *first-hand sales* must be conducted (pursuant to the Fish Sales Organization Act[2]), a licencing system which determines *who* can fish and under which conditions (mainly pursuant to the Participation Act), and an extensive enforcement and sanction system (all above statutes and some provisions in the Coast Guard Act[3]). These are sets of rules that are complex, idiosyncratic, highly entwined, rooted far back in time, under-scrutinized and with a widespread use of sector-specific terminology that is opaque for someone not working on these issues on a daily basis.

The *main objective* is to gain new insights on how the *design and content* of the legislation can contribute to a better performance of its main objectives. This will be done in a twofold exercise. First, an initial step in the construction of a *dynamic* and *analytical framework* for *normative analysis* of fisheries legislation is conducted by using relevant theory and material

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1 By "commercial fishing in Norway" all forms of commercial fishing pursuant to lov 6. juni 2008 nr. 37 om forvaltning av viltlevande marine ressursar (Marine Resources Act) and lov 26. mars 1999 nr. 15 om retten til å delta i fiske og fangst (Participation Act) by Norwegian vessels under Norwegian jurisdiction are included. Therefore, the topic does not include e*xploitation* of marine genetic resources, *hunting* for marine mammals such as seals and whales and fishing for *anadromous salmonids* (as salmon on trout). Footnotes are in the thesis used as documentation, some cross-referencing, suggestions for supplementary readings, to further elaborate the topic in question or to specify, explain or translate concepts, terminology and notation. Footnotes should therefore be used actively, but are not needed for text coherence per se.

2 Lov 21. juni 2013 nr. 75 om førstehandsomsetning av viltlevande marine ressursar (Fish Sales Organization Act).

3 Lov 13. juni 1997 nr. 42 om Kystvakten (Coast Guard Act).

collected in a *legal historical inquiry* and a *comparative case study* between selected fisheries in Norway and Pacific[4] Canada to identify and synthesize on how we legislate fisheries, whether there are any general characteristics across jurisdictions, which lenses legislation could best be viewed through and how legislation can be improved. This is a framework I will refer to as the *fisheries legislator approach (FLA).*

The theoretical point of departure of this exercise is elaborated in chapter 1.3.1, and the approach is further conceptualized in chapter 2.4, but a main proposition is that the limits and opportunities for change in a current legislative framework can be better understood by including legal historical and cultural perspectives. It is the identification and reflection of a Norwegian FLA that constitutes most of the synthesis of the thesis, but the idea is also that the approach can be applied to any jurisdiction. The comparative outlook to Canada will therefore run through parts of the thesis. Second, the approach will be tested on one specific research question in a Norwegian context, but this is to be regarded as a preliminary exercise. The question to be tested is: How can the right to the wild living marine resources of Norwegian society as a whole under section 2[5] of the Marine Resources Act be operationalized and strengthened? This rather complex question is further introduced in chapter 2.5. Notwithstanding, the idea is that the approach can be a point of departure for analysis of any normative question concerning fisheries legislation.

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[4] I will generally use the term "Pacific" when referring to fisheries on the West Coast of Canada outside the province of British Columbia (BC). I will use the term "Atlantic" when referring to fisheries on the East Coast of Canada.

[5] In an English version of the Marine Resources Act found at the website of the Directorate of Fisheries (the Directorate), see appendix I, section 2 is translated into: "[t]he wild living marine resources belong to the Norwegian society as a whole." Norwegian wording: "[d]ei viltlevande marine ressursane ligg til fellesskapet i Noreg." The heading of this provision in this English version is translated to "[r]ights to the resources," but I assume my own translation of the heading with the wording: "[t]he right to the resources," which I find to be more in line with the Norwegian wording of: "[r]etten til ressursane." All translations of quotes or other words from English to Norwegian are done by me, unless otherwise specified. I provide the original quote in a footnote. If not specified, the translations of the wording of the Marine Resources Act are the ones in appendix I.

The *addressees* of the thesis are primarily legal scholars and others in academia with an interest in scrutiny of fisheries legislation from a legislator[6] perspective. At the same time the thesis aspires for *critical review* of selected areas of the legislation. The thesis therefore also turns attention to decision-makers in the form of the legislature and public agencies with reflection on limits and opportunities for change under a Norwegian FLA, and articulation of recommendations under the research question.

1.2 Topicality and research status

The rationale for studying fisheries legislation, as a regulatory system, broadly, in contrast to more traditional exhaustive *de lege lata* analysis of specific rules, is the underlying normative ambition, a lacuna of legal research on domestic fisheries legislation and the nature and supranational influences of the regulatory system. The former points to how the study object is of high topicality both at the global and the national level. World fisheries are in some areas at a crisis point, and overfishing, the loss of biodiversity, damaged ecosystems and the climate challenge all require urgent action. To secure responsible and equitable stewardship of wild-living marine resources is therefore a high priority on the international agenda. United Nations (UN) Sustainable Development Goal (SDG) number 14 on life below water, other SDGs and legally binding treaties such as the Convention on Biological Diversity (CBD),[7] the United Nations Framework Convention on Climate Change (Paris Agreement),[8] the United Nations Convention on law of the Sea (UNCLOS)[9] the United Nations Fish Stock Agreement (UNFSA),[10] and international guidelines and

6 When I refer to "legislator" in relation to this framework, I refer to a legitimate rule-maker in a democratic organized constitutional state which includes both the superior legislative authority adopting statutes (*the legislature*), and the adoption of subordinate legislation by the executive branch (*the executive*), or other legal entities conferred such authority, unless otherwise specified or clear in the context of the thesis.

7 Convention on Biological Diversity, May 22, 1992 (CBD).

8 United Nations Framework Convention on Climate Change, December 12, 2015 (Paris Agreement).

9 United Nations Convention on the Law of the Sea, December 10, 1982 (UNCLOS).

10 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, August 4, 1995 (UNFSA).

recommendations[11] set out goals, specific targets, obligations and best practices that are deemed necessary to reverse *negative biological trends.*[12]

Although Norwegian fisheries have been ranked in the top for their environmental performance globally,[13] and no critical remarks on the environmental performance were made in a recent performance audit[14] by the *Auditor General of Norway*,[15] there are still observations of overfishing, discards and unreported/wrongly reported catches in Norwegian fisheries.[16] These issues were addressed by a policy advisory commission[17] from 2019, which proposed measures and changes in organization and legislation, and called for a further scrutiny of challenges in the regulatory framework to remedy the situation.[18] Difficult and controversial issues of who is to benefit from the resources and a *tension* between *market-orientation* and more traditional *small-scale fisheries* in rural areas are other challenges that continue to be on the policy agenda in many fisheries nations, including Norway.[19] The performance audit by the Norwegian Auditor General (see above) identified that the fisheries policies of the last 15 years have underperformed in achieving the *social objectives* of securing employment and settlement in coastal communities, which

11 Especially relevant are FAO (1995); FAO (2009a); FAO (2001).

12 See for example IPBES (2019).

13 See for example Pitcher et al. (2008). See also state of fisheries in a European context in FAO (2020).

14 Riksrevisjonen: Dokument 3:6 (2019–2020) Riksrevisjonens undersøkelse av kvotesystemet i kyst- og havfisket (Auditor General Report 2020). In Norwegian these audits are referred to as "forvaltningsrevisjon."

15 In Norwegian referred to as "Riksrevisjonen." This is the audit agency of the Norwegian Parliament that can provide the Parliament with comprehensive and independent audit of the government under more specific rules in lov 7. mai 2004 nr. 21 om Riksrevisjonen (Auditor General Act).

16 See for example Svorken and Hermansen (2014). These are also types of fisheries crime that fall under the term "unreported" in the broader concept of *illegal*, *unreported* and *unregulated* fishing (IUU-fishing) that is widely used in international, regional and domestic fisheries governance. I assume the definitions laid down in FAO (2001).

17 I use this term when I refer to all publicly appointed commissions under the official NOU (which is an abbreviation of "norsk offentlig utredning") system. Hesstvedt (2020) uses this terminology for NOUs. Similar Canadian advisory mechanisms will be referred to by their original names. When referring to other forms of committees or groups I will make my own translations.

18 NOU 2019: 21 Framtidas fiskerikontroll. When referring to these commission reports, I will use the full title in the first appearance of the citation. If cited again, I will use the number of the report (for example NOU 2019: 21) in later citations. For other reports, a short form will be given in brackets in the first appearance.

19 See for example Holm et al. (2015); Pinkerton and Davis (2015).

are enshrined in the *purpose clauses*[20] in the relevant statutes. Furthermore, the performance audit found that some of the fundamental principles in Norwegian fisheries governance have been challenged, and that consequences of some of the policies have not been adequately examined prior to implementation.

Despite these challenges, the legal research agenda has little to offer on how the current legislation functions, or how it contributes to realizing the societal objectives. A doctoral thesis by Eivind Smith from 1979 concerning the legal status of fish sales organizations, especially as administrative agencies and cooperatives, addresses some public law issues relevant to commercial fisheries.[21] Even though parts of Smith's findings are relevant for the understanding of current law, the legislation has developed substantially in the last decades.[22] Peter Ørebech undertook a legal analysis of commercial licences in 1982.[23] In the 2000s there have been carried out several legal historical studies of fishing rights in saltwater.[24] Susann Funderud Skogvang studied the right to fish in fjords and coastal waters in her doctoral thesis from 2012.[25] Common for these more recent studies is that they have

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20 Purpose clauses are commonly used in Norwegian law to set out the purpose of the statute in question, see for example purposes in section 1 in the Marine Resources Act and section 1 of the Participation Act, which are described in chapter 3. This also seems to be a legislative technique in Canadian law. In the *Fisheries Act, RSC 1985, c F-14 (Fisheries Act)* section 2.1 the purpose of the Act is similarly laid down, see more in chapter 10. Since this thesis will cite legislation in two jurisdictions, some clarification of what notation that will be used throughout is expedient. All Canadian legislation will be referred to in italics, including statutes, regulations and case law, whereas Norwegian legal sources are referred to with no emphasis. Furthermore, the systematisation in Canadian law with sections ("§" in Norwegian law), subsections ("ledd" in Norwegian law) and paragraphs ("bokstav" in Norwegian law) will be used. When referring to a specific provision, for example paragraph b in the second subsection of the Marine Resources Act, it will be written as: Marine Resources Act section 7(2)(b). Similarly, paragraph b in the second subsection of section 4.1 in the *Fisheries Act* will be referred to as: *Fisheries Act* section 4.1(2)(b). An exception to the above is Kongeriket Norges Grunnlov (Norwegian Constitution), in which sections are referred to as Articles.

21 Smith (1979a). A recent commentary on the Fish Sales Organization Act is found in Falkanger (2021).

22 Some outdated descriptive overviews of the fisheries legislation are found in Ørebech (1984); Ørebech (1986); Wigum (1980); Wigum (1992); Lekve (2000). I will use the term "concession" for special licences in the offshore fleet under the Participation Act section 12. When referring generally to the use of a public permit(s) to access fisheries, I will speak of licences or licencing arrangements.

23 See more in Ørebech (1982).

24 See for example Sunde (2006); Sunde (2009); Strøm Bull (2011); Ørebech (2007); Skogvang (2010).

25 Skogvang (2012).

a primarily private law perspective. From a public law perspective there has been increased attention by legal scholars over the last two decades in journal publications that provide input.[26] There is also relevant work in areas of law of the sea and environmental law which interface with fisheries governance more generally, but there is limited emphasis on domestic law questions.[27]

Principles and practices of how to govern fisheries is strongly influenced by theoretical and methodological developments in biology, neoclassical economics and other social sciences. These principles are also embedded in international law and environmental law. As chapter 4 will demonstrate, there is a vast literature and many studies on how to govern marine resources, but little emphasis on the *role of law* and how to *implement ideas and policies* on sustainable fisheries practices *in the statutory schemes* in a national jurisdiction. A guidebook for a Fishery Manager from 2009 published by the UN Food and Agricultural Organization (FAO) reinforces the modest attention to domestic legal issues in a fisheries governance context. It gives an extensive overview of main elements of fisheries governance, but the legal and institutional aspects are not pursued in detail. It is rather the role of a "fishery manager" that is at the core, and the manager is:

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26 Irene Dahl discusses criminal liability in the penal provision in lov 3. mars 1983 nr. 40 om saltvannsfiske m.v. (Saltwater Fishing Act 1983) in Dahl (2002). Lars Fause introduces and discusses criminal prosecution more generally in Fause (2008a) and Fause (2008b). More extensive production has been carried out in questions related to character, content and the functioning of commercial licences. Svein K. Arntzen discusses discrimination of vessel groups in Arntzen (2015), an important Supreme Court case concerning retroactive legislation in participation regulation in Arntzen (2016a) and questions concerning time limitation of public licences in Arntzen (2017). In Arntzen (2019) a more private law analysis was conducted on fish licences in relation to mortgage law. Arntzen also goes into legal aspects of fish sales through rules laid down in the Fish Sales Organization Act in Arntzen (2016b) and Arntzen (2011). Eirik Wold Sund and Tore Fjørtoft have published a comprehensive overview of the rules in the Participation Act concerning commercial licences in Sund and Fjørtoft (2018). Also, a master's thesis on the same topic is found in Saric (2018). Peter Ørebech and Torbjørn Trondsen have addressed some legal economic topics in the fisheries sector in Trondsen and Ørebech (2012). Nordtveit (2012) addresses regulation of fisheries through licences and quotas in a more general Norwegian public governance context. In addition, there are several other master's theses concerning different public law issues, see for example Haug (2004); Solsvik (2006); Nissen (2013); Pettersen (2014); Eriksen (2015); Stave (2016); Skrede (2016); Havrevold (2018); Petersen (2018); Gustavsen (2018); Skog (2018); Frøvik (2019).

27 Some relevant literature is Jakobsen (2016); Platjouw (2015); De Lucia (2019); Dahl (2009); Bohman (2021); Henriksen (2001).

> required to develop sufficient familiarity with international binding and voluntary instruments concerning fisheries to ensure their effective translation and application at the domestic level. The attention of the manager should eventually focus on how these instruments influence or are reflected in national fisheries legal frameworks.[28]

This quote thereby encourages managers to give attention to the effective translation and application of law at the domestic level. The guidance, however, gives little input to how the translation and application is to be done in practice, but rather highlights features of a *given legislation* a manager should pay attention to.[29] What a *manager* is more specifically, or what it is in relation to a *legislator* is also not discussed. The development of a fisheries legislator approach (FLA) as a framework for law improvement is therefore also an attempt to gain grounds for a more *general discussion on how to legislate fisheries* and considerations to make when implementing international law and principles at a domestic law level.[30]

Lastly, the nature of the Norwegian regulatory system (and presumably other jurisdictions) invites scrutiny and clarification of the system as a whole. As noted, the various components of the system are highly entwined, and some rules can only in a limited degree be studied (or understood) in isolation. There can also be unforeseeable consequences by amending rules without due caution to other components of the overall system.[31] The different objectives of the legislation and relevant considerations for a legislator to account for are furthermore articulated *vaguely*, and are to different degrees *value-based* and require interpretation. Designing and setting out policies into legislation and regulations therefore confronts the legislator with various *dilemmas* and difficult assessments and choices in a highly political and conflict-filled context.

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28 FAO (2009b) page 112.

29 FAO (2004) provides some recommendations and guidelines for the implementation of rights-based management in domestic law. It is, however, at a rather general level, and the study builds on a few case studies.

30 This is conducted for environmental policies more generally in Nordrum (2019).

31 Barnes (2011) page 436 points to this more generally and the need for care when attempting to adjust any legal relationship as it "forms part of a complex array of interests that are affected by change."

There are industry and regulatory characteristics for this field that are impetuses for the legislator. First, the commercial fleet subject to regulation is *diverse,* ranging from large industrial vessels in the range of 60 to over 100 meters with a crew of 15–20 persons owned by large corporations, to the 7-meter one-man vessels organized as sole proprietorships. Second, the regulatory framework is (and has been) to various degrees influenced by Norwegian *rural, social, trade and geopolitical policies* more generally. Third, how the fleet is regulated is in different ways connected to the *buyer and production structure on land.* Fourth, most of the activities of the commercial fleet take place in areas *beyond private ownership* on what in social and economic theory often is referred to as common pool resources (CPRs). And fifth and finally, fisheries is a livelihood characterised by going out at sea in highly changing weather conditions, hunting for moving resources in the ocean not visible to the eye, not knowing how much you can catch next year, and often not necessarily for the current year or next week, and being highly dependent on the export and market situation. All of the above makes the nature of the profession *highly volatile* and *unpredictable.* The sum of all this also demonstrates some of the idiosyncratic nature of fisheries and that caution is needed when it is compared with other industrial activities.[32]

1.3 Legal theoretical point of departure and overall research design

1.3.1 Placement in legal theory

In order to start developing a platform to critically review fisheries legislation, the thesis will use and combine ideas and tools developed in sociology of law, legal history, comparative law and legal cultural ideas, and new institutional law and economics. It is also inspired by more recent theoretical approaches to legislation that some refer to as *legisprudence*, with the creation of law by the legislator as the study object, and an emphasis on quality and quantity of regulation.[33] The main ambition of the thesis resonates particularly to areas of

[32] See also Charles (1994) page 201, where it is highlighted that fisheries are one of the most complex human activities and that "The fishery systems involves an inherent interplay between humans and natural world, as both an economic 'industry' and a socio-cultural foundation for people and communities." Examples of regulation of other ocean and coastal industries, including aquaculture and petroleum industries, will at the same time be highlighted when relevant in the thesis.

[33] See for example Mader (2001) page 119; Wintgens (2012) page 1; Wintgens and Thion (2007).

interest around "the political process predicting the enactment of legislation, the implementation process and the effects of legislation," and the *theory of legislation* which looks at "consideration of the role or function of legislation as an instrument of social guidance and control by the State."[34]

Fundamental to this thesis is the assumption that law is more than formally adopted rules by a legislature in a democratic state, and that law fills a social function in society, in which context, culture and history matter. Some ideas in the classical position in the Nordic sociology of law tradition provide a useful theoretical point of departure. It was theory that emerged post World War II (WWII) with the evolution of the welfare state and a large public sector that increased and changed the application of legislation which demanded a political governance of individual behaviour.[35] In a Norwegian context, Vilhelm Aubert was influential. In his paramount book *The social function of the law*[36] from 1976 he demonstrates how the law can play an active role in the planning of a society, especially for specific areas of administrative law.[37] Aubert (1950) and Aubert, Eckhoff and Sveri (1952) were other pioneering empirical socio-legal inquiries of, respectively, industry and social welfare regulation.[38] Other examples of socio-legal approaches are found in a study of Norwegian state support instruments in Boe (1983) and on the role of the state and decentralization of public tasks in Sand (1996).[39] Sand argues that the legal organizational changes in the state must be understood in a broader social context.[40]

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34 Mader (2001) page 120.

35 Hydén (2013) page 101.

36 In Norwegian the name is "Rettens sosiale funksjon." I will, unless otherwise specified, throughout the thesis use footnotes to present the Norwegian name of books, concepts and similar in quotation marks, which I have translated to English in the text (presented in italics).

37 Aubert (1976) page 301.

38 Aubert (1950); Aubert, Eckhoff and Sveri (1952). See also Kelman (1981) for a comparative analysis of occupational safety and health policy in Sweden and the US.

39 Boe (1979); Sand (1996).

40 Sand uses legal sociological perspectives by the social theorists Niklas Luhmann and Gunther Teubner. See also Sand (2013) for an overview over of more recent German theoretical developments on reflexive law in an evidence-based society with increased impact of science and technology for legal developments.

The work of Swedish legal scholar Per Stjernquist is particularly relevant to this thesis as natural resources management was one of his areas of interest. Stjernquist (1973) is an empirical study of how the forestry laws in Sweden had been applied in the field and what effect it had on forest owners. In other words, it was an inquiry on how the law performed "in action." To Stjernquist, legislation as instruments for achieving political goals and change in society must "be analysed in quite another way than traditional legislation which principally is aimed at preserving and modifying established order in society."[41] The study demonstrated that it was good contact in the field between field personnel and forestry owners that made the forestry program successful, and not the program in its legal form.[42] The system therefore worked by using social pressures instead of legal sanctioning. At a more general legal level, Eckhoff (1983) outlines the various tools and possibilities of the state to govern behaviour of humans in relation to natural resources and the environment.[43] A main purpose in this work was how to *promote a responsible resource and environmental policy* through legislation and state intervention.[44] Nordrum (2019) undertakes the efficacy of Norwegian environmental regulation more generally. This thesis can be seen as an attempt to further develop a methodology for purpose-oriented legal analysis of the regulatory system of one specific sector of natural resources exploration in a modern economic context.

Legal cultural theories are both connected to some of the above theoretical advancements and inspirational to the thesis. *Legal culture* is a concept that is not commonly agreed upon, but there have been attempts to define it.[45] As in sociology of law, the idea is that law constitutes more than positive and amendable law, but also ideas and expectations of law in a broader societal and cultural context. Sunde (2020) proposes a definition of legal culture

41 Stjernquist (1973) page 21.

42 Stjernquist (1973) page 205.

43 More legal analysis of regulatory frameworks for natural resources and the environment in doctoral theses in a Norwegian context are found in Solli (2020); Hauge (2016); Winge (2013); Reusch (2012); Myklebust (2010); Schütz (2007); Backer (1986).

44 Eckhoff (1983) page 11.

45 Se an overview in Sunde (2020).

"as ideas of and expectation to law made operational by institutional (-like) practices"[46] (emphasis in original omitted). Husa (2015) describes it as "the system-specific way in which values and price and legal concepts are integrated into the actual operation of the legal system."[47] Analysis of a legal culture can therefore also represent efforts to try to understand features of the law and its role within a given society.[48] Tuori (2002) conceptualized the idea of legal culture by introducing a multi-layered nature of the law that highlights its historicity, and that it is a product of historically changing phenomena of various paces of change.[49] In this layering the "surface level" consists of the legal order of statutes, regulations, case law, administrative practice and legal research, which is regarded as "turbulent" and constantly changing.[50] The "middle level" of the law is where change evolves more slowly and consists of meta-norms and legal principles. The "deep structure" is the most stable layer where the fundamental principles in law, for example human rights, are structured. However, even this layer can be subject to change.[51] The multi-layered nature of the law is also explored in Norwegian literature and a methodology on legal culture as an analytical tool for comparative legal research is under development and influences the thesis.[52] Connected to this is the conceptualization by Alan Watson of the move of rules, or a system of law, from one jurisdiction to another, as *legal transplants*.[53] This term is commonly used on the borrowing of law and legal institutions in a modern context, but literature also highlights the problematic dimension of this way to improve a legal system as laws and institutions are never transplanted into a legal vacuum.[54]

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46 Sunde (2020) page 27.

47 Husa (2015) page 4, which is rendered in Koch (2020a) page 44.

48 Nelken (2004) page 1.

49 Tuori (2002) page 147. See also Sunde (2005) chapter 4; Nordrum (2017) chapter 3.2; Nordrum (2019) chapter 3.2.

50 Tuori (2002) page 155.

51 Tuori (2002) page 192.

52 See an introduction to it in Sunde (2020); Koch (2020a); Koch (2020b). See more in chapter 2.3.

53 Watson (1974) page 121.

54 Husa (2018) page 129.

Theorists in new institutional economics and economic sociology have suggested that institutions are products of the historical evolution and deeper structures. Nobel laureate Douglass North is known for his work on economic history and institutional change.[55] He viewed institutions as the "rules of the game" and as the "humanly devised constraints that shape human interaction."[56] In North (1990) institutional change is viewed as incremental and path-dependent processes, with emphasis on how institutional structure (and thereby the legal frameworks) plays a role in how different institutions perform. He also draws attention to the concept of "adaptive efficiency" which is concerned with the rules that shape the way an economy evolves over time and on "the willingness of society to acquire knowledge and learning, to induce innovation, to undertake risk and creative activity of all sorts, as well as to resolve problems and bottlenecks of the society through time."[57] These are ideas further developed in a more contemporary new institutional law and economics context in Driesen (2012), which are further reflected on in part IV of the thesis. Figure 1 presents four interconnected levels of social analysis introduced by Nobel laureate Oliver Williamson in Williamson (1998) and (2000), which have similarities to the ideas of Tuori.[58]

[55] North (1981); North (1990); North (2005).

[56] North (1990) page 3. See also reference to North in a Norwegian context in Nordtveit (2016).

[57] North (1990) page 80.

[58] See more in Williamson (2000); Williamson (1998), also referred to in Nordrum (2019) page 107–112. Nordrum highlights how Tuori does not refer to economic theory, and Williamsson not to legal theory, but that their ideas are connected by the use of a concept of "embeddedness."

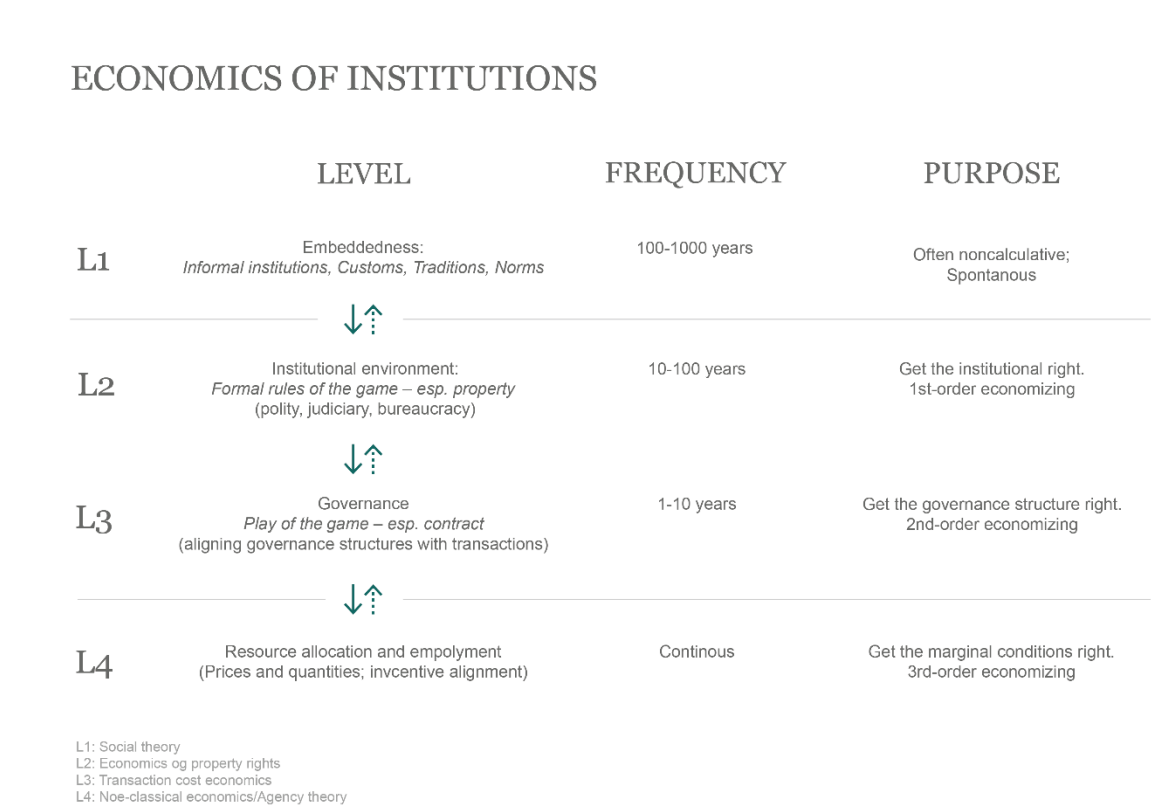

Figure 1 Levels of social analysis (rendered from Willamson (2000))

The top level (L1) in the figure is the level of *social embeddedness,* where informal practices are rooted and where change happens over longer periods of time (from 100 and up to 1000 years). The second level (L2) is where the formal "rules of the game," referring to North (1990), are made and all branches of government are located. Changes at this level takes place within a frequency of 10 to 100 years. The third level (L3) deals with the institutions of governance, how they are organized and how "the play of the game" takes place. The fourth level (L4) is the day-to-day level where the attention is on efficiency in the resource allocation. This is a level where neoclassical economic approaches have been influential.[59] A main point by Williamson is that change at the second level is constrained by the first level and that:

[59] See more on these approches in chapter 4.

> cumulative change of a progressive kind is very difficult to orchestra. Massive discontent – civil wars … or occupations (following World War II), perceived threats (the Meiji Revolution), breakdowns (Eastern Europe and the former Soviet Union), a military coup (Chile), or a financial crisis (New Zealand) – will, however, occasionally produce a sharp break from established procedure. Such "defining moments" are nevertheless the exception rather than the rule.[60]

Williamson is also inspired by sociologist Mark Granovetter,[61] and other scholars in economic sociology advancing the concept of "embeddedness." This is again a position rooted back to a "substantivist" school in anthropology with the work of social theorist Karl Polanyi in Polanyi (1944) as an example.[62] The influences from new institutional economics (NIE) are relevant to the thesis as the *role of the regulation* in an *economic context* also calls for reflection. This is especially pertinent as the topic under scrutiny is the regulation of *commercial activities,* in which securing an economically profitable management of the resources is one of the main objectives of the legislation.[63] The breakthrough in NIE with emphasis on *legal structure* is also pointed out in Scandinavian legal literature.[64]

1.3.2 The concepts of institution, legitimacy and rule of law

Common to all of the above theoretical developments is the idea of *social embeddedness* of norms in society and the law being more than formally adopted legislation, and the evolutionary character of the law. In this thesis, the "rules of the game" for the fishery is represented by the legislative framework for commercial fisheries, or the fisheries management institutions. The thesis assumes institutions as "commonly known rules used to structure recurrent interaction situations, such rules being endowed with a sanction mechanism in case of noncompliance."[65] A distinction can therefore be made between 1)

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60 Williamson (2000) page 598. Parts of the quote is also rendered in Nordrum (2017) page 90.

61 Williamson (1998) page 27. Williamson (2000) page 596 refers to Granovetter (1985).

62 Polanyi (1944). Tuori also draws on some of the ideas by Polanyi, see Tuori (2002) page 212, 218. See also Nordrum (2019) page 108 footnote 353.

63 See more in chapter 3.

64 Sandgren (2000) page 478.

65 Voigt (2019) page 13. Voigt is here inspired by Ostrom (1986).

the rule component and 2) the sanction (or enforcement) component of the institutions. Moreover, the thesis acknowledges that there are formal and informal norms in society.[66] As this thesis addresses *rule effectiveness,* and how performance of legislation can be improved, the question of why and how people comply with rules is essential to acknowledge and include in the thesis discussions. In this regard, the issue of *interaction* between the different norms in society is important. How to avoid designing legislation where the interaction is *one in a conflict*, and how to design *legitimate* legislation, are issues that run through the thesis.[67]

The thesis generally refers to legitimacy as the belief that the man-made law is appropriate and fair, and that individuals in society feel personally committed to comply to rules and decisions on a voluntarily basis.[68] Similarly to Weber (1947) the thesis also sees legitimacy as the belief in "legality, the readiness to conform with the rules which are formally correct and have been imposed by accepted procedure."[69] I acknowledge the complexity of why rules are complied with or not, and do not intend to pursue a more specific definition of legitimacy as this is widely studied in multiple disciplines. I will at the same time when relevant try to problematize how these issues come into play when fisheries legislation is designed. A distinction between *internal legitimacy* and *external legitimacy* is at the same time presumed.[70] By "internal legitimacy" I refer to the legitimacy of the rules and enforcement system by the actors that are subject to regulation of their industry activities, which will also be used interchangeably with "industry legitimacy." By "external legitimacy" I refer to the legitimacy of legal frameworks from the perspective of the general public, which will also be used interchangeably with "public legitimacy." This is also connected to theories on *social contracts* in the organization of a society with roots back to the classical contract tradition represented by Locke, Rosseau and Hobbes and many other

66 North (1990) distinguishes between "informal" and "formal" constraints.

67 See for example de Soto (2000) addressing the challenge of introducing property rights schemes in developing countries. He highlights the importance on designing norms that are rooted in people's beliefs, also referred to as "extralegal social contracts."

68 This similarly to Nordrum (2017) page 179.

69 Weber (1947) page 120.

70 See, for example, this distinction in Jentoft (2000).

philosophers.[71] This thesis views the concept broadly as the external legitimacy to the social organization of fisheries management in the form of fisheries institutions, in which expectations and responsibilities of *the people* (stakeholders, communities and the general public) and *the state* are expressed.[72]

The concept of the "rule of law" is, similar to legitimacy, a recurring concept in the thesis, which is vastly analysed from different perspectives and with no firmly-agreed upon definition and different terminology across jurisdictions. As the thesis includes a Canadian case study, a clarification of the use of rule of law terminology is necessary. This is mainly why I will speak of the concept as "rule of law," and not the European counterpart of "Rechtsstaat" (with "Rettsstat" and "Rettssikkerhet" as common notions in a Norwegian context). The following briefly points to the core values in the concept that is fundamental in an administrative state, and practically relevant in a fisheries governance context, assumed in this thesis.[73] In theory, the aspirational idea of a societal order with a rule of law, rather than of men, has been widely discussed legally, politically and philosophically since the ideas of Aristotle in ancient Greece, through the *traditional model of legality* advocated by Albert V. Dicey[74] in British constitutionalism in the 1800s, up until the current time, involving a modern administrative state in many jurisdictions under a *modern rule of law doctrine* in which administrative decision-making under conferred authorities plays a central role.[75] A common conceptualization is that the rule of law offers four *essential guarantees* to legal subjects: 1) all are equal under the rule of law, 2) creation, enactment, revision and enforcement of all laws takes place under public standards, 3) the system treats individuals fairly and 4) access to justice for all persons.[76]

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71 See an overview of the classical social contract tradition in Seabright, Stieglitz and Van der Straeten (2021); Loewe, Zintl and Houdret (2021).

72 See also Holm et al. (2015).

73 For a general overview in a Norwegian and Canadian context, see Aubert (1989) chapter 2; Boe (1998); Liston (2013).

74 Dicey (1959).

75 See an overview in Bingham (2011). See Aubert (1989) page 65 in a Norwegian context. See also Ebbeson (2010) on how notations of rule of law and legal certainty have changed in a discussion of the rule of law in governance of complex socio-ecological changes. See more on social-ecological systems in chapter 4.6.5.

76 See, for example, Liston (2018) page 141–142.

The element of *legality* is at the core and goes back to the fundamental principles of a democratic and constitutional state with a separation of powers between a *legislative* (the legislature in the form of a Parliament), a *judiciary* and an *executive* branch of the government.[77] Put simply, the executives and administrative bodies can only act within a valid authorization prescribed by the legislature in law, and the judiciary oversees that the executives acts within their powers. Related to this is *accountability to the law*, which means that everyone, including officials and the public, are responsible for their actions and accountable to the law. For the relationship between the individual and the state, whether in criminal law or administrative law, action that may interfere against individuals must be founded in law.[78] Connected to legality is also the issue of *legal certainty*, which entails that rules must be publicly known and that the addressees of the law can predict the consequences of their behaviour. Other substantive guarantees for individuals set out in constitutional rights, unwritten law and case-law are that the public exercise and enforcement of these laws by the state is not arbitrary, unreasonable, disproportionate or represents other forms of abuse of power. The rule of law concept also encompasses procedural safeguards often referred to as requirements of *due process* or a *duty of procedural fairness*. In administrative states the availability of procedural protection promotes better informed decision making and that individuals are treated respectfully throughout the processes.[79] Some of the substantive and procedural safeguards relevant in a fisheries management context is addressed in more detail in the comparative study in part III of the thesis.

1.3.3 Multi-method approach and structure of the thesis

The overall methodology of the thesis is a multi-method approach that combines descriptive analysis of empirical material in a legal historical inquiry and comparative case

[77] Both Norway and Canada are constitutional monarchies that apart from the federative nature of Canada have similar basic institutional structures, see more in part III.

[78] In Norwegian law this principle is laid down in Article 113 of the Norwegian Constitution.

[79] Huscroft (2013) page 148.

study, with synthesis, theorization and normative analysis building on the theoretical influences presented above.[80] The thesis consists of the following five parts:

- **Part I** Introduction of research design, introduction to the core components of the regulatory framework and a general overview of theoretical underpinnings and key concepts in fisheries governance
- **Part II** Empirical material: A legal historical inquiry
- **Part III** Empirical material: A comparative case study in regulatory frameworks between cod fishing in Norway and halibut fishing in Pacific Canada
- **Part IV** Synthesis and theorization: What do we do and how can we improve it effectively?
- **Part V** Policy: What should we do?

The more specific scope and methodology of the different parts are introduced in chapter 2, but how they are connected needs elaboration. The legal historical and comparative inquiries in **part II and III** are used as empirical input to identify and develop a fisheries legislator approach (FLA) for the Norwegian case in a synthesis in **part IV.** I refer to it as "empirical" because (as explained above) it is not used for traditional *de lege lata* analysis of legal sources, although some clarification and systematization of the components of the current regulatory system in a descriptive way has been conducted. It has been highlighted in literature that legal sources can function as empirical material when not used to analyze the content of positive law.[81] The point here is that the thesis attempts to go beyond a doctrinal approach by using a mixed methodology to analyze the legislation in a broader societal context. It could be seen as a response to a warning that *failure to go beyond legal methods* to address problems which lie outside the reach of the legal methods "reduces the possibility for legal science to achieve social relevance and increases therewith the risk of marginalization."[82]

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[80] Nobel laureate Elinor Ostrom, who is further presented in chapter 4, has been a pioneer of using multi-method approaches to research on common pool resources, see for example Poteete, Janssen and Ostrom (2010).

[81] Sandgren (2000) page 449.

[82] Sandgren (2000) page 446.

As seen above, the role of history to explain the origins, change and effectiveness of institutions is central in legal cultural theories and approaches in new institutional economics. The comparative element is also essential for the theorization as it adds insights to how history, culture, geography and social conflict can explain why there are different fishery institutions across jurisdictions, but also point to more *common characteristics* of legislating fisheries.[83] Differences in institutions can also assist in explaining why performance is different across jurisdictions.[84] In a fishery context, different regulatory systems can for example explain different degrees of success in fisheries management between countries. The empirical material from **part III** will therefore also to the extent relevant serve as input to the preliminary policy analysis addressing the research question in **part V.**

The overall methodology comes at a cost. Mixing approaches and using ideas from different disciplines is susceptible to criticism of eclecticism and lack of depth of analysis. I acknowledge the risks and pitfalls and that any conclusions must be modest. A combination of perspectives also requires extensive scientific overview and methodological stringency. In the following chapter the more specific approaches to the different parts of the thesis is presented.

2 Scope and methodology of thesis parts

2.1 Part I Equipping the ship for the journey: Research design and background

Part I of the thesis consists of four chapters. The objectives and research design of the thesis are the topics of chapters 1 and 2, some of which have already been introduced. The remainder of part I consist of two more background chapters.

Chapter 3 presents an overview of the different elements of the legal framework in Norway. This chapter primarily supports and supplements the empirical inquiries in parts II and III,

[83] See for example Voigt (2019) page 158. Voigt highlights how institutions in this sense serve as *explanandum* (that which is to be explained).

[84] See for example Voigt (2019) page 158. Voigt highlights that in this respect different institutions function as e*xplanans* (that which explains something).

and the synthesis in part IV, but it also has a value by itself giving an overview of Norwegian fisheries legislation for readers new to this area of law, and in conveying some of the *complexity* of the regulatory system. The objective is therefore to clarify the different components and central norms in the system, and how they are inter-connected, and *not an exhaustive doctrinal analysis*. It is at the same time a clarification and systematization building on the Norwegian legal method in which statutes, *preparatory works*[85] and case law are the main legal sources studied.[86]

Chapter 4 gives a *descriptive overview* of the broader theoretical landscape backgrounding fisheries governance, and how legal questions are connected to different aspects of the management. This is an important *background chapter* for readers that are little acquainted with the economic and biological underpinnings of the regulatory system and management instruments. The overview also provides a natural context to present and define central *concepts*, *management objectives*, *assumptions* and *terminology* in the different theoretical traditions, including maximum sustainable yield (MSY), maximum economic yield (MEY), resource rent, environmental sustainability, scientific knowledge, precautionary approach, rights-based fisheries and fisheries management regimes. It also gives insights into some of the main challenges of and discourses on how marine resources best could be governed. It also points to some of the important driving forces for change of regulations.

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[85] *Preparatory works* are various official documents that play a key role in the legislative processes that lead to the adoption of primary legislation in Norway. In Norwegian these are referred to as "forarbeider." Most important are *Bill propositions* and *Parliament Committee recommendations*, which are authoritative in the interpretation of legislation. The former is the document where a Bill is presented the Parliament by the responsible Ministry. These are in Norwegian referred to as "lovproposisjoner." The latter is the recommendation by the relevant Parliament committee that addresses the Bill proposition before its adoption in the Parliament. In Norwegian these are referred to as "komitéinnstillinger." Other documents, such as policy advisory commission reports (NOUs) and similar advisory documents can also be considered as preparatory works, but with less authoritative weight. See more on the legislative processes comparatively in chapter 10.3.2. See also Kjølstad, Koch and Sunde (2020) page 118.

[86] See Eckhoff (2001) for a general introduction to Norwegian legal method, and Bergo (2019) on statutes, regulations and preparatory works as legal sources.

2.2 Part II Empirical material: A legal historical inquiry

2.2.1 Objective

The topic of Part II is as seen a legal historical inquiry of the Norwegian fisheries legislation. Some unresolved issues in Norwegian fisheries governance were pointed out in chapter 1.2. Challenges connected to fulfilling the objectives of the legislation is nothing new, but something the legislating authority has faced and tried to remedy over the course of time. Insights into how the current regulatory system has evolved, which rationale it is based on, and factors that have influenced the decision-making, are therefore essential for understanding how we regulate today. The legal historical inquiry aims to reveal such knowledge, and to provide empirical input for part IV and V.

2.2.2 Scope and methodology

The purpose is more specifically to give a legal historical *overview* of *regulatory trends* and important *driving forces* in legislative processes. I will identify *when* and *how* the main elements of the regulatory system were introduced in authoritative rules adopted through *unilateral* public authority. The inquiry will go back to the first traces of commercial fisheries in the early medieval age and up to today. The methodology used is a systematic review of authoritative legal sources with the identification of key characteristics in the framework to guide the review.

To start with the latter, the main components and more principal rules and considerations of the current legislation are to be identified in the material. There are first of all some principles for the management of the wild-living resources fundamental to the system, including the *management principle* and the *ecosystem-based approach.* These are principles and concepts that reflect obligations in international fisheries law.[87] However, the underlying concerns these principles are to promote have probably been a part of Norwegian fisheries management for a long time. The legal historical inquiry strives to reveal to what extent, and how, these concerns have been taken into consideration in domestic law throughout history. Second, the study will identify the origins of instruments

[87] See more in chapters 3.2 and 4.

used to regulate fishing operations at sea and during landings, typically *rules of conduct* and *technical rules*, and their justifications.[88] In conjunction with these topics the main elements in the *enforcement and sanction system* will be identified. The use of administrative confiscation and administrative fines pursuant to the Marine Resources Act will be emphasized as they play an important role in the function of the fisheries administration in the *resource control*.[89] Additionally, the public role of fishermen[90] in the enforcement system and sales of fish is to be revealed from a legal historical perspective.

Lastly, the introduction of *limited entry*[91] fisheries, vessel ownership rules and introduction of harvest limitations in the form of quotas will be identified, including its justifications. In conjunction to this, the use of *economic instruments* or *market-based mechanisms* will also be reflected. All of the above characteristics will continually be reviewed in light of legislative design choices (at what level are decisions made), legislative processes (e.g., use of expert committees and stakeholder consultations or *participatory governance*[92]), legal policy dilemmas and Norwegian law more generally. The aim is to reveal the *first occurrence* of rules that in different ways address the above characteristics. This means that smaller subsequent modifications or modernisation of rules up until today are only included when the amendment represents other legal or factual implications relevant to the thesis. This can

88 This includes priority rules (can also be seen as "traffic rules") on the fish grounds, area management, technical regulations (mesh size, minimum fish sizes, gear restrictions), discard prohibition and reporting/registering requirements (reporting obligations) for the vessels throughout the whole harvest and landing cycle.

89 By resource control I refer generically to the monitoring, control and enforcement of the outtake of the marine resources and compliance with regulations. In Norwegian "ressurskontroll."

90 I will use this term interchangeably with "harvesters" when referring to the actors in the fleet segment of the fishing industry more generally. I will refer to a "vessel owner" or "licence holder" when these specifications are important.

91 I will use this term interchangeably with *access restrictions* or *closed fisheries* when referring to commercial fisheries where a public permit to participate is required.

92 I will use the term "participatory governance" interchangeably with "user participation" and "co-management" when referring generally to how the harvesters are given responsibilities and are involved in operational fisheries management. In FAO fishery manager's handbook, co-management is defined as "[a] process of management in which government shares powers with resource users, with each given specific rights and responsibilities relating to information and decision-making." FAO (2009b) page 477.

for example be that factual events connected to a modification could be important for the understanding of later legal developments.

With the above guidance as the point of departure, extensive legal historical material has been reviewed systematically at the level of detail found appropriate to reveal the legislative trends. For the period from around year 1000 up until 1814 I have searched the National Library of Norway online database for books or collections of regulations,[93] with a subsequent screening of titles of regulations under fishery specific topics.[94] Regulations with a title indicating a content that could fall under the above characteristics have been studied in more detail to identify relevant rules. From 1814 and up to our time I have reviewed *Parliament registries*[95] to identify Bill propositions or other relevant cases addressed during Parliament sessions that could be relevant to this inquiry. Subsequently, the Bill propositions, and any supplementary material in the form of policy advisory commission reports and similar, have been studied in more detail. As more and more components of the system have been revealed, the review has been conducted with less intensity. Legal historical and historical literature have been used continuously during this process to support findings in primary sources and to provide information of factual conditions in the time period studied.[96] Case law has not been reviewed systematically in this inquiry, but

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93 I will speak generically of *regulations* when referring to various legislation up until the adoption of the Norwegian Constitution and formal statutes under the Norwegian Constitution in 1814. These are regulations that in Norwegian and Danish (as Norway was under Danish rule for a period of the time) primarily are referred to as "forordning," "rescript," "kongebrev," "anordning," "motbok." In a more contemporary context, *regulations* ("forskrift" in Norwegian) refer to decisions made under chapter VII in lov 10. februar 1967 om behandlingsmåten i forvaltningssaker (Public Administration Act) when referring to Norwegian law. In a Canadian context, *regulations* refer to statutory instruments as defined under section 2(1) in the *Statutory Instruments Act, RSC 1985, c S-22 (Statutory Instruments Act).*

94 Many of the studied collections are regulations compiled by jurists, which have topical registries where "fisheries" is one of the recurring topics. I have first and foremost searched through titles listed under this topic. As will be demonstrated in Part II, Norway was under Danish jurisdiction for a long period. I have therefore also briefly screened registries and some books with Danish fishery relevant regulations.

95 I have reviewed the main registry for relevant publications from the cabinet and the Parliament for different time periods under the topic "fisheries."

96 The importance of factual context in legal historical studies is highlighted in theory. See for example Michalsen (2011) page 17; Strøm Bull (2011) page 11.

some cases from the Supreme Court of Norway of particular relevance to the evolution of legislation have been studied.

2.3 Part III Empirical material: A comparative case study

2.3.1 Objective and theoretical approach

The purpose of the comparative case study is both to provide empirical material to support the identification and testing of a Norwegian fisheries legislator approach (FLA), and to gain a deeper understanding of how fisheries are legislated and impacted by contextual factors more generally across jurisdictions. It is therefore an analytical exercise indented to be more than a description of a specific regulatory system in two jurisdictions,[97] but that neither fits into a typical macro-comparison between legal systems nor a micro-comparison that addresses specific legal problems in detail.[98] For the latter, the *functional approach* has in theory been regarded a useful point of departure. The basic idea under this approach is that different rules and practices in different legal systems can have similar functions.[99] The functional research question would therefore be how two different jurisdictions solve a similar problem, for example how to respond to an overfishing problem when designing fisheries legislation. The approach has at the same time been criticized for not accounting for contextual differences and a risk of overemphasizing similarities.[100]

The proposition of this thesis is that a normative discussion of specific rules can be improved with support in a country-specific FLA, which accounts for legal history and culture. The case study will therefore attempt an approach that combines elements from a *functionalist comparativist* (similarities), *cultural comparativist* (deep structures) and *critical comparativist* (dissimilarities) perspective.[101] The thesis will use the comparative case to further illuminate the interactive function of fisheries legislation as a system of rules, consisting of many sub-systems, and to shed light on cross-jurisdictional similarities and

97 See for example Jansen (2006) page 307; Bruce (2021) page 20.

98 Zweigert and Kötz (1998) page 4–5. See also Husa (2018).

99 Husa (2015) page 119.

100 Husa (2003) page 433.

101 See more on these issues in Danneman (2006); Husa (2003); Husa (2015).

differences. It can also be seen as an *institutional approach* by mixing comparative examination of legal and cultural contexts at some level of detail, with a comparison of some of the central norms in practice.[102] The legal cultural model introduced in Koch (2020b) is also relevant to this exercise.[103] It has especially provided valuable guidance to the analytical approaches presented in next sub-chapter.

There are weaknesses and epistemological challenges to the chosen combination of perspectives where contextual factors are included, and a stringent functional research question that runs through the comparative case is not applied.[104] The main objective of the thesis is at the same time not to conduct a comparative analysis per se, but to increase knowledge of how to improve fisheries legislation with emphasis on the Norwegian case.[105] Some of the chosen methodology to limit potential sources of bias and errors are outlined in the following sub-chapter.

2.3.2 Choice of case, data collection and analytical approach

Canada, and a halibut fishery in the Pacific fisheries more specifically, has been selected as the comparative case. The rationale for this is twofold.[106] *Principally*, there are several common features between the two jurisdictions that make them suitable for comparison.[107] Both nations are stable, prosperous democracies and constitutional monarchies that have implemented, and are strongly influenced by, several of the key elements in fisheries management recommendations from FAO and the Organization of Economic Cooperation

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102 See an example of an institutional approach in Verweij (2000). Kelman (1981) is another example of a comparison of two regulatory systems in two jurisdictions. Berg (1999) is an example of a comparative study of implementation and enforcement of fisheries law in the Netherlands and in the United Kingdom.

103 In addition is the operationalization of the model in Hunter, Sunde and Nordtveit (2020) relevant to this thesis. This is a legal cultural analysis of the character of petroleum licences in different jurisdictions, including Norway and Canada.

104 See for example Verweij (2000) page 1009.

105 Jansen (2006) page 315 points out how a comparatist should endeavour clarity and openness when providing the rationale for methodological choices. See also Bruce (2021) page 23.

106 This is also similar to the rationale of Bruce (2021) in her choice of comparative cases.

107 Husa (2015) sets out how the objects compared must have some common characteristics that form a common denominator for comparison, or what is referred to as *tertium comparationis*.

and Development (OECD). Canadian saltwater fisheries are under federal jurisdiction, which simplifies the study.[108] There are also similar challenges observed with respect to external legitimacy to the legislation and IUU-fishing, which means the regulatory framework serves a function to similar socio-legal problems.[109] Additionally, coastal Norway and Canadian fisheries have small-scale coastal fisheries that operate near shore. The coastal fishing fleet appears to be equally diversified, although the Norwegian fleet is larger in both size and annual catches. In both British Columbia (BC) and coastal Norway, there are indigenous people that make a livelihood from fisheries. There is also vast research on Pacific Canada fisheries from different disciplines. Of the *pragmatic* rationale, I have lived in BC for more than a year, and have a family of fishermen living in the province. Through previous work experiences I also have a network with contacts within the government and research communities. Lastly, it is also an advantage that all sources are in English.

The first part of the inquiry is a descriptive overview of the Canadian fisheries legislation, including its foundations and roots and general legal context. This has been conducted primarily as desk studies of legal sources and relevant literature.[110] Similar characteristics running through the Norwegian legal historical review (see chapter 2.2) will be highlighted to the extent possible in the Canadian Pacific fisheries. The aim is as in the Norwegian case to identify main trends in the regulatory evolution. Major similarities and differences to the Norwegian system will be identified at this stage.[111]

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[108] Aquaculture is for example under a shared responsibility between provincial and federal authorities. See more in Doelle and Saunders (2016).

[109] See for example Ainsworth (2016); Edwards and Pinkerton (2020). Danneman (2006) page 17 argues that a "similarity of problems is essential for such an enquiry when deciding which other legal system should be chosen for a comparison."

[110] Important legal historical secondary sources are Harris (2001); Harris (2008). In addition, the historical works Gough (2007); Swenerton (1993) are important secondary sources.

[111] Danneman argues for emphasizing differences during the process of description "because a focus on describing similar features is likely to lead to repetition, whereas a focus on difference will not." Danneman (2006) page 25.

The next part aims for more descriptive analysis of parts of the current law in Pacific Canada fisheries and Norway that provide input to the synthesis and theorization in part IV. Generally, when moving over to more in-depth analysis of institutions and specific rules, the study will have a micro-comparative perspective. This raises challenges for an outsider to the law, particularly in knowing what objects to look for in the legislation. In comparative law theory Sacco (1991) underlines how "living law" contains so many different elements "such as statutory rules, the formulations of scholars, and the decisions of judges," and that one cannot speak about "the legal rule of the country," but of "the rules of constitutions, legislatures, courts, and indeed, of the scholars who formulate legal doctrine."[112] Sacco calls all of these elements in living law "legal formants." The aim is not to conduct exhaustive doctrinal analysis of the legal framework, but to address elements of "legal formants" in a *case study* of a halibut fishery in Pacific Canada and a coastal cod fishery in Norway. The aim of the study is to compare the decision-making processes, the role of participatory governance, the main duties and obligations of the actors, enforcement, sanctioning and punishment and appeal mechanisms.

In order to find the "legal formants" in the Pacific Canada groundfish fisheries, desk studies of authoritative legal sources case law and relevant literature are combined with empirical data collection through interviews with government representatives at the federal and regional level,[113] researchers in the field and representatives from the industry. During the first half of 2019, I spent time as a visiting researcher at Peter A. Allard School of Law at the University of British Columbia (UBC), and conducted a series of semi-structured interviews with the eight respondents presented in table 1, who generously participated in the project.

[112] Sacco (1991) page 21–22.

[113] These were representatives from the Department of Fisheries and Oceans Canada (DFO). DFO is the executive branch of the government, and equivalent to the Ministry in Norway

Table 1 List of respondents

Description of respondents	Reference used in thesis
Representative 1 from DFO in Ottawa	DFO respondent 1
Representative 2 from DFO in Ottawa	DFO respondent 2
Representative 3 from DFO in Ottawa	DFO respondent 3
Representative 4 from Justice Canada in Ottawa[1]	DFO respondent 4
Representative 5 from DFO Pacific region in Vancouver	DFO respondent 5
Active fisherman in Pacific fisheries	Fisherman respondent
Representative from industry association (licence holders) in the Pacific fisheries	Industry respondent
Representative from a designated monitoring company (independent third party) in the Pacific fisheries	Monitoring company respondent

The interviews were conducted face-to-face, with the exception of DFO respondent 5 that was done by phone, and two additional Skype meetings with DFO respondent 4. All interviews were conducted on the basis of written consent.[114] The respondents were in advance provided information on the project, on data protection rules and a list of topics to be covered. An example of an information letter is found in appendix II. All conversations were audio recorded, and most of the material was transcribed. This was done in order to make the material credible.[115] All data was processed and is stored anonymously. DFO respondents 2 and 3 took part in a group conversation. The respondents were chosen through a combination of strategic selection and input from my fisheries network. For the interviews I had prepared interview guides that steered the conversation and an example is available in appendix III. Only the industry respondent and DFO respondent 5 were given these questions in advance. As the interviews were semi-structured, however, the conversations were mostly structured by topics, as many of the questions had to be re-

[114] The research design for the interviews were assessed and approved by the Norwegian Centre for Research Data (NSD).

[115] Kvale, Brinkman and Anderssen (2015) provided methodological input on qualitative interviews used in the data collection.

articulated during the interview due to the nature of answers given as well as language and time limitations.

As the desk studies and data collection progressed, new insights were gained, and the material and overall methodology was adjusted along the process. Koch (2020b) sets out a formula of seven research steps in comparative analysis that involves creating a research question, finding the objects and objectives of the comparison, finding a method that serves the overall purpose, pinpointing, assessing and explaining similarities and differences, systematizing and critically scrutinizing the comparative findings and starting all over again by adapting the research questions and critically reviewing all other steps in light of the findings.[116] The steps relevant to the analytical phase of the comparison in this formula were inspirational to the processing of the collected data, with continuous adjustments along the process. The material will both be used as documentation in describing the fisheries legislation in Canada generally, but also to highlight management and enforcement practices in the case study of the selected fisheries. In spite of these efforts to familiarize myself with the regulatory frameworks and historical context, linguistic and contextual difficulties, and my basic training in the Norwegian legal method, creates risks of bias and potential sources of errors in the inquiry.

2.4 Part IV Synthesis and theorisation: Some fundamental assumptions

2.4.1 Conceptual point of departure

As introduced in chapters 1.1 and 1.3.3, the main objective of the thesis is to start developing a fisheries legislator approach (FLA) as a *dynamic* and *normative analytical framework* for analysis of fisheries legislation, with Norwegian commercial fisheries as a case. The core elements of the framework, that the inquiries in part II and III are to further investigate, and part IV to synthesize on, are illustrated in figure 2.

[116] Koch (2020b) page 73.

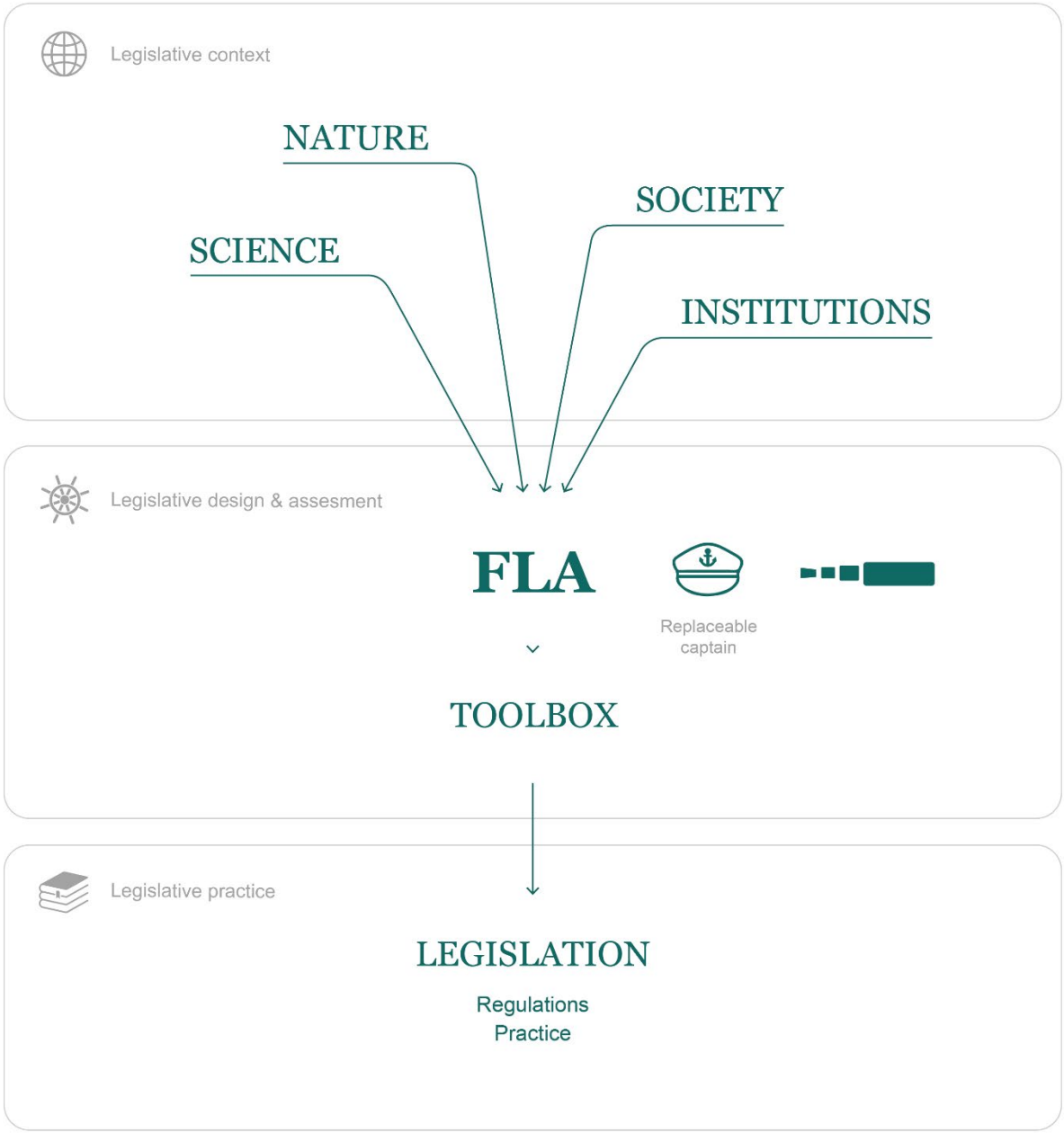

Figure 2 Conceptualization of fisheries legislator approach (FLA)

What I try to model in the figure is what a legislative process and outcomes of regulating commercial fisheries means in action. It is important to emphasize at the outset that this conceptualization *does not claim any originality* on how to view a legislating activity generally, but more of pioneering ideas through the explicit formulation and application of FLA specifically. It is also a simplification of real life in which important features, interactions and detail have been left out. When speaking of a fisheries legislator in this framework, it refers to the task of legislating fisheries irrespective of time, and it applies to

both design and adoption of constitutional norms, statutes and subordinate[117] legislation and practice. The time dimension is at the same time to be further explored in the thesis.

The basic idea is that a fisheries legislator operates within overarching constraints and circumstances that must be taken into consideration. This is the top level in the figure referred to as *legislative context*. The legal historical inquiry and comparative study is to further shed light on the legislative context, but four categories function as points of departure. First and foremost is *nature* identified as a distinct category. This is a category that encompasses biological constraints, including unforeseen events and ecological crises, which are outside the control of the legislator. What can actually be harvested depends on these constraints. *Science* is a related category, which in this conceptualization represents our understanding of functions, processes and state of marine ecosystems and of human nature and society, but which also reflects technological innovations that influence how fisheries can be conducted and monitored. This category represents a broad understanding of scientific knowledge, which also includes traditional knowledge as defined by FAO, see more below in chapter 4.3.3.

A third category includes *institutions* as assumed in chapter 1.3.2. This category refers to all types of norms, whether formal or informal, including international law obligations, constitutional norms, statutory law, customary law, case law, ethical rules, social norms and others that influence a legislating activity at different levels. The final category is *society*, which basically represents the rest of potential impetuses to a legislator. The overall legislative context is the level in which fisheries policy and management objectives arise, are articulated or in other ways become obligations for a fisheries legislator in a national jurisdiction. It is also the level where decisions by a fisheries legislator can be reviewed by courts, which can redirect a state of law, or where macro-economic crises or international fisheries law disputes arise. These are also categories in which the boundaries can blur and

[117] I will refer generically to adoption of any kind of decisions under authorities set out in enabling provisions as subordinate legislation and practice. When referring to specific types of decisions, such as regulations and individual decisions under the Public Administration Act (in Norwegian referred to as "enkeltvedtak") in a Norwegian context, I will use this notation.

overlap, and that are not distinct or fixed in a real-world setting. They are only to be seen as analytical guidance to understand the legislative context better.

The middle level in the figure is where the *legislative design and assessment* of fisheries legislation by a legislator takes place. The basic proposition of the thesis is, building on the theory introduced in chapter 1.3.1, that fisheries legislation in a specific jurisdiction is more than formally adopted rules, but also consists of deeper structures in which history and context matters. The idea is therefore to identify a *multi-faceted lens* in the form of FLA accounting for the legal cultural context, which can assist the legislator to *navigate in* and understand linkages in a complex fisheries legislation. In other words, FLA is to be seen as a framework to support a legislator in a specific jurisdiction (typically in the form of *the legislature, a political executive* or an *administrative executive)* to implement political ambitions and aspirations, best-practices or ideal theory or management instruments and legal transplants from another jurisdiction into effective fisheries legislation.[118]

An analogy to demonstrate FLA in the figure is that it represents a pair of *binoculars* that can assist a replaceable captain (a legislator) to set the course, and find which *tools* are best suited for the *steering* of the fisheries management system (the vessel) in a certain direction. The current legislative framework can therefore be viewed through different perspectives in the binoculars. It can, for example, zoom out and see the broader picture and how all components are connected, it can zoom in to study a specific component of the system, or it can view legislation through historical or comparative perspectives, in order to assess the legal framework normatively. FLA is therefore dynamic, country specific and evolves over time.

[118] There are similarities to the legal culture approach introduced in Sunde and Hunter (2020), but in my approach the normative and practical orientation seems more prominent.

The tools available to the legislator for implementing policies are diverse and under continuous development. Literature[119] and several public advisory commissions[120] in a Norwegian context address regulatory instruments that can be relevant in environmental regulation making. There are first and foremost many general *institutional design choices* that can be made, including using purpose clauses, delegating executive authorities, using prohibitions and ordering certain actions and permitting action through licencing schemes. The use of *economic instruments* has, as will be demonstrated in the thesis, become influential in modern fisheries management. Examples of instruments can be arrangements to merge licences and decommission/scrapping of vessels through market-based mechanisms. Other instruments can be more socially oriented, such as allocating quotas for specific social purposes, or the issuing of licences to young fishermen to increase recruitment to the industry. *Technological instruments* can be of use for electronic monitoring of fishing vessels and similar in the enforcement of the harvest operations. The outcomes of the legislative design and assessment choice is seen in the bottom level in the form of *legislation*, *regulations* and *practice*. These are outcomes that again will become an element of a future legislative context for a legislator. On background of this *conceptual point of departure*, the legal historical inquiry in part II and comparative study in part III will be used to further illuminate how fisheries management is legislated. The conceptualization will therefore be revisited and further reflected on in part IV.

2.4.2 Basic assumptions in a Norwegian fisheries legislator approach (FLA)

Although the thesis is to further explore how commercial fisheries in Norway are legislated, some basic assumptions that are fundamental to the legislative point of departure of a Norwegian FLA are made. The legislation is reviewed through the lens of a legislator. This might also be seen as a *societal perspective*, but one in which it is assumed that the fisheries will continue to be an important industry contributing to future employment and value creation. This will be done within the context of a market-based economic system, where

[119] See for example Nordrum (2019); Eckhoff (1983)

[120] See e.g. NOU 2015: 15 Sett pris på miljøet - Rapport fra grønn skattekommisjon; NOU 2013: 10 Naturens goder - om verdier av økosystemtjenester; NOU 1995: 4 Virkemidler i miljøpolitikken.

demand and offer will decide the input of factors in the production. In this perspective the industry is generally not subsidized.[121]

Fisheries regulation is at the same time a combination of *industrial* and *environmental* regulation. A societal perspective is therefore also founded on a fundamental environmental perspective. The emphasis will be on direct effects of the fishery activities on marine biodiversity in the form of outtake of the resources, impact of gear on marine ecosystems and by-catch related issues. At the same time, emissions from commercial fisheries need future attention and are elements of the legislative context. The *industry element* of the societal perspective is also closely linked to the environmental perspective, as the control mechanisms not only aim at ensuring compliance of crucial rules of conduct, but also at accounting for quantities of fish harvested. The harvesters play, as will be demonstrated in the thesis, a key role in that regard. This includes consideration to clarity and foreseeability of the regulatory framework.

It is under this mix of perspectives a Norwegian FLA will be identified and further clarified. These basic assumptions are inspired by the introduction of a *management principle*[122] in the Marine Resources Act. The concept originates in discussions in two policy advisory commissions, which proposed the first drafts of the Marine Resources Act and the Nature Diversity Act,[123] on which basic principle the harvest and exploitation of marine resources should be founded on. One legislative point of departure was that all harvest is prohibited until the authorities opens up for it (a *conservation principle*). The other principle was that all harvest is allowed until it is restricted by regulations or prohibition (a *harvest principle*). The result of these discussions was the introduction of a new management principle in

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121 I acknowledge that the issue of fisheries subsidies is controversial and not settled in the World Trade Organisation (WTO) and that there are a variety of governmental transfers that fall within or outside the scope depending on how to define a "subsidy." As for now, I generally mean direct transfers to the industry and subsidies that contribute to illegal, unreported and unregulated fisheries and to overfishing in general, and that will be prohibited under the UN SDG 14.6.

122 In Norwegian referred to as "forvaltningsprinsippet."

123 Lov 19. juni 2009 nr. 100 om forvaltning av naturens mangfold (Nature Diversity Act)

section 7(1) of the Marine Resources Act that lays down that the Ministry[124] "shall evaluate which types of management measures are necessary to ensure sustainable management of wild living marine resources." Furthermore, there is no general prohibition of harvest. In the Bill proposition to the Parliament this was elaborated:

> In the Ministry's view, which legislative point of departure that is assumed is not the decisive point, but that the overall legislation gives the authorities expedient tools to manage the resources for the future and facilities for appropriate trade-offs of different considerations. It is therefore necessary to develop a separate management principle for wild living marine resources in ocean and on land that expresses the purpose of and considerations underpinning the management … The Ministry is therefore of the opinion that it is not necessary to introduce a rule setting out that all harvest of living wild marine resources is prohibited until the authorities open for harvest. The crucial point must be to find solutions that ensure that the stocks over time produce a harvestable surplus, while at the same accounting for the coastal communities and the industry.[125]

This quote summarizes some of the multi-faceted perspective of legislating fisheries in a Norwegian context, where consideration to the environment, coastal communities and the industry must be balanced and accounted for.

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[124] I refer to any Ministry responsible for fisheries legislation in Norway as "the Ministry."

[125] Ot.prp. nr. 20 (2007–2008) Om lov om forvaltning av viltlevande ressursar page 49–51. Norwegian wording: "Slik departementet ser dette, er det ikkje avgjerande kva for lovmessig utgangspunkt som vert lagt til grunn, men at lovgjevninga totalt sett gjev styresmaktene gode reiskapar for å forvalte ressursane for framtida og legg opp til gode avveningar mellom ulike omsyn. Det er difor behov for å utvikle eit eigforvaltningsprinsipp for viltlevande ressursar i sjø og land som viser formålet med og omsyna bak forvaltninga … Departementet meiner altså at det ikkje må innførast ein regel om at all hausting av levande marine ressuar er forbode før styresmaktene opna for hausting. Det avgjerande må vere å finne løysningar som gjer at bestandane over tid produserer eit haustingsverdig overskot, samstundes som omsynet til kystsamfunna og næringa vert tekne vare på. Forvaltningsprinsippet er nedfelt i § 7 første ledd."

2.5 Part V Policy: What should we do?

Once an FLA has been carved out for the Norwegian case in part IV, the last part of the thesis will test the approach in practice. This will merely be of an explorative and preliminary character with room for critical reflection and identification of areas for future research. The chosen research question is as introduced above:

- How can the right to the wild living marine resources of Norwegian society as a whole under section 2 of the Marine Resources Act be operationalized and strengthened?

This is a complex question, as this principle of the right to the resources encompasses many aspects of fisheries governance. It is both about access of the people of Norway and costal communities to marine resources as common pool resources (CPRs), which I will throughout the thesis refer to as a principle of *common shared resources,* and of the management responsibilities of the state.[126] How to approach the question therefore needs further refinement in light of the thesis observations, but an underlying motivation is to explore how the social performance of the legislation can be strengthened through legal action. As noted in chapter 1.2, the Auditor General of Norway has identified that the Norwegian fisheries legislation has had an unsatisfactory social performance the last 15 years. The thesis will now continue with further introduction to the study object in chapter 3 and theoretical landscape in chapter 4 before part I of the thesis is concluded.

3 Overview of the regulatory framework for Norwegian commercial fisheries

3.1 Introduction

The legal framework for commercial fisheries in Norway is a web of statutes and subordinate legislation and practice. This chapter will provide a brief overview of the general context that the statues are laid down within, followed by an introduction to the main statutes and regulations. The purpose is to give a background overview the overall

[126] See more on theories of ownership of natural resources in chapter 4.

legal framework, and its complexity and different sub-systems, which supports the legal historical inquiry and comparative study in part II and III. It is also to be seen as a prelude to the following chapter 4 that presents some of the central theoretical underpinnings of modern fisheries governance.

Chapter 3.2 starts by introducing the basic international fisheries law framework and influences. The placement in Norwegian law more generally and other relevant legislation is presented in chapter 3.3. Chapter 3.4 highlights the indigenous dimension with the Sámi people in a Norwegian fisheries context. Chapter 3.5 and 3.6 introduce the main rules in and regulations under the Marine Resources Act and the Participation Act, while chapter 3.7 addresses the question of ownership of the resources and the scope of the regulating authority. The main elements of the Fish Sales Organization Act and relevant regulations are presented in chapter 3.8. The overall enforcement system, and use of sanctions and punishment, incorporates elements from all three previous statutes and concludes this overview in chapters 3.8 and 3.9.

3.2 International law

Norwegian fisheries legislation is laid down within international law frameworks, and national developments are continuously influenced by global agreements and soft law. It is important at the outset to point out that there is a *tradition of dualism* in Norwegian law. This means that international law obligations first come into legal effect (applied by courts) when transformed or translated into national law. This sub-chapter emphasizes an introduction to international fisheries law obligations, but as will be seen throughout the thesis is the European Convention of Human Rights (ECHR) of November 4, 1950, also central. Obligations under the ECHR are incorporated directly into Norwegian law under the Human Rights Act section 2.[127] Also obligations under the UN International Covenant on Civil and Political Rights (ICCPR)[128] are incorporated through the Human Rights Act. Both of these conventions prevail other Norwegian statutory law in case of conflict under the Human Rights Act section 3. These human rights obligations are therefore given what in

[127] Lov 21. mai 1999 nr. 30 om styrking av menneskerettighetenes stilling i norsk rett (Human Rights Act).

[128] International Covenant on Civil and Political Rights, December 16, 1966 (ICPPR).

theory has been referred to as a "semi-constitutional" protection.[129] International fisheries law is, on the other hand, transformed into fisheries legislation.

As will be demonstrated later, the creation and codification of the law of the sea framework provided the basis for a shift into a quota regime that changed how we would regulate fisheries fundamentally. Norway established its 200 nautical mile *exclusive economic zone* (EEZ) by the adoption of the Norwegian EEZ-Act in 1976.[130] Important prior international developments were the conferences on the law of the sea in the 1950s, 60s and 70s that laid the foundation for the final adoption of the United Nations Convention on the Law of the SEA (UNCLOS) and establishment of the International Tribunal for law of the Sea in 1982.[131] UNCLOS represented partly a codification of previous customary law and treaties, and partly new law of the sea.[132]

Pursuant to UNCLOS Article 56(1) Norway has *exclusive rights* to exploitation, conservation and management of the living marine resources, as well as *jurisdiction* to conduct marine scientific research and protect and preserve the marine environment in the Norwegian EEZ (NEEZ).[133] Under Article 56(2) Norway has a duty to have due regard to rights and duties of other states and to act in manner with provisions under UNCLOS. The resources must be sustainably managed and the coastal state "shall determine the allowable catch of the living resources in its exclusive economic zone."[134] Other states shall be given access to any surplus of allowable catches through agreements or other arrangements, and foreign actors that are granted access and fish in the NEEZ must comply with Norwegian

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129 See for example Langford and Berge (2019) page 219.

130 Lov 17. desember 1976 nr. 91 om Norges økonomiske sone (Norwegian EEZ-Act). The limit of the EEZ is 200 nautical miles (1 nautical mile=1852m) from the baseline (In Norwegian "grunnlinja") that at any time is adopted, but not beyond the midline towards other states unless otherwise agreed. Section 1(2) in the EEZ-Act.

131 See more on these processes in Churchill and Lowe (1999) page 13–22. Norway signed the Convention on December 10, 1982, and ratified it in 1996. The Convention went into force on November 16, 1994.

132 See Dahl (2009) chapter 5 for a historical background.

133 See Bankes (2020) for an overview of interpretation of some of the provisions in UNCLOS related to EEZs by international courts and tribunals.

134 UNCLOS Article 61(1).

rules and regulations.[135] Furthermore, Norwegian authorities can enforce foreign fishing activities, including boarding, inspection and other measures "as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention."[136] Pursuant to UNCLOS Norway has established a 12 nautical mile (from the baseline) *territorial sea* in the Norwegian Territorial Sea Act.[137] Foreign vessels have a right to innocent passage through the territorial sea (or stopping and anchoring in cases of force majeure or trouble), but no access to internal waters unless laid down in regulations by the King in Council.[138] One duty of the coastal states with respect to conservation of living resources is, taking into account "the best scientific evidence available," to "ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation."[139] These are measures that "shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield," but non-biological considerations can also be taken into account.[140] The concept of maximum sustainable yield (MSY), and how it plays a part in the management, is further addressed in chapter 4.

UNCLOS also provides a framework to regulate fishing in areas beyond EEZs (high seas). Under Article 63(2) there is a duty for states that share *migratory* and *straddling stocks* that occur within respective EEZs, and in areas beyond and adjacent to those EEZs, to collaborate through subregional or regional organization on necessary management and conservation measures. Under Article 64 a similar duty is laid down for *highly migratory species*. The adoption of UNFSA in 1995 marked a landmark in international fisheries law as it further specified rights and duties for states in relation to fishing and enforcement in

135 UNCLOS Article 62.

136 UNCLOS Article 73 (1).

137 Lov 27. juni 2003 nr. 57 om Norges territorialfarvann og tilstøtende sone (Norwegian Territorial Sea Act).

138 Norwegian Territorial Sea Act sections 1, 2 and 3. The term *King in Council* refers the Norwegian cabinet as a collective decision-making organ. In Norwegian this is referred to as "Kongen i statsråd." As the executive power is formally vested in the King or Queen (under Article 3 of the Norwegian Constitution), these are decisions formally signed by the monarch in weekly meetings. These formal decisions are referred to as *Order in Council*. In Norwegian they are referred to as "kongelig resolusjon."

139 UNCLOS Article 61(2).

140 UNCLOS Article 61(3).

high seas, and not least it also incorporated several environmental law principles that also apply to areas under national jurisdiction.[141] These are also environmental law principles laid down in CBD, but this chapter emphasizes the implementation in international fisheries law. With regards to UNFSA, this includes inter alia the application of the precautionary approach,[142] to ensure that measures "are based on the best scientific evidence available,"[143] to "protect biodiversity in the marine environment,"[144] and to "take measures to prevent or eliminate overfishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources."[145] Some of the concepts in these rules are further reflected on in chapter 4.

Important for the co-operation on straddling and highly migratory species under these frameworks is also the establishment of various subregional or regional cooperation bodies in Regional Fisheries Management Organizations (RFMOs), and adopted conventions in that regard. Norway is a contracting party to many organizations, but the majority of Norwegian fisheries takes place within the Convention area of the North East Atlantic Fisheries Commission (NEAFC), established in 1980, but with roots back to 1959.[146] In recent years the various RFMOs have been important in the development of regional and global instruments to prevent IUU-fishing by establishing control, monitoring and enforcement schemes at sea and in ports, and to protect biodiversity in international waters by prohibiting bottom fishing in Vulnerable Marine Ecosystems (VMEs) and other

141 UNFSA Articles 3(1) and 3(2), and Articles 5, 6 and 7. See more in Henriksen, Hønneland and Sydnes (2006).

142 UNFSA Article 6

143 UNSA Article 5(b).

144 UNFSA Article 5(g).

145 UNFSA Article 5(h).

146 Convention on Future Multilateral Cooperation in Northeast Atlantic Fisheries (NEAFC), November 18, 1980. Under the Convention, NEAFC has the authority to lay down regulations and management measures in the Convention Area, including the establishment of closed areas and allowable catches and their allocation to the Contracting Parties. See Gezelius (2008a); Gezelius, Raakjær and Hegland (2010) for an overview of the historical events in this regard.

measures.[147] Norway also has extensive bi- and multilateral cooperation with other coastal states within the framework of international law, normally annually to agree on quotas and quota allocation on shared stocks, and on mutual access to fishing in jurisdictions of the contracting parties.[148] EU legislation does to little extent, and more indirectly, influence Norwegian fisheries legislation, as matters related to fisheries are generally outside the scope of the EEA-Agreement.[149]

3.3 Placement in Norwegian law

The Public Administration Act applies to all exercise of public authority by the fisheries administration, and the fish sales organizations when they carry out their public duties introduced below, if not exempted by law. Adoption of regulations and individual decisions under the authority of fisheries legislation is therefore an area under Norwegian administrative law. There are also many *ministerial executive orders*[150] that are legally binding to administrative agencies in their decision-making or exercise of discretion. The Executive Order on Examination[151] is particularly pertinent as it provides additional procedural requirements on how to inform a case for subordinate decision-making. In addition, the Freedom of Information Act is central to all public decision making as it sets out the main principle that all documents are open to the public unless restricted with

147 There are also Norwegian fishing vessels fishing in the Northwest Atlantic and in the Antarctic. Norway is therefore also a contracting party in the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, October 24 1978 (NAFO) and the The Convention on the Conservation of Antarctic Marine Living Resources, May 20 1980 (CCAMLR). After the Bluefin tuna started appearing more in Norwegian waters, Norway has since 2004 been a contracting party in the International Convention for the Conservation of Atlantic Tunas, May 24 1966 (ICCAT)

148 For an overview of content of, and actual fishing by, all international fisheries agreements Norway is a party to, see Meld. St. 15 (2018–2019) Noregs fiskeriavtalar for 2019 og fisket etter avtalane i 2017 og 2018.

149 The European Economic Area Agreement, May 2 1992 (EEA). Questions regarding export and trade of fish from Norway into the EU are regulated in protocol 9 to the agreement. One example of EU influence is a requirement for residency for crew on Norwegian commercial vessels that led to an amendment in Norwegian legislation a few years ago. See more on this case and process in Ot.prp. nr. 99 (2005–2006) Om lov om endring i lov 17. juni 1966 om forbud mot at utlendinger driver fiske m.v. i Norges territorialfarvann.

150 I will use this English generic term for both "regjeringsinstrukser" and "departementsinstrukser."

151 Kongelig resolusjon av 16. februar 2016: Utredningsinstruksen (Executive Order on Examination).

authority in statutory law.[152] Its main purpose is to ensure an open and transparent public decision-making to strengthen democracy and rule of law principles for citizens.[153] Furthermore, the day to day operations related to control and enforcement falls under administrative law when there is use of administrative sanctions. General criminal law[154] will similarly come to play in relation to the enforcement and sanction component of the system when cases are reported to the police and the prosecuting authorities choose to issue a criminal charge. The comparative study in part III will go further into substantive and procedural rules in the Public Administration Act in the context of exercising fisheries legislation more specifically, but administrative law issues will also run through the thesis. The same goes for criminal law, but the main emphasis is on criminal liability and the responsibilities of the fisheries administration.

The environmental law perspective is also essential as fisheries activities are exploitation of natural resources that in various ways can impact marine ecosystems. As noted in chapters 1.2 and 3.2, Norway has many international obligations related to protection of biodiversity, preventing pollution, waste management and carbon emissions and many more, laid down in domestic legislation. Environmental rights of individuals and environmental obligations for the authorities are enshrined in Article 112 of the Norwegian Constitution. The provision encompasses a duty for the current generation to ensure a sustainable development of the natural resources for the future generations.[155] The Environmental Information Act is an operationalization of the right to environmental information under Article 112(2) of the Norwegian Constitution. Its purpose is to ensure public access to environmental information so that each individual can contribute to the environment, protect themselves and participate in the public debate.[156] It therefore supplements the

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152 Lov 19. mai 2006 nr. 16 om rett til innsyn i dokument i offentleg verksemd (Freedom of Information Act) section 3.

153 Freedom of Information Act section 1.

154 Lov 20. mai 2005 nr. 28 om straff (Penal Code); lov 22. mai 1981 nr. 25 om rettergangsmåten i straffesaker (Criminal Procedure Act).

155 The Norwegian Constitution Article 112(1).

156 Lov 9. mai 2003 nr. 31 om rett til miljøinformasjon og deltakelse i offentlige beslutningsprosesser av betydning for miljøet (Environmental Information Act) section 1.

Freedom of Information Act when it comes to transparency of public decision-making, but additionally gives individuals right to access environmental information concerning private actors.[157]

Many of the more specific international obligations concerning biodiversity and use of natural resources are, as will be seen below, laid down in the Marine Resources Act, but the general provisions on sustainable use in the Nature Diversity Act[158] supplement those rules.[159] This includes inter alia principles for official decision-making in which decisions shall (as far as reasonable) be based on scientific knowledge (section 8), a precautionary principle (section 9) and an ecosystem approach (section 10).[160] In special cases when a marine species is rare or in risk of extinction, regulations can be made under section 23 on priority species. Pollution from fishing vessels is regulated by provisions in the Maritime Safety Act[161] and the Pollution Act.[162] The Planning and Building Act is also a central statute for the management of coastal areas within its scope 1 nautical mile outside the baseline, which co-exists, and is coordinated with, fisheries legislation.[163] Lastly, it should be reminded that the harvest of marine resources is commercial animal (mostly) food production that is largely conducted by companies with employees in competitive markets. There are therefore many areas of law that in different ways will influence the fishery related activities, including animal welfare legislation,[164] food security legislation,[165] cooperative

157 Environmental Information Act chapter 4.

158 Lov 19. juni 2009 nr. 100 om forvaltning av naturens mangfold (Nature Diversity Act).

159 See Ot.prp. nr. 52 (2008–2009) Om lov om forvaltning av naturens mangfold (naturmangfoldloven) page 117.

160 Section 2(1) sets out that the territorial scope of the act is the territorial waters, but section 2(3) clarifies that sections 1, 3, 5, 7–10, 14, 16, 57 and 58 applies on the continental shelf and NEEZ "to the extent they are appropriate."

161 Lov 16. februar 2007 nr. 9 om skipssikkerhet (Maritime Safety Act).

162 Lov 13. mars 1981 nr. 6 om vern mot forurensninger og om avfall (Pollution Control Act).

163 Lov 27. juni 2008 nr. 71 om planlegging og byggesaksbehandling (Planning and Building Act).

164 Lov 19. juni 2009 nr. 97 om dyrevelferd (Animal Welfare Act).

165 Lov 19. desember 2003 nr. 124 om matproduksjon og mattrygghet mv. (Food Act).

legislation,[166] tax law[167], corporate law,[168] law of sales,[169] property law,[170] competition law[171] and labour law[172] to mention some that will be highlighted when of particular relevance to the topics addressed throughout the thesis.

3.4 The Sámi perspective (aboriginal dimension)

The indigenous Sámi people have been involved in fisheries in the geographical areas of what is now Norway for thousands of years.[173] Norway has international obligations to protect the rights of minorities and indigenous groups.[174] These obligations are further implemented in Norwegian legislation, including constitutional protection of the rights in Article 108 of the Norwegian Constitution and general provisions set out in the Sámi Act.[175] Fisheries legislation also addresses the Sámi perspective in both the Marine Resources Act and the Participation Act, which will be briefly reflected in the chapters below.

The Norwegian government does not, however, acknowledge that the Sámi have any exclusive right to fishing in the coastal areas outside the county of Finnmark. A policy advisory commission examined this issue and submitted a report with proposals in 2008.[176] The commission concluded that people living in coastal areas of Finnmark have a right to fish on basis of historical use and international law on minorities and indigenous groups. This was both an individual right, and a collective right for a community in a fjord and more

166 Love 29. juni 2007 nr. 81 om samvirkeforetak (Cooperative Societes Act).

167 Lov 26. mars 1999 nr. 14 om skatt av formue og inntekt (Taxation Act).

168 Lov 13. juni 1997 nr. 45 om allmennaksjeselskaper (Public Limited Liability Companies Act); lov 13. juni 1997 nr. 44 om aksjeselskaper (Limited Liability Companies Act).

169 Lov 13. mai 1988 nr. 27 om kjøp (Sale of Goods Act).

170 Lov 8. februar 1980 nr. 2 om pant (Mortage Act).

171 Lov 5. mars 2004 nr. 12 om konkurranse mellom foretak og kontroll med foretakssammenslutninger (Competition Act).

172 Lov 17. juni 2005 nr 62 om arbeidsmiljø, arbeidstid og stillingsvern mv. (Working Environment Act).

173 See NOU 2008: 5 Retten til fiske i havet utenfor Finnmark chapter 6 for an overview of the settlements and culture of the Sea Sámi population in Finnmark.

174 Most relevant treaties are the ICCPR Article 27 and Interntional Labour Organisation (ILO) Indigenous and Tribal Convention No. 169 (ILO Convention No. 169).

175 Lov 12. juni 1987 nr. 56 om Sametinget og andre samiske rettsforhold (Sámi Act).

176 NOU 2008: 5.

broadly. The commission proposed a new Act on the right to fish outside the coastal areas of Finnmark to codify the content of the right, and to establish a separate management system for fishing in the areas.

The proposals were not pursued in a subsequent Bill proposition on these issues by the Ministry.[177] The government did not agree that there existed an exclusive right to fishing outside of Finnmark, and it considered that the current fisheries legislation was congruent with international obligations. The Ministry did, however, propose to codify a right to fish, with some modifications, for all people in Finnmark and municipalities with Sámi populations in Troms and Nordland into existing fisheries legislation. The intention was to "secure that the fisheries regulations also in future would by far be within the limits provided by international law and contribute to strengthen small scale fisheries in parts of Northern Norway as a district policy instrument."[178] The Parliament supported the proposal, and several amendments were made to the Marine Resources Act, Participation Act and Finnmark Act. In the follow-up a fjord fishery advisory board has been established and extra quotas has been allocated to the open cod fishery in Finnmark and areas of Troms and Nordland with Sámi populations.[179]

3.5 The Marine Resources Act

3.5.1 General provisions: Purpose and considerations

The Marine Resources Act sets out the main framework for how the many diverse commercial fisheries shall be managed, and on which considerations the management must

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177 See more in Prop. 70 L (2011–2012) Endringar i deltakerloven, havressurslova og finnmarksloven.

178 Prop. 70 L (2011–2012) page 8. Norwegian wording: "sikre at fiskerireguleringane også for framtida vil vere klart innanfor dei rammene som følgjer av folkeretten, og ein vil medverke til å styrkje dei som driv fiske med små fartøy i delar av Nord-Noreg som eit distriktspolitisk verkemiddel."

179 All proposals were part of a package of measures agreed on after consultations with the Ministry and the executive branch of the Sámi Parliament. The majority of the Sámi Parliament endorsed the proposals. The agreement was on the measures, but the Sámi Parliament did not support the Ministry's interpretation and understanding of the international law obligations. Further information on the consultation process and a separate comment from the Sámi Parliament is included in Prop. 70 L (2011–2012) page 116. The fjord fishery advisory commission is in Norwegian referred to as "fjordfiskenemnda."

be based on.[180] It is therefore basically the set of rules that regulates *what* can be fished, *where* the fishery can take place and how the fishery *must be conducted*. Chapter 1 of the Act sets out the general provisions related to purpose, scope and management considerations. It generally applies to all Norwegian vessels[181] regardless of which jurisdiction the activities take place in, and to foreign vessels when fishing within the NEEZ if explicitly laid down in regulations. The purpose clause in section 1 in the Act introduces from the very beginning a *tribid* nature of the legislation, in the intersection of balancing 1) environmental sustainability concerns, 2) socio-economic and commercial concerns and 3) promotion of regional and distributional policies.[182] The purpose clause therefore also reflects the three *sustainability pillars*, respectively environmental, economic and social sustainability, widely recognised as fundamental considerations underpinning responsible fisheries management. None of the considerations are given priority over another in the wording of the statute, or explicitly in the preparatory works. There are, however, some statements in the Bill proposition that suggest a priority order as it is set out that the prioritizing between the purposes must "be done within a sustainable frame, where harvest in the long term must not impair the ability of the resources to reproduce."[183]

Section 2 establishes that the "wild living marine resources belong to Norwegian society as a whole."[184] As seen in chapter 2.5, I will refer to this principle as a *common shared resources* principle. It is emphasized in the Bill proposition that the provision does not create a public property right in a legal sense, but is an acknowledgement of the right for society as a whole in contrast to privately owned resources.[185] It is also highlighted that this must be seen in

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180 The territorial application and personal scope is laid down in Marine Resources Act sections 4 and 5. Section 5 sets out the general rule that the act applies to everyone within the territorial application.

181 It is clarified in Ot.prp. nr. 20 (2007–2008) page 179 that this includes vessels that fall under the application of lov 24. juni 1994 nr. 39 om sjøfarten (Norwegian Maritime Code) section 1. Unregistered vessels fall under the general application in section 5 of the Marine Resources Act.

182 Marine Resources Act section 1.

183 Ot.prp. nr. 20 (2007–2008) page 30. This same is suggested, and same source is also referred to, in Sund and Fjørtoft (2018) 57. Norwegian wording: "må skje innenfor ei berekraftig ramme, der hausting på lengre sikt ikkje må svekke ressursane si evne til reproduksjon."

184 See footnote 5 above on this translation.

185 Ot.prp. nr. 20 (2007–2008) page 177.

conjunction with the management responsibilities of the state to ensure that the stocks and marine ecosystems "are in balance and produce a harvestable surplus."[186] These issues were thoroughly debated in the process that led to the adoption of the Act, which involved a proposal by a policy advisory commission of a *public property right* to the resources, which is addressed and reflected further on in chapter 3.7 and later parts of the thesis.[187] Various theories on ownership of natural resources are presented in chapter 4. The principles and fundamental considerations in the management of the wild living marine resources are set out in section 7. The introduction of the "management principle" (as introduced in chapter 2.4) was an important new principle that laid down a *duty* for the fisheries administration to "evaluate which types of measures are necessary to ensure sustainable management of wild living marine resources."[188] This is a duty that applies to the Ministry. Section 7 is therefore the statute that confers the *general regulatory authority* to the executive branch of the Norwegian Government. As will be shown, the Marine Resources Act mostly consists of executive authorities to lay down more specific regulations, but this provision is central as it lays down the *general management responsibility* in the decision-making.

The Bill proposition clarifies that sustainable harvest does not only include harvest of targeted species, but also protection of other parts of the ecosystem.[189] In this holistic approach a long list of considerations must be emphasized, including a precautionary-approach and an ecosystem-based approach. The wording does not explicitly mention that the management shall be based on scientific knowledge, but section 7(2)(a) adds that emphasis shall be given to the precautionary approach "in accordance with international agreements and guidelines." By this the above-mentioned Article 5(b) in UNFSA, which sets out that states shall ensure that measures are based on the best scientific evidence available, applies to the decision-making. The Bill proposition also underlines that the

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186 Ot.prp. nr. 20 (2007–2008) page 177. Norwegian wording: "er i balanse og produserar eit haustingsverdig overskot."

187 See discussions in NOU 2005: 10 Lov om forvaltnings av viltlevende marine ressurser chapter 6 and Ot.prp. nr. 20 (2007–2008) chapter 4.3.

188 Marine Resources Act section 7(1).

189 Ot.prp. nr. 20 (2007–2008) page 177.

decision shall be based on "extensive scientific knowledge."[190] The Sámi perspective is also reflected as a fundamental consideration as the authorities shall ensure that management measures "help to maintain the material basis for Sámi culture."[191] Furthermore, emphasis shall be given to economic aspects and effective enforcement of the activities.[192] Section 8 authorizes the establishment of a council for regulatory advice, and section 8b the establishment of an advisory board for the counties of Troms and Finnmark and Nordland. Parts II and III address the issues of stakeholder participation in more detail.

3.5.2 Quota regulations

Chapter 3 of the Marine Resources Act establishes the legal framework for adopting catch limitations. The main instrument is the use of *quotas* for each commercial species. Section 11(1) authorizes the Ministry to adopt *national quotas* for a specific resource.[193] This can be done through a quantity, number of individuals, and number of fishing days or a number of other input factors. Furthermore, quotas can be limited to certain time periods and/or geographical areas. Most common is the use of quotas by weight, with the national quota referred to as the Total Allowable Catch (TAC).[194] The provision also authorizes adoption of quotas to achieve specific policy goals of settlement and employment through the use of *district quotas*[195] or requirements to where a harvest must be landed, and in what condition.[196]

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190 Ot.prp. nr. 20 (2007–2008) page 181–182. Foreshadowing some of the later comparative perspectives, it is interesting to see how the Norwegian legislation is reviewed in a comparative study of discretion in fisheries management in Canada, US, New Zealand, EU, Iceland and Norway found in Bernard and Van Tuyn (2016). This is a study I was made aware of by two of the respondents in DFO. In this study it is for example not identified that Norway builds its management on best available science. This demonstrates how important knowledge of a legal tradition in a jurisdiction is when comparing legal frameworks, both to know the relevance of preparatory works and the fragmentation of the legislation, with the Nature Diversity Act supplementing the provisions in the Marine Resources Act.

191 Marine Resources Act section 7(2)(g)

192 Marine Resources Act sections 7(2)(e) and 7(2)(c).

193 See more on this in the motives for this provision in Ot.prp. nr. 20 (2007–2008) page 185.

194 There are exceptions though. For example, the national quota of wrasse (leppefisk) is set out as a number of individuals (millions) that can be harvested within a specific time and area. See more in forskrift 14. desember 2018 nr. 1979 om reguleringen av fisket etter leppefisk i 2019 (Wrasse Regulations 2019).

195 In Norwegian referred to as "distriktskvote."

196 Marine Resources Act sections 11(3) and 11(4).

The majority of the commercial species are shared with other coastal states, so the national quota is mainly determined by what is agreed on in coastal state negotiations. Coastal state negotiations take place the fall before *the regulatory year*, on the basis of quota recommendation provided by the International Council for the Exploration of the Sea (ICES).[197] The process of quota allocation and other preparations before the next *regulatory year* is the preparation for the next year's continuous and cyclic process, often referred to as *the regulatory cycle.*[198] As to roles and responsibilities in these processes, both the Ministry and the Directorate are involved. The Ministry has the authority to adopt regulations when this is conferred through provisions in the Marine Resources Act, but in many cases the authority is further delegated to the Directorate. All of the allocations, and what each vessel can harvest, are set out in *annual regulations.*[199] The process that leads to the adoption of regulations involves stakeholder participation.

Section 11(2) authorizes the Ministry to allocate a total allowable catch to a specific vessel group or group of gears; I will refer to them from now on as *group quotas*. Traditionally, vessel groups use specific gear so that these two categories are mostly the same. There is, however, an increased use of gear flexibility in vessel groups in the last few years. Vessel length can also be a variable that determines belongingness to a group. This might on paper appear as minor regulatory details, but when it comes to what the individual licence holder is allocated annually, it can be of significant importance which group a vessel is placed in. Some rules are, however, under revision. Se more on this in part II.

A group quota is then allocated to *specific* vessels through different systems depending on what vessel group that is at case. This is, however, not done through the use of

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197 ICES is an intergovernmental marine research organization that provides scientific advice for the member countries, basically coastal states in the Northeast and Northwest Atlantic. The Institute for Marine Research in Norway is involved from Norwegian side. See more on role and function here: www.ices.dk

198 I am not sure where this term originally came from. It is now a well established and widespread term often referred to and illustrated in public documents.

199 These are in Norwegian often generally referred to as "reguleringsforskrifter," and more specifically by specifying the actual species and year, for example, forskrift 21. desember 2018 nr. 2232 om regulering av fisket etter torsk, hyse og sei nord for 62 grader N i 2019 (Cod Regulations 2019). I will use the term annual regulations when I speak generally of these regulations.

administrative decisions, but is set out in regulations. This part of the quota allocation is strongly connected to the participation element of the management. It is the licences in the relevant fishery that is the linkage between what the regulation sets out, and what the actual vessel can fish. I will elaborate the main elements of this legislative instrument in chapter 3.6.3, presenting the licencing scheme for the coastal fleet and the offshore fleet. Much can be said on the *allocation of the resources*, and introduction of *limited entry* fisheries, and this is a topic that is well studied in a Norwegian context and further addressed in a legal historical context in part II of the thesis.[200] As of now, I find it sufficient to summarize that there have been developed different allocations keys for the main commercial species that the industry has agreed on after negotiations among the diverse commercial vessel groups. These have largely been assumed by the fisheries administration.

3.5.3 Technical regulations, area management and local regulations

In addition to establishing the quotas the fleet can harvest, the annual regulations set out different types of rules in how the different types of fisheries must be conduced, including gear restrictions, by-catch rules, minimum fish sizes, when a fishery can take place and sometimes also where. These are rules that are laid down with legal basis in enabling provisions in the Marine Resources Act chapter 4 on "The conduct of harvesting operations and other utilisation of wild living marine resources."[201] Rules of conduct are supplemented by rules set out in permanent regulations in the Rules of Conduct Regulations.[202] These regulations are extensive and very technical, including 19 chapters addressing different gear and fleet types, and 101 provisions.

Both the Rules of Conduct Regulations and the large set of annual regulations set out different types of rules that go far back in the regulatory tradition and will be reviewed in a legal historical and comparative perspective in parts II and III. Some rules set out in the Marine Resources Act chapter 4, and 5 on "Order on harvest grounds, compensation, local

200 For an overview of the historical developments in fisheries allocations in English, see for example Hersoug (2005).

201 Norwegian wording: "Gjennomføring av hausting og anna utnytting av viltlevande marine ressursar."

202 Forskrift 22. desember 2004 nr. 1878 om utøvelse av fisket i sjø (Rules of Conduct Regulations).

regulations and committees,"[203] are however, more principally important and merit an introduction at the background stage. First and foremost, section 15 sets out a *general duty to land all catches* of fish, but the Ministry is authorized to in regulations make exemptions from the duty and prohibit discards of biological waste.[204] The general duty is mainly motivated in: 1) to contribute to that a large part of the harvest is registered and calculated in quota accounts, 2) to reduce the risk of underestimating the actual outtake of fish landed and registered, and 3) it is a duty that is important out of consideration to the environment and the stocks.[205]

Another important provision is section 19, which authorizes the establishment of marine protected areas (MPAs), where fishing or hunting of wild living marine resources can be prohibited, or partly prohibited. This is a form of protection that can be an alternative to protection of marine areas under chapter V in the Nature Diversity Act. The Bill proposition emphasizes that introduction of MPAs can supplement and provide a more permanent alternative to more temporary closures of areas under section 16.[206] It is at the same time highlighted that measures are not meant for the long term, but that it is the purpose of the protection that determines its duration.[207] It is also highlighted that the protection measures must not go longer than the purpose of the protection, in other words fishing that does not impact what is protected can still be allowed.[208] In 2016 the first regulation pursuant to the provision was adopted and established a prohibition on bottom fishing in several areas in the NEEZ to protect coral reefs.[209]

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203 Norwegian wording: "Orden på haustingsfelt, erstatning, lokale reguleringar og utval."

204 In Norwegian the duty is referred to as "ilandføringsplikt."

205 Ot.prp. nr. 20 (2007–2008) page 189.

206 Ot.prp. nr. 20 (2007–2008) page 194.

207 Ot.prp. nr. 20 (2007–2008) page 194.

208 Ot.prp. nr. 20 (2007–2008) page 193. An example highlighted is that pelagic fisheries can be permitted in areas where the bottom habitat is protected.

209 Forskrift 8. januar 2016 nr. 8 om beskyttelse av korallrev mot ødeleggelser som følge av fiskeriaktivitet (Coral Reef Regulations 2016).

Lastly, section 32 sets out rules that authorize establishment of local regulations by regional offices of the Directorate, or by an appointed local committee. The provision therefore opens up for establishing local rules designed and laid down by others than the government. It is therefore an instrument for co-management of the resources. The scope is, however, limited to rules of conduct that organize gear types, times of fishing activities and reporting obligations to the Directorate. Additionally, section 33 is a related provision that authorizes the Directorate to appoint local overseers,[210] that through "guidance and warnings shall work to prevent violations of provisions adopted pursuant to this Act, and contribute to law and order on the fish grounds."[211]

3.6 The Participation Act

3.6.1 General provisions: Purposes and scope

The central function of the Participation Act is, as the name indicates, regulating *who* can participate in *commercial fisheries* in Norway, and on which *terms*. Although many commercial fisheries on key species have limited entry today, it is important to highlight that commercial fisheries generally are open to *everyon*e if the person fulfills fairly basic qualification requirements presented below in chapter 3.6.2. This point of departure is often overshadowed by the limited entry element in the major commercial fisheries. Chapter 1 sets out the purposes and application of the Act. The purposes are:

[210] I will refer to personnel appointed to control fisheries as "overseers" or "supervisors" interchangeably in the Norwegian context, but will specify when they come from the industry or the public. These are mostly terms used in the legal historical inquiry in part II. Other terms will be specified when relevant in a Norwegian or Canadian context.

[211] Norwegian wording: "rettleiing og åtvaring skal arbeide for å hindre brot på føresegner som er fastsette i eller i medhald av lova, og vere med å halde ro og orden på haustingsfelt."

a) to adjust the harvest capacity of the fleet to the resource base in order to secure a rational and sustainable use of the marine resources,
b) to increase the profitability and value creation in the industry and through this secure settlement and employment in rural areas, and
c) to provide for the harvest of the marine resources still benefitting the coastal population.[212]

The provision itself does not prioritize any of these purposes, but the Bill proposition emphasizes that the protection of the resource base has been the most central purpose.[213] Furthermore, the aboriginal perspective is included in section 1a, setting out that the Act shall be applied "in accordance with international law on indigenous peoples and minorities."[214]

The Act generally applies to commercial harvest from a vessel that is Norwegian pursuant to the Norwegian Maritime Code sections 1 to 4, and vessels owned by a foreigner in Norway when the vessel is less than 15 meters.[215] Section 3(1) sets out that fishing and hunting is considered to be commercial when the person concerned has these activities as a "livelihood alone or in combination with other industrial activities and where a vessel is used."[216] Under the authority of section 3(1) the King has adopted the Fisherman Register Regulations that further specify what constitutes commercial harvest, including income requirements.[217]

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212 Norwegian wording: "a) å tilpasse fiskeflåtens fangstkapasitet til ressursgrunnlaget og sikre en rasjonell og bærekraftig utnyttelse av de marine ressurser, b) å øke lønnsomheten og verdiskapingen i næringen og gjennom dette trygge besetting og arbeidsplasser i distriktene, og c) å legge til rette for at høstingen av de marine ressurser fortsatt skal komme kystbefolkningen til gode."

213 Ot.prp. nr. 67 (1997–98) Om lov om retten til å delta i fiske og fangst page 41.

214 Norwegian wording: "i samsvar med folkerettens regler om urfolk og minoriteter."

215 Participation Act section 2(1).

216 Norwegian wording: "levevei alene eller sammen med annen næring og hvor fartøy nyttes."

217 Forskrift 18. desember 2008 nr. 1436 om manntal for fiskarar og fangstmenn (Fisherman Register Regulations).

3.6.2 General requirements and fundamental principles

A basic *commercial permit*[218] is necessary to take part in any commercial fishery with a vessel.[219] This is a permit that is issued by the Directorate[220] to a *specific person* for a *specific vessel*, and it only entitles the person to fish pursuant to provisions that at all times are set out under the Participation Act or the Marine Resources Act.[221] The permits are granted at the discretion of the Directorate, i.e. the administration "can" issue the permit if basic requirements are fulfilled. No person has therefore a *legal claim* to be issued a permit even if all requirements are met.[222] The Ministry has set out more specific rules for the processing and issuing of commercial permits in the Commercial Permit Regulations.[223] There is recent legal literature that go into detail about the practical processes and the set of requirements that applies, so I will at this point only introduce the main principles and rules in the system that in different ways will run through the various parts of the thesis.[224]

As indicated above, there is a *nationality requirement* to participate in commercial fisheries in Norway set out in section 5 of the Participation Act. A commercial permit can only be issued to a person that is Norwegian citizen, or a foreigner that has residence in Norway for vessels less than 15 meters long.[225] Section 5(2) prescribes which companies and unions are considered "Norwegian citizens" under the Act. There is a general *residence requirement*[226]

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218 In Norwegian this type of licence is referred to as "ervervstillatelse."

219 Participation Act section 4(1).

220 The authority is delegated by the Ministry.

221 Participation Act sections 4(2) and 4 (3). Both a legal person and physical person can be issued a commercial licence, see for example judgment in Rt. 2012 s. 543. This case is also rendered in Sund and Fjørtoft (2018) page 35.

222 This was reiterated in a recent Bill with some amendments of the Act in 2014 that also highlighted that several reasons for rejections were developed in administrative practice. Prop. 88 L (2014–2015) Om endringer i deltakerloven page 23. See more under in the description of section 7 of the Act.

223 Forskrift 7. desember 2012 nr. 1144 om ervervstillatelse, registrering og merking av fiskefartøy mv. (Commercial Permit Regulations).

224 See more in Sund and Fjørtoft (2018); Saric (2018).

225 Participation Act section 5(1).

226 In Norwegian referred to as "bostedskrav."

in section 5a of the Act that establishes that at least half of the crew and the *captain*[227] must live in a coastal municipality or a municipality that borders a coastal municipality. Section 6 of the Act is probably the most controversial and debated provision in the Act. The provision sets out a general requirement that a licence can only be issued to a person that has been active in commercial fishing "on or with" a Norwegian vessel for a minimum of three of last the five years, and still is "connected to" the profession. This is what I will refer to as the *activity requirement*.[228] It was previously required that the owner had to be physically on the actual vessel, but this has been modified through development of administrative practice as the vessels got bigger and the owner would have an increasing number of tasks that required more time on land for administering the operations. This is what is referred to as an *administrative vessel owner*.[229] Being "on" a vessel entails physical presence, whereas "with" is subject to assessment for each individual case. The Bill proposition sets out a little guidance with the statement, "[t]he decision of whether there is such activity requires a specific judgement in each case, where substantial weight must be given to the specific owner's proximity to the operation of the vessel and the actual fishing. It must be a requirement that the vessel owner's main activity is operation of a vessel owner company."[230] These are highly discretional criteria, but an executive order from the Ministry set out fairly specific instructions on what is required.[231]

The main controversy connected to the rule is that someone "outside" a vessel owner company or the fleet segment will have a hard time becoming a majority owner of a fishing

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227 In Norwegian this is referred to as "fartøyfører." In the participation rules there are also rules concerning the vessel master, which in Norwegian is referred to as "høvedsmann." I will use these term when referring to relevant rules in the legislation.

228 In Norwegian this is referred to as "aktivtetskravet." I will use the term activity requirement in a Norwegian context, whereas similar policies in a Canadian context are often referred to as *owner-operator policies*. I will use that term when referring to the Canadian arrangement more specifically.

229 In Norwegian "administrerende reder."

230 Ot.prp. nr. 67 (1997–98) page 44. Norwegian wording: "Avgjørelsen av om en slik aktivitet foreligger vil bli gjenstand for en konkret vurdering i den enkelte sak, hvor det må legges betydelig vekt på den enkeltes nærhet til driften av fartøyet og utøvelsen av fisket. Det må være et krav at rederens hovedaktivitet er drift av fiskebåtrederi."

231 Nærings- og fiskeridepartementet 30. april 2014: Instruks om praktiseringen av ordningen med administrerende reder (Executive Order on Administrative Vessel Owners)

vessel, i.e. that it could be regarded as a discriminatory practice. There are for example many fish processing companies that want to buy fishing vessels to supply the industry and have vertical control over the value chain. Nevertheless, there has been broad consensus politically for a long time that a harvester-owned fleet is a fundamental principle that must be maintained. As is the case in many of the provisions in the fisheries legislation, the principle is not set out without important exemptions. Section 6(3) sets out that "[t]he Ministry can, in special cases, when district or regional consideration indicates so, by administrative decision, grant exemptions from the requirement in subsection one and two of previous activity in fishing or hunting."[232] The use of this topic merits a thesis on its own, but the origin and majority of the exemptions are closely related to the emergence of a trawler fleet and processing industry in Northern Norway that is addressed in part II. The other exemption that can be done is for a vessel under a certain size, by regulations adopted by the King. This is done through a general exemption for vessels under 15 meters.[233]

Section 7 sets out guidance as to cases where an application for commercial licence can be rejected. The provision has been under recent attention due to developments in administrative practice. The issue concerns section 7(1)(a), which sets out that an application can be rejected if "granting is not desirable, taking the importance of the fishing fleet in a district distributional context, consideration to the resource base or other purposes of the Act."[234] This broad discretionary power of the Directorate can represent a challenge as decisions authorized under this provision are based on assessments that largely builds on policy considerations, and not objective criteria. What has caused some challenge in the assessment of each individual case are statements in the Bill proposition that an application for commercial permit can be rejected if the vessel does not have a sufficient *resource base,*[235] but no specific statements of what can be considered "sufficient" is made. The Commercial

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[232] Norwegian wording: "Departementet kan i særlige tilfelle, når næringsmessige og regionale hensyn tilsier det, ved enkeltvedtak gjøre unntak fra kravet i første og annet ledd om tidligere aktivitet I fiske eller fangst."

[233] Commercial Permit Regulations section 2.

[234] Norwegian wording: "innvilgelse ikke er ønskelig ut fra hensynet til fiskeflåtens distriktsmessige fordeling, hensynet til ressursgrunnlaget eller lovens formål for øvrig."

[235] A *resource base* means what the vessel is entitled to fish each year, commonly referred to as "driftsgrunnlag" or "kvotegrunnlag" in Norwegian.

Permit Regulations section 2a provides an objective guideline that a commercial licence can be rejected for all vessels over 15 meters that do not have an additional licence in form of a permanent concession or annual permit.[236] For cases where there are additional licences an executive order by the Ministry sets out objective criteria on which vessel lengths that are found *proportional* to the resource base of the licences.[237] In other words, these are criteria that determine if an application of replacing a vessel with a larger vessel to fish on the relevant licences can be approved.

Section 8 lays down that a commercial permit can only be issued if the vessel is "equipped for and suitable for harvest operations."[238] This provision must be seen in relation to general safety requirements laid down in legislation, particularly the Maritime Safety Act. Sections 10 and 11 are also important general provisions as they set out when a licence is no longer valid and when a licence can be revoked. As to revoking, section 11(1) lists reasons when a licence *shall* be revoked, whereas section 11(2) says when it *can* be revoked. The former is basically related to fulfillment of formal requirements in sections 5 and 6 of the Act. The latter includes cases where there is lack of activity or the vessel has not been used in commercial fishery for a set period of time,[239] that the vessel or vessel owner no longer fulfils the statutory requirements,[240] when the conditions the licence is based on have substantially changed,[241] that wrong information was forwarded or information relevant to the assessment of the application was kept away,[242] that the owner or other operators have been

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236 See more on these two licencing schemes in chapter 3.6.3.

237 Nærings- og fiskeridepartementet: Instruks om forholdsmessighet mellom driftsgrunnlag og fartøystørrelse aved tildeling av deltakeradgang, June 15 2017 (Executive Order on Proportionality 2017).

238 Norwegian wording: "utrustet for eller egnet til å drive fiske eller fangst." The preparatory works clarify that the intention is to ensure that commercial licences are not issued to vessels that are obviously not constructed for commercial fisheries. There are examples of rejections on basis of this provision, see for example Fiskeridirektoratet: Vedtak 27. oktober 2016 nr. 16/13866.

239 Participation Act section 11(2)(a)

240 Participation Act section 11(2)(b)

241 Participation Act section 11(2)(c).

242 Participation Act section 11(2)(d).

involved in serious or repeated offences of any of the fisheries legislation,[243] or to revoke on basis of general administrative law rules.[244] Licences can also be temporary revoked.[245]

3.6.3 Two commercial licencing schemes

3.6.3.1 Introduction

Fishing on the main species of commercial value is largely subject to limited entry. Most of the commercial fleet therefore operates with a licence in the form of a permanent *concession* in the offshore fisheries, or fulfil requirements in annual participation regulations to access coastal fisheries (*annual permit),* in addition to the commercial permit. Why we have this distinction, and which fisheries and gear types that are relevant in closed fisheries, will be further studied as a part of the evolutionary outline in part II. The quota system has also recently undergone a substantial revision that resulted in many amendments to the Participation Act and the Marine Resources Act that are not in effect yet, which is also addressed in part II.

3.6.3.2 Permanent concessions (offshore fisheries)

Chapter III of the Participation Act sets out the rules concerning permanent concession in the offshore fleet, with more specific rules set out in the Concession Regulations pursuant to section 12(1).[246] A permanent concession is mandatory to participate in offshore fisheries, and a commercial permit is a basic requirement to be issued a permanent concession.[247] The strong connection between an owner (physical or other legal person), a vessel and a licence to be legally entitled to participate in limited entry fisheries is reflected in section 15, which lays down that a special licence can only be issued to a vessel owner for a specific vessel, and

243 Participation Act section 11(2)(e).

244 Participation Act section 11(2)(f).

245 Participation Act section 11(3).

246 Forskrift 13. oktober 2006 nr. 1157 om spesielle tillatelser til å drive enkelte former for fiske og fangst (Concession Regulations).

247 Participation Act sections 12(1) and 13. What is to be considered an offshore vessel under the special licence requirement is exhaustively regulated in section 1-1 of the Concession Regulations. See more on this in Sund and Fjørtoft (2018) page 35.

that "[t]he licence does not give a right to use another vessel."[248] As will be seen, there are ways to transfer a concession separately from a vessel, but a permanent concession does not function legally or operationally independently of the owner and the physical vessel. As will be further demonstrated in part II, the number of permanent concessions is fixed, and anyone who wants to go into the industry needs to acquire an existing licence, if approved by the administration. There is, however, legal basis to issue new concessions under section 16 upon the discretion of the Ministry with regards to the purposes of the Act. This is not a widely used provision, but it happens occasionally, and must be done through a public announcement process.

As there is little issuing of new concessions, the entrance (or exit) into offshore fishing happens through buying and selling vessels and/or concessions in private agreements between actors. The public regulation of these transactions and transfers is set out in section 17 of the Act. Under the provision, the Ministry can approve the issuing of a permanent concession in three de facto situations; 1) to a vessel owner that wants to replace his/her vessel with another vessel,[249] 2) to a person who buys a vessel with a special concession from another vessel owner to fish commercially,[250] and 3) to a vessel owner or owner of another vessel who surrenders a corresponding permanent concession irrespective of the physical vessel.[251] Section 17 recently underwent a principally important law revision that received a lot of public attention, which is addressed in the legal historical outline below.[252]

Section 17(2) is another rule emphasizing the connection between a person, licence and the physical vessel. If a vessel owner plans to sell a vessel, or build a new one, or the vessel has been wrecked, the owner can apply for a *general replacement licence*[253] for an unspecified vessel. By this, the legislation allows for the use of a vessel other than the original one for a certain period of time pursuant to more specific rules in the Concession Regulations section

[248] Norwegian wording: "Tillatelsen gir ikke rett til å benytte annet fartøy."

[249] Participation Act section 17(1)(a).

[250] Participation Act section 17(1)(b).

[251] Participation Act section 17(1)(c).

[252] See details on the law revision in Prop. 88 L (2014–2015).

[253] In Norwegian terminology referred to as "generell utskifningstillatelse."

1-5.[254] A permanent concession is cancelled if a commercial permit is cancelled or revoked.[255] Furthermore, the above rules for revoking commercial permits also applies to special licences.[256]

When it comes to what each vessel actually can fish from year to year, it is necessary to link the permanent concessions to the allocation of quotas pursuant to the Marine Resources Act. The Concession Regulations set out the different vessel groups in the offshore fleet in chapters 2 – 8. Once the allocation of the commercial species is allocated to the relevant vessel group according to the established allocation keys, each vessel is allocated a quota that is determined by *the share* the concessions have of the group quota.[257] The origins of these shares are addressed in more detail in part II of the thesis.

3.6.3.3 Annual permits (coastal fisheries)

In contrast to offshore fisheries, no permanent licencing arrangements are used to limit entry in the coastal fisheries, but this will, as will be demonstrated in part II, change soon. Currently access is regulated through *annual participation regulations*[258] authorized under section 21 of the Participation Act that set out the terms and conditions to participate from year to year for the different coastal groups. For the regulatory year of 2021 there are sixteen closed fisheries established under more specific rules in chapter 2 in the Participation Regulations 2021.[259] A general requirement under section 4 of the regulations is that only

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254 One important practical requirement is that the replacement licence is only valid for two years, and can only be extended if there are circumstances outside the control of the vessel owning company leading to the new vessel (the replacement vessel) not being acquired within the deadline. If no vessel is acquired and no extension is approved, the licence will be cancelled.

255 Participation Act section 18(1).

256 Participation Act section 18(1).

257 The terminology used for expressing this share has varied. For trawlers this is done through the use of *quota factors* (In Norewgian referred to as "kvotefaktor"), whereas for purse seine this is done through *basis tonnes* (In Norwegian referred to as "basistonn"). Both group quotas, and variables to calculate the vessel quota on basis of these terms are set out in the annual regulation for the relevant fishery. In a recent law revision, all these terms are to be replaced with one *unified quota factor*.

258 I will refer generally to these as annual participation regulations, but specify when referring to a specific set of regulations.

259 Forskrift 16. desember 2020 nr. 2907 om å delta i kystfartøygruppens fiske og enkelte andre fiskerier for 2021 (Participation Regulations 2021).

vessels that had access to the same vessel group, and with the same gear type, the previous year can access the fishery this year. In practice, however, this access is referred to as an annual permit that is listed with an identification number in individual decisions granting the mandatory commercial permit to a vessel owner for a specific coastal vessel, and the rules for the fishery are continued in the same form from year to year. The annual permits are also regarded as intangible assets of economic value that are subject to taxation.[260]

Similar to the permanent concessions in the offshore fisheries, administrative practices that opened up for transfer of annual permits between vessel owners have developed and led to a revision of section 21 of the Participation Act. It basically sets out that the rules laid down in sections 17(1) and 17(2) (see above) can be established in annual participation regulations. Currently chapter 3 in the Participation Regulations 2021 sets out various rules for sales and replacements of vessels. Similar to concessions in the offshore fleet, annual regulations pursuant to the Marines Resources Act set out the variables that enable each vessel owner in the coastal fleet to calculate what the vessel can fish of each species, each year.[261]

3.6.4 Structural policies for the merging of fishing rights (efficiency measures)

Over the last two decades there has been a significant structural shift in the fishing fleet. Put briefly, the fisheries sector has for decades gone through modernisation and productivity increases that have changed the very basic structure of the industry and how the fishery is carried out. There is much to say about these changes, and I will further describe the evolution in part II and reflect on it in part IV. Currently there is in place a market-based

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[260] See for example the judgment in Rt. 2014 s. 1025. See more on this case in the comparative inquiry in part III.

[261] Put briefly, there is a certain amount of *quota factors* connected to each annual permit. This amount determines how much fish each vessel is entitled to, and how many tonnes the vessel can fish each years is set out in annual regulations. To be able to read the tables set out in annual regulations, however, it is necessary to know the *quota determining length* that is connected to the permit (this is referred to as "hjemmelslengde" in Norwegian). This is the original length of the vessel that had access to the fishery when it was closed. If a vessel owner later wanted to replace the original vessel, this could be done, but future shares of a group quota were determined by the length of the old vessel, the so-called "hjemmelslengde." This is a bit of a complex calculation exercise as the regulations for some fisheries sets out tables with quota determining length, quota factors and the corresponding tonnes of fish. These are also elements of the system that is up for revision (see chapter 8.4.3).

system facilitating for merging of both permanent concessions and annual permits (referred to more generically as licences in the following). Arrangements in this system are generally referred to as *structural quota arrangements (SQAs)*. The very basic idea is that a vessel owner that owns two (or more) vessels within the same vessel group with a corresponding licence on each vessel can enter into an arrangement where both licences (or more when relevant) are put on one of the vessels. Subsequently, the other vessel (or more) needs to exit fishing activities for good, and in most cases by scrapping. The licence(s) that was connected to the vessel(s) that left the fishery, are referred to as a *structural quota(s)* and becomes a part of the resource basis of the remaining vessel. These arrangements are laid down under two sets of regulations, the Coastal SQA Regulations[262] and the Offshore SQA Regulations,[263] with authority in section 14 in the Marine Resources Act. By doing this, the remaining vessel will be able to fish much more than previously for the years the structural quota is valid (20 years is the main rule). There is, however, a continuous public debate on the design and limits of the use of these instruments as they affect both *fleet structure* in coastal communities, i.e. concentration of licences in certain regions, and the provision of raw material to the process industry on land, and therefore also the *landing structure*.

3.7 Ownership of resources and the scope of the regulating authority

Before an introduction of questions concerning ownership of the resources, the public law perspective of the thesis should be reiterated. Potential *exclusive private rights* to saltwater fishing are therefore not addressed. See more on the discourse on private fishing rights in Norwegian legal theory in chapter 4.5.2. The wild-living marine resources are not subject to private property rights (state ownership) under Norwegian jurisdiction. As noted, there was a proposal from a policy advisory commission to establish a public property right to the resources that was not pursued by the government. Instead, the principle of common shared resources under Marine Resources Act section 2 was laid down. In a *hearing statement*[264] by

[262] Forskrift 7. november 2003 nr. 1309 om spesielle kvoteordninger for kystfiskeflåten (Coastal SQA Regulations).

[263] Forskrift 4. mars 2005 nr. 193 om strukturkvoteordning mv. for havfiskeflåten (Offshore SQA Regulations).

[264] There are statements made under official hearings of proposed regulations or other policies by the executive branch. See more on the procedural requirements in regulation-making in the comparative study in part III.

the Norwegian Fisherman Association[265] in the legislative process before the Marine Resources Act was adopted, it was brought to attention that licences are being sold between private actors, and that there are significant investments involved in the business, which according to the association indicates that *private-based rights* to harvest the resources have emerged.[266] The assessment in the Bill proposition was that even though commercial realities are present in the licencing schemes, and that the number of transactions had increased the last few years, the Ministry underscored that:

> [P]ayment between private parties alone does not create a new content in a licence to fish, as the Norwegian Fisherman Association seems to think. The licences issued by the fisheries administration in individual decisions pursuant to the Participation Act or structural quota arrangements, have a defined content pursuant to the enabling statutes, regulations and terms and conditions of the licence. The licence authorizes a right to conduct certain activities, but the scope of this activity does not go beyond the powers of the enabling legislation. The scope can also be changed, either pursuant to the enabling legislation as it is today, or by amendments of the Acts."[267]

This quote highlights that access to commercial fisheries is based on a public licence and that the rights of the licence holder *go no further* than what is set out in relevant legislation and the conditions of the licence. It was also set out by the Norwegian Supreme Court in a landmark case in Rt. 2013 s. 1345 that commercial fishing "is not a right, but is depending

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265 This is the largest organization representing the harvesters and licence holders in the Norwegian commercial fishing fleet.

266 Ot.prp. nr. 20 (2007–2008) page 41.

267 Ot.prp. nr. 20 (2007–2008) 41. The Norwegian wording: "vederlag melllom private partar ikkje i seg sjølv gjev eit nytt innhald i løyvet til å fiske, slik fiskarlaget synest å meine. Dei løyva som vert gjevne av fiskeristyresmaktene i enkeltvedtak med heimel i deltakarlova eller strukturordningane, har eit definert innhald som følgjer av heimelslovane, forskriftene og vilkåra i løyvet. Løyva gjev rett til å drive ei viss verksemd, men rammene for denne verksemda går ikkje ut over heimelsgrunnlaget. Rammene vil også kunne endrast, anten i samsar med heimelslova som ho er i dag eller som følgje av lovendringar."

on a public permission,"[268] which is reiterated by the same Court in HR-2019-2396-A.[269] The former case is further outlined in a legal historical context in part II and reflected more generally on in part IV, but the question at bar was whether an amendment of a set of offshore fleet regulations represented retroactive legislation that is prohibited under Article 97 of the Norwegian Constitution. There was a strong dissent in the case in favor of the state, but all votes acknowledged that there can be "special circumstances" in a case in which a constitutionally protected *legal position*[270] for licence holders can be established.[271] Such circumstances can be cases where the authorities have made a promise or entered into agreements with a private actor that "could constitute grounds for binding the future exercise of administrative authority."[272]

A cardinal topic in administrative and constitutional law, and under human rights obligations, is what the various branches of the government can do under its powers. There is a lot of individual decision-making under the participation legislation setting out different rights and duties of the licence holders, which frequently give rise to questions regarding the *scope of the regulating authority*. In addition to Article 97, Article 98 and 105 of the Norwegian Constitution that respectively prohibit unfair or disproportionate differential treatment and rewards full compensation when a person must surrender their movable or immovable property for the public use, are relevant. Obligations under the ECHR Protocol 1, Article 1 (P1-1) concerning the protection of private property (peaceful enjoyment of possessions) must also be seen in relation to how the authorities can interfere with positions of individuals (such as licence holders), and came up in Rt. 2013 s. 1345. Section 35 of the Public Administration Act is also relevant as it regulates the reversal of administrative

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268 Rt. 2013 s. 1345 para 67. Norwegian wording: "ikke er en rettighet, men er avhengig av tillatelse fra offentlig myndighet"

269 HR-2019-2396-A para 62. See also Alvik and Bjørnebye (2020) page 100.

270 This is a term referred to as "rettslig posisjon" in Norwegian, which can be said to encompasses what a licence holder is legally entitled to under the licence. The translation "legal position" is used in the English translation of the case found in www.lovdata.no.

271 See for example Rt. 2013 s. 1345 para 73.

272 Rt. 2013 s. 1345 para 76. Norwegian wording: "kan gi grunnlag for å binde framtidig utøvelse av forvaltningsmyndighet." See also Rt. 1992 s. 1235 page 1240.

decisions by executives. These are only some of the constitutional and statutory duties that apply to public decision making, which raise complex legal questions. This thesis will only review some of these issues generally for the purposes of the thesis where relevant in parts II and III, with further reflections in part IV.

3.8 The Fish Sales Organization Act

3.8.1 Introduction

Two key features of the Norwegian system are that all first-hand sales of fish are regulated by law, and that the harvesters play an active role through five[273] different fish sales organizations in the phase of landings, control and sales of catches pursuant to rules laid down in the Fish Sales Organization Act. This is a complex system, and the multi-faceted role of the sales organizations was the subject matter of the doctoral thesis of Smith (1979a). The legal historical inquiry in part II will demonstrate how the system has evolved, but there are two points to highlight in this overview. The first is the significance the system has had as a *social policy measure* by protecting the interest of the fishermen through the *legal monopoly* that for a long time has authorized the sales organizations to 1) establish terms and conditions for sales and conduct the sales, and 2) to unilaterally establish minimum prizes on the sales of fish.[274] This aspect of the regulatory system is presented in chapter 3.8.3. The other is the role of the sales organizations as *public agencies* in both the regulation of harvest operations, and in the resource control system, which is introduced in chapter 3.8.4. The overview starts with an introduction of the purpose and organizational rules for the regulation of the sales in chapter 3.8.2.

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273 *Norges Sildesalgslag* is responsible for all sales of pelagic fish species, including herring, capelin, blue whiting, mackerel, sprat and Norway pout regardless of where it is landed in Norway. The other four organizations are responsible for sales of all other species, including whitefish (cod, haddock, saithe), in separate geographical regions. *Norges Råfisklag* is by far the largest (in turnover) of these four organizations, being responsible for the three northernmost counties of Finnmark, Troms and Nordland, and Nordmøre in the county of Møre and Romsdal.

274 See for example Hersoug, Christensen and Finstad (2011).

3.8.2 Purpose and organizational provisions

Section 1 sets out that the purpose of the Act is to "contribute to a sustainable and socio-economic profitable management of the wild living resources and to facilitate for a good framework for the first-hand sales and by securing documentation of the resource outtake."[275] As with the purpose of the Marine Resources Act, environmental and economic concerns are emphasized.[276] The more social dimension of the regulation of sales through fisherman owned cooperatives is not explicitly articulated, but the legal historical inquiry will demonstrate that consideration to the harvesting sector has been a fundamental part of this component of the regulatory system.[277] Section 2 sets out that the statue applies to all sales of wild living marine resources in first-hand (which means the first sales from the harvesters when a vessel enters the dock), except anadromous fish and farmed fish if not laid down in regulations. It generally applies to all sales of fish in areas under Norwegian jurisdiction and by Norwegian vessels, including from foreign vessels when catches are landed in Norway.[278]

Under section 4(1) the Ministry is authorized to approve cooperatives pursuant to the Cooperative Societies Act as fish sales organizations, and only fishermen or organizations of fishermen can be members of a sales organization.[279] Section 4(2) sets out basic organizational requirements that by-laws of the organizations must have, whereas the Ministry can lay down more specific regulations on responsibilities and geographical areas

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275 Norwegian wording: "medverke til ei berekraftig og samfunnsøkonomisk lønsam forvaltning av vitlevande marine ressursar og leggje til rette for gode rammer for førstehandsomsetning og ved å sikre dokumentasjon av ressursuttaket." See more in Falkanger (2021).

276 It was also drafted with the purpose of harmonizing a new purpose clause with the purpose clause in the Marine Resources Act section 1. Prop. 93 L (2012–2013) Lov om førstehandsomsetninga av viltlevande marine ressursar page 38.

277 The organisational structure of being a cooperative per se could, however, more implicitly underpin the social profile of the system. In Norwegian cooperative law the emphasis of organising economic activities in a cooperative is on the *user interests* and demands, and not in maximizing profits. See for example Ot.prp. nr. 21 (2006–2007) Om lov om samvirkeforetak page 7–8.

278 Fish Sales Organization Act section 3. The geographical scope is in essence harmonized with the Marine Resources Act. See more in Prop. 93 L (2012–2013) page 39.

279 The rules in this Act therefore apply to the fish sales organizations, and supplement specific rules in the Fish Sales Organization Act.

or species under the legal monopoly of specific sales organizations under section 4(3).[280] Another central provision is the duty for the Ministry to appoint an *independent public inspector* for each sales organization with a wide authority to control various types of information related to activities of the sales organizations.[281] The Bill proposition emphasizes that it is crucial that a sales organisation has the necessary legitimacy as an objective control authority when exercising its role as a public agency.[282] The Ministry can revoke an approval of an organization if the obligations in the Act are not fulfilled, if the public inspector is prevented from his/her duties, if rules pursuant to the act are violated seriously/repeatedly and if the structure of the sales organization is not found expedient to fulfil the purposes of the Act.[283]

3.8.3 Legal monopoly and regulation of sales

Section 8 of the Act sets out the fundamental principle that all first-hand sales of wild living marine resources must happen through, or by approval of, a fish sales organization. A fish sales organization can levy a fee on all first-hand sales to fund its sales activities under section 9, whereas section 10 sets out a duty for the sales organizations to adopt general conditions of the sale.[284] The sales organizations by this have a statutory protected position to determine the rules and conduct of all first-hand sales of marine resources landed in Norway, in other words a *legal monopoly* on sales of fish.[285] There are therefore five sets of

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280 More specific rules are laid down in forskrift 20. desember 2013 nr. 1665 om førstehandsomsetning av viltlevande marine ressursar (First-hand Sales Regulations).

281 Fish Sales Organization Act section 5.

282 Prop. 93 L (2012–2013) page 41.

283 Fish Sales Organization Act section 6

284 In Norwegian the general statutes are referred to as "vedtekter," whereas the business rules are "forretningsregler." I will refer to these as *by-laws* and *business rules* in the following.

285 See for example Smith (1979a) page 43. Although Smith analysed the former statute, lov 14. desember 1951 nr. 3 om omsetning av råfisk (Raw Fish Act 1951), in the late 70s, many of his conclusion are still relevant for those areas that have remained the state of law in legislation. Smith expressed that the competence authorized normally would be referred to as a statutory protected position, and that this highlighted the legal monopoly of the sales organisation in the first-hand sales.

business rules that will apply to the sales depending on either type of species or where the catch is landed.[286]

The most debated element of the statute, and overall system, is sections 11 and 12, which authorize the establishment of minimum prices to "achieve a reasonable sharing of the revenues from the market between the fisherman and the industry."[287] Minimum prices are established after negotiations between the fish sales organization and industry parties,[288] but in cases of disagreement, the sales organization can lay down a minimum prize unilaterally if mandatory mediation pursuant to section 12(1) does not succeed.[289] Although the monopoly nature of the marked mechanism itself is controversial, the minimum price arrangement might be the strongest manifestation of the special position the harvesting sector has in first-hand sales, a position that is still under regular critique by the processing industry.[290] The procedural rules for the adoption of regulations under the Public Administration Act do not apply to the establishment of sales conditions,[291] nor to the establishment of minimum prices.[292]

3.8.4 Regulating fisheries and control responsibilities

The regulatory authority of the fish sales organizations in relation to harvest operations are set out in chapter 4 of the Fish Sales Organization Act. Section 13(1) authorizes the sales organizations to adopt temporary harvest prohibitions, or other regulatory measures, when

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286 See footnote 273 above. An expert group was appointed in June 2016 with a mandate to examine the fish sales organizations as a marked mechanism in first-hand sales, including business rules. The group concluded that there is a large variation in the form, content and services in the business rules among the organizations, and it recommended a harmonization. See more in Expert Group on Firs-hand Sales 2016: Forenklinger og forbedringer innen førstehåndsomsetningen av fisk.

287 Wording of Fish Sales Organization Act section 11(1).

288 Fish Sales Organization Act section 11(2).

289 Fish Sales Organization Act section 12(2).

290 See more on some proposed changes to the minimum price arrangement by a working group that examined the question prior to the adoption of the Act in chapter 8.3.

291 Fish Sales Organization Act section 10(4)

292 Fish Sales Organization Act section 11(2)

it is necessary in relation to sales or to ensure expedient use of the catches,[293] whereas section 14(1) authorizes the sales organization to direct catches to specific buyers.[294] The procedural rules for the adoption of individual decisions or regulations pursuant to the Public Administration Act chapters 5 and 7 do not apply to these regulatory decisions, but all parties must be notified prior to the execution of regulations or directions.[295] Under section 16 of the Act, the Ministry can impose on the sales organizations responsibilities in relation to quality requirements during harvest and handling of raw material, and make sure that this is in accordance with regulations on quality pursuant to the Food Act section 9.

3.9 Resource control and enforcement

The resource control system is an extensive area of the overall regulatory framework with many involved actors. The government has expressed that "[a] trustful and effective resource control is a prerequisite for all management of wild living marine resources,"[296] thus underpinning the fundamental role of enforcement in the overall management system. I will in the following outline the main rules for the operative control of the vessel operations from departure from port up until landing and the duties directly connected to landings.

3.9.1 Roles and responsibilities of the Directorate and fish sales organizations

The Marine Resources Act lays down the main provisions undergirding the control and enforcement system of the commercial fleet. Chapter 6 in the Marine Resources Act sets out

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293 It is emphasized in Prop. 93 L (2012–2013) page 44 that "necessary" means there must be a justifiable situation that calls for action. The general price level or impact of one fishery on another are examples of what are not alone reasons to stop harvest operations, whereas situations with uncertainty if there will be buyers, or excess supply, can be relevant situations. What is as regarded expedient use of catches could be to use raw material for human consumption, instead of being grinded into animal feed. The validity of a set of regulations from 2017 under this authority has been challenged in the court system. The Court of Appeal found the regulations to be valid (and thereby also the forfeiture of a catch harvested in violation to it) in LB-2019-192794. The case is at the time of the thesis submission for consideration in the Supreme Court of Norway.

294 It is highlighted in Prop. 93 L (2012–2013) page 45 that catches can be directed to specific buyers or landing facilities in order to "secure a rational sale of the catches on basis of accessible landing capacity." Norwegian wording: "sikre ei rasjonell omsetning av fangstane ut frå tilgjengeleg landingskapasitet."

295 Fish Sales Organization Act sections 13(3) and 14(2).

296 Ot.prp. nr. 20 (2007–2008) page 111. Norwegian wording: "Ein truverdig og effektiv ressurskontroll er ein føresetnad for all forvaltning av viltlevande marine ressursar."

rules to facilitate for control and monitoring on board vessels and during landing operations. Section 34 authorizes the Ministry to prescribe rules by regulations on inter alia gear types required on board a vessel, how to store gear and harvest onboard, ordering tracking devices on the vessels and the use of tools or documentation that ensure control of quantities harvested. The intention is to reduce opportunities to hide illegal harvest.[297] This provision must also be seen in relation to the other provisions in the chapter, but particularly section 36, which authorizes the Ministry to require the owner or user of a vessel to keep a *catch logbook*,[298] and adopt more specific rules on the content of it. Section 43 authorizes use of electronic equipment and software to collect and transfer different types of information for the control and monitoring under this chapter. The duty to keep a catch logbook is in the Bill proposition expressed as "an important tool in the resource control and the duty to keep logbook is therefore central in the control context."[299] Moreover, sections 38–42 address issues with the transition of catches from the harvester to the first-hand buyer more specifically. Section 39 is crucial as it authorizes a duty to complete a *landing note*[300] with information on the catch, which under more specific rules in the Landing Regulations[301] is required to be signed by both the harvester and the buyer.[302] It also authorizes prescription of prior notifications before landings.[303] Several regulations are adopted that specify the different types of duties for harvesters and buyers in this chapter.[304] Some rules will be discussed in more detail in the comparative study in part III.

297 See more on this in Ot.prp. nr. 20 (2007–-2008) page 202–203

298 In Norwegian this term is referred to as "fangstdagbok."

299 Ot.prp. nr. 20 (2007–2008) page 204. Norwegian wording: "ein viktig reiskap i ressurskontrollen og plikta til å føre fangstdagbok er difor sentral i kontrollsamanheng."

300 In Norwegian referred to as "landings- og sluttseddel."

301 Forskrift 6. mai 2014 nr. 607 om landings- og sluttseddel (Landing Regulations)

302 Marine Resources Act section 39(1). See more on this in Ot.prp. nr. 20 (2007–2008) page 206–207.

303 Marine Resources Act section section 39(3).

304 Most relevant regulations are forskrift 21. desember 2009 nr. 1743 om posisjonsrapportering og elektronisk rapportering for norske fiske- og fangstfartøy (Electronic Monitoring Regulations); forskrift 24. mars 2010 nr. 454 om krav til utstyr og installasjon av posisjonsrapporteringsutstyr (Monitoring Device Regulations); forskrift 19. desember 2014 nr. 1822 om elektronisk rapportering for norske fiske- og fangstfartøy under 15 meter (Coastal Fishery App Regulations).

Chapter 7 set outs the main roles and powers in the fisheries enforcement, which is supplemented by the powers of the Coast Guard (see chapter 3.9.2). Section 44 confers the main responsibility to the Directorate. This is a wide authority that encompasses enforcement of most activities related to the harvest of wild living marine resources. A *general duty* to collaborate with the Directorate when controlled is laid down in section 45. Sections 46(1) and (2) authorize the Directorate to inspect vessels and landing facilities, including access to inter alia catch logbooks, accounts and relevant documents and relevant objects. A corresponding duty for the person in charge on vessels/onshore facilities follows in 46(3). Under section 46(4) the Directorate is authorized to issue orders to stop fishing, transportation or similar activities on board the vessel or at land, and to seal gear and relevant storage facilities. Section 47 authorizes the use of inspectors or observers on the harvesting vessel at the expense of the vessel and to prescribe more specific rules on duties and payments in regulations.

Section 48 regulates the role and powers of the fish sales organizations. The sales organizations have a duty to control that provisions pursuant to the Act are complied to, limited to information that naturally follows the responsibilities of the organization pursuant to the Fish Sales Organization Act.[305] The first subsection sets out that this in particular is "ensuring that the catches taken and landed are in accordance with provisions laid down under the present Act."[306] Section 48(2) sets out an exhaustive list of what the organizations can demand access to during controls. The Bill proposition clarifies that the authority to inspect does not include vessel operations at sea, only during landing

[305] Marine Resources Act section 48(1).

[306] Norwegian wording: "kontroll med at fangstuttak og landa fangst er i samsvar med føresegner som er fastsette i eller i medhald av lova her."

operations. During controls the organizations are exercising public authority and a duty of secrecy applies.[307]

Chapter 6 of the Fish Sales Organization Act lays down the *control responsibilities* of the sales organizations under this statute. The general rule is that the fish sales organizations must control compliance to provisions laid down pursuant to the Act.[308] Under such controls the sales organizations are authorized access to vessels and landing facilities and relevant information for control purposes.[309] The sales organizations must give and receive all information the Directorate finds necessary for control purposes under the Fish Sales Organization Act and the Marine Resources Act. It is highlighted in the Bill proposition to the Marine Resources Act that the Norwegian system, with a legal marketplace of sales through a sales organization "provides a unique register of quantities, species, quota area and price that makes this a good tool in the resource control."[310] There are different control mechanisms of the performances of the sales organizations both within the executive

[307] Public Administration Act section 13. On the other hand, the Freedom of Information Act applies when exercising public duties. The scope of the extent of the public authority can become unclear when it comes to the market-related tasks of the organizations, where there might be information of a more business-related character that the involved actors want to keep outside the public. In a letter from the Directorate of June 24, 2016, the Directorate has considered that price information falls under the duty of secrecy for competition reasons, but that the rules of deferred access pursuant to the Freedom of Information Act section 5 apply. The price information can therefore be made public after a year. See more in Fiskeridirektoratet: Offentliggjøring av landings og sluttsedler, June 24 2016 nr. 16/1549. There is an ongoing court case on these matters that at the time of the thesis submission.

[308] Fish Sales Organization Act section 17.

[309] Fish Sales Organization Act section 18.

[310] Ot.prp. nr. 20 (2007–2008) page 139. Norwegian wording: "gjev ei unik registrering av kvantum, art, kvoteområde og pris som gjer dette til eit godt verktøy i kontrollsamanheng."

branch of the government, and by the Auditor General of Norway.[311] Lastly, chapter 8 in the Marine Resources Act sets out some measures against IUU-fishing, including authority to prohibit landing of catches from non-Norwegian vessels,[312] to lay down measures targeting anyone engaged in, or contributing to, IUU-fishing in regulations,[313] and authority to prohibit "activities that may undermine national management measures or measures taken by international or regional fisheries management organizations."[314]

3.9.2 Role of the Coast Guard

Lastly, the Coast Guard plays a key role in the enforcement system as it has the main responsibility for fisheries enforcement at sea. It is generally organized within the Norwegian Navy under the Ministry of Defense, and its authority in fisheries matters is set out in the Coast Guard Act. In fisheries matters the Coast Guard has various civil responsibilities exercised under *administrative authority*, *limited police authority*[315] and

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311 In 2017 the Auditor General of Norway for example presented a review that pointed out a lack of control performance by the sales organizations in the southern areas of Norway, and set out a critique of the overall resource control system, and how the fisheries administration followed up these issues. See more in Riksrevisjonen: Dokument 3:9 (2016–2017) Riksrevisjonens undersøkelse av fiskeriforvaltningen i Nordsjøen og Skagerrak (Auditor General Report 2017) In a 2016 report by the Directorate it was revealed that only 2 of the current 6 organizations (at that time) were conducting physical controls, see more in Fiskeridirektoratet: Fiskeridirektoratets oppfølging av salgslagens kontrollarbeid - Tilsynsrapport 2016 (Fish Sales Organization Audit 2016). In a report by the Directorate from 2019 there were reported more use of physical controls, but still at low levels and not sufficiently carried out in the smallest sales organizations, see more in Fiskeridirektoratet: Fiskeridirektoratets oppfølging av salgslagenes kontrollarbeid - tilsynsrapport 2019 (Fish Sales Organization Audit 2019).

312 Marine Resources Act section 50.

313 Marine Resources Act section 51.

314 Marine Resources Act section 52. Norwegian wording: "forby verksemd som kan vere med på å undergrave nasjonale forvaltningstiltak og tiltak frå internasjonale og regionale fiskeriforvaltningsorganisasjonar."

315 There is no general legal definition of what constitutes police authority. In the Bill proposition to the Police Act, it is laid down that "Police authority is used as a term for the overall authority to impose orders and interfere against the public, if necessary, by force, that is characteristic for the police." Ot.prp. nr. 22 (1994–95) Om lov om politiet page 38. Norwegian wording: "Politimyndighet brukes som betegnelse på den samlede myndighet til å gi påbud og foreta inngrep overfor publikum, om nødvendig med makt, som er særegen for politiet." The quote is rendered in Aaserød (2019) 23. As of limited authority, Aaserød highlights that this means that the authority could be limited by geographical scope, by responsibilities or function, for a specific period of time or in a particular position, so that the authority is "full" within these limitations.

limited prosecuting authority.[316] Section 9(1) sets out its *administrative authority* to ensure compliance with provisions pursuant to the Marine Resources Act[317] and the Participation Act[318] within Norwegian jurisdiction, and outside Norwegian jurisdiction according to international law.[319] It has furthermore a general authority of ensuring compliance with environmental regulation of activities within the scope of the Act.[320] Under section 29 of the Coast Guard Act the Coast Guard is authorized to stop and inspect vessels, impose orders to stop fishing activities or itself take action to stop fishing activities, and to access all necessary documentation of logbooks or other relevant documents. A *limited police authority* is laid down in section 21. Coast Guard officers can therefore start investigations on suspicion of offences within the Coast Guard jurisdiction.[321] It also has the authority to lay down measures necessary to maintain law and order on the fish grounds.[322] The coercive measures under its authority are set out in sections 25–27, including seizure of vessels and bringing them ashore, searches of persons and vessels, arrests, and searches and seizure according to rules set out in the Criminal Procedural Act. Decisions to use any of the coercive measures are prosecuting decisions, and therefore reflect the *limited prosecuting authority* of the Coast Guard. Criminal acts are reported to the police pursuant to the Criminal Procedure Act section 223. Normally this would be to the police district where the vessel owner company has its office, and any seizures of vessels and bringing them ashore would be done to the nearest police district.[323] Normally, the investigation and police report from the Coast Guard (or Directorate) suffice when it comes to clarifying facts and collecting evidence; however, sometimes there will be additional investigations by the police ashore.[324]

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316 As a part of the Defense, the Coast Guard also has *military authority*. I will not go into this authority as it is not an element of the fisheries enforcement.

317 Coast Guard Act section 9(1)(e).

318 Coast Guard Act section 9(1)(f).

319 The territorial scope is set out in section 3 of the Act.

320 Coast Guard Act Section 11.

321 Coast Guard Act Section 21(2).

322 Coast Guard Act Section 24.

323 Fause (2008a) page 20.

324 See more on this in Fause (2008a) page 24–26.

Under what authority it operates is important as it determines rights and duties of the person(s) and vessel under scrutiny.[325] The purpose of the action determines under what authority it acts. However, this can change during a process and might not be a clear transition from the administrative step, to the police step, in all cases.[326] It will be an individual decision for the Coast Guard to take in each specific case. Under which authority the Coast Guard operates is also important as to the chain of command. During administrative operations the Coast Guard is generally under the authority of the executive branch of the government, and the Ministry of Defence has a general power to instruct it.[327] When a case has evolved into a police investigation, the Coast Guard is under the authority of the Prosecutor/Police.[328]

3.10 Administrative reactions, sanctions and punishment

3.10.1 Introduction

The importance of follow-up of violations of the fisheries legislation cannot be overstated. The sanction system is a complex regulatory structure within the fishery regulatory framework itself entangled with resource control/enforcement, and as an element in Norwegian criminal law more generally, that raises many legal questions that this thesis can only briefly introduce and problematize. A main characteristic is that there are two procedural paths to pursue fisheries offences under: 1) the administrative path and 2) the

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325 See more on this issue in Fause (2008a) page 20–21. Fause elaborates that during a normal inspection, the vessel operator is under an extensive duty to explain the situation and disclose documentation. If the person is under investigation, however, the rules of self-incrimination will apply.

326 Fause (2008a) page 22. Fause points out that a classical example is when the Coast Guard visually observes and confirms through maps that a vessel is fishing in a closed area, or during an inspection reveals that no catches have been registered in the catch logbook. Further examinations of these matters will fall under police investigation. A more unclear case is when an inspector suspects that registered quantities in a catch logbook do not correspond to the actual quantities stored on the vessel. Calculating stored fish is a time consuming and complicated process, and examinations back and forth could fall into both control and police authority. Fause emphasizes that the officers should be careful not to stretch the administrative authority further than the legal authority goes.

327 This is an extensive topic this thesis has not pursued any further. See more in Ot.prp. nr. 7 (1999–2000) Om lov om endringer i politiloven page 24; Graver (2015) page 163–174, which are referred to in Aaserød (2019) page 49.

328 Coast Guard Act section 34

criminal path. Chapter 3.10.2 will briefly introduce the use of administrative sanctions more generally in Norwegian law. Chapters 3.10.3 and 3.10.4 follow with an introduction of administrative confiscation and administrative fines in fisheries legislation. Lastly, issues of criminal liability and punishment under criminal prosecution are addressed in chapter 3.10.5. There are also provisions that authorize revoking of licences and coercive fines. The former is to some extent introduced in chapter 3.6.2 above on commercial licences, while the latter has not yet been particularly relevant in a fisheries context and will therefore not be addressed specifically. Many of these issues are cross cutting in fisheries legislation; however, it is the Marine Resources Act that will be emphasis in the following as most offences are violations pursuant to this Act.

3.10.2 The administrative procedural path: Why and when

Follow-up of offences in an administrative procedural path has become an important element in Norwegian administrative law generally, and in many administrative sectors specifically, in the last few decades. This is also the case for fisheries legislation, although the use of administrative confiscation of illegal catches goes far back in time (see more in part II).[329] The general developments of administrative sanctions are more recent responses to postwar developments in society with a spread of regulations into more and more areas of life, to establishment of administrative agencies to exercise and enforce the rules, and to more and more acts or omissions in the rules laid down as penal provisions.[330] This evolved into a state of law with resource intensive criminal prosecution of minor offences, little or non-existent enforcement, and lack of compliance and a general undermining of the system in general. This is one of the reasons why in 2001 a policy advisory commission was tasked with assessing how the public should react to criminal offences, to *decriminalize* various offences and to examine and propose sanctions that could be more effective than

[329] This form of confiscation is not regarded as an administrative sanction pursuant to the legal definition in the Public Administration Act section 43(2), as it is not regarded as an offence under the ECHR, see more in Rt. 2007 s. 1217. The term "reaction" is therefore more precise.

[330] NOU 2005: 15 Fra bot til bedring - et mer nyansert og effektivt sanksjonssystem med mindre bruk av straff page 144.

punishment, a process that resulted in a new chapter 9 on administrative sanctions in the Public Administration Act, in effect from July 1, 2017.[331]

The development raises important constitutional issues. Article 96 in the Norwegian Constitution lays down the very fundamental rule that no one must be punished without a court judgment. Any sanction regarded as punishment pursuant to the Constitution, would therefore violate the Constitution if sentenced in an administrative decision. The administrative sanction instruments have therefore evolved under critical constitutional review by the legislative and judicial authority.[332] Additionally, the obligations that Norway has committed to in the ECHR, influences the content and design of administrative sanctioning mechanisms.[333] Some general principles that guide the use of administrative sanctions have been developed in Norwegian law. The legislator must in the choice of sanctioning instruments ensure how the instruments ensure a guarantee of due process of law, effectiveness and efficiency, and weigh these considerations in order to establish a scheme where the purpose of the instrument, including its preventive effect, can be achieved with as little use of resources as possible.[334] As noted in chapter 3.3, the Public Administration Act applies to administrative decision-making, whereas cases reported to

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331 See more on the law amendments in Prop. 62 L (2015–2016) Endringer i forvaltningsloven mv. A similar process, in a smaller scale though, has also been carried out for aquaculture legislation. A working group looked into administrative sanctions, reactions and punishment in lov 17. juni 2005 nr. 79 om akvakultur (Aquaculture Act) and submitted a report in April 2012. Proposals from this process were later discussed and further developed in a Bill process that proposed amendments in the legislation, see more in Prop. 103 L (2012–2013) Endringer i avkakulturloven. One of the reasons for this initiative was a court challenge on the legality of the home provision for administrative penalty in the Aquaculture Act. The case was ongoing during the amendment process; however, it was ruled that the former provision did not violate the Constitution in Rt. 2014 s. 620. Anyway, the amendments in the legislation further clarified the legality of the use of administrative penalties pursuant to the Aquaculture Act.

332 See for example Rt. 1984 s. 684; Rt. 2000 s. 996 ; Rt. 2002 s. 497 regarding additional tax, Rt. 2002 s. 1298; Rt. 2008 s. 478 regarding daily penalties and the above mentioned, in note 331, Rt. 2014 s. 620 regarding administrative penalty pursuant to the Aquaculture Act. See also discussions on the different sanctions in Berg (2005).

333 Important provisions are Article 6 on right to a fair trial and Articles 2 and 4 in Protocol 7 to the Convention on respectively right of Appeal in criminal matters and right not to be tried or punished twice.

334 See for example Prop. 62 L (2015–2016) chapter 7.4.2. This chapter sets out some more detailed guidelines for cases where administrative sanction can be an expedient form of reaction.

the police will be pursued under rules laid down in the Criminal Procedure Act. Administrative decisions can be challenged in courts pursuant to the Civil Procedure Act.[335]

3.10.3 Administrative confiscation of illegal catches

Administrative confiscation[336] of illegal catches in the fisheries legislation is a central element of an arrangement with a long tradition (see more of the evolution in part 2). Although there is authority to confiscate illegal catches pursuant to section 27 of the Participation Act and section 23 of the Fish Sales Organization Act, it is section 54 in the Marine Resources Act that is most important from a practical point of view (most frequently used), and its main features is presented in the following. The provision does not lay down explicitly that it authorizes confiscation, so the actual wording necessitates elaboration. The first subsection sets out that:

> Catches or the value of catches harvested or delivered in contravention of provisions laid down in or under the present Act or the Act relating to the right to participate in fishing and hunting, accrue to the appropriate sales organisation or the state if the sales organization's right to first-hand sales do not apply to the catch. This applies irrespectively of whether the case entails liability to a penalty.

This wording basically sets out that any catch "harvested or delivered" in violation to a provision in or pursuant to the Marine Resources Act or the Participation Act is subject to forfeiture, and that the harvest, in practice the value of it, goes to the sales organization the catch would be sold through.[337] Under section 54(2) more specific rules are laid down in the Confiscation Regulations.[338] The role of the sales organization is central in these

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335 Lov 17. juni 2005 nr. 90 om mekling og rettergang i sivile tvister (Dispute Act). It might a condition in a decision that the case is appealed administratively before it can be challenged in courts, see the Public Administration Act section 27b.

336 I will use the term "confiscation" interchangeably with "forfeiture" throughout the thesis when referring to this form of reaction under fisheries legislation.

337 See also Ot.prp.nr. 20 (2007–2008) chapter 7.4 and page 219.

338 Forskrift 12. mars 2010 nr. 390 om inndraging av fangst og bruk av inndregne midlar (Confiscation Regulations).

arrangements as the sales organizations are responsible for the *quota accounting* and provide the marketplace for the sales. The sales organizations are therefore authorized in the Confiscations Regulations section 2(2) to issue confiscation when there are violations of catch limitations (excess quotas) and similar contraventions. The regional offices of the Directorate issue confiscations for violations of other offences, but can also issue confiscation under the same authority as the sales organizations.[339] The appellate instance for most appeals of confiscation decisions is the Directorate centrally.[340] There is also an authority to issue a remuneration for 20 % of the confiscated value if the contravention was unintentional (basically a fixed deduction of cost related to the contravention).[341] Confiscated values are to be used by the sales organizations for resource control and other specific purposes set out in the Confiscation Regulations section 4, including support for transportation of fish for production or price support.

The main purpose of the administrative confiscation is to ensure that the relevant person or company receive no unwarranted proceeds from harvesting illegally, in other words it has a *restorative purpose*.[342] As will be elaborated in part II another rationale for it is environmental consideration, including to promote landings of illegally harvested fish (to prevent it from being discarded).[343] It is underlined in the Bill proposition that it is *the illegal part* of a catch that is to be confiscated.[344] Establishing what part of a catch that is illegal, what constitutes a harvest that is "caught" or "delivered" unlawfully, and whether an actual "contravention" can be established (whether there is an *actus reus*), can in some cases cause interpretation problems.[345] It has been laid down by the Supreme Court that the

339 Confiscation Regulations Section 2(3).

340 Confiscation Regulations section 2(4).

341 Confiscation Regulations section 3

342 See for example Ot.prp. nr. 20 (2007–2008) page 106–108.

343 Ot.prp. nr. 20 (2007–2008) page 106

344 Ot.prp. nr. 20 (2007–2008) page 219

345 See some examples of this in Eriksen (2015).

standard of evidence must be higher than for ordinary civic cases (preponderance of the evidence), and it is set at qualified preponderance (clear-and-convincing standard).[346]

As the provision indicates, there is no fault requirement (*mens rea*), as it is not regarded as a punitive reaction by the legislator.[347] Administrative reactions without a punitive purpose generally falls outside the scope of Article 96 of the Norwegian Constitution,[348] but the constitutionality of the Marine Resources Act section 54 has not been explicitly tested in specific cases in the judicial system.[349] It is, however, laid down by the Supreme Court that the administrative confiscation is not an offence under Article 6 of the ECHR.[350] In the last few years, however, there has been critical legal attention to how this provision is practiced, especially in light of more recent case law from the ECHR, which calls for increased legal scrutiny of the system.[351]

3.10.4 Administrative fines

There is authority to issue administrative fines pursuant to section 59 of the Marine Resources Act and section 28 in the Participation Act. Since the provisions are more or less identical, the former is used to exemplify use of this sanction in fisheries legislation. Section 59(1) sets out that administrative fines can be issued to a person that *intentionally*, or by *negligence*, contravenes provisions laid down in, or under, the Act. In section 59(2) it is laid down that also enterprises can be issued administrative fines, regardless of whether a person can be issued a penalty. It is therefore not required to prove fault by a person in cases involving an enterprise. This is a provision that must be understood in relation to the provisions on penalties for enterprises in the Penal Code sections 27 and 28. Through Administrative Sanctions Regulations section 4 it is laid down which acts and omissions in various regulations pursuant to the Marine Resources Act and the Participation Act that can be

346 Rt. 1999 s. 14. It was emphasized in Ot.prp. nr. 20 (2007–2008) page 219 that section 54 was a continuation of the previous sections 7 and 11 under the Saltwater Fishing Act 1983, see more in part II.

347 Ot.prp. nr. 20 (2007–2008) page 219.

348 See for example Rt. 2014 s. 620 para 52.

349 A relevant case from aquaculture regulation is found in Rt. 2014 s. 620 para 52.

350 Rt. 2007 s. 1217.

351 See for example Rui (2020); Frøvik (2020). See more in chapter 8.2.

subject to administrative fines, most of which the regional offices of the Directorate are authorized to issue. As any other administrative decision, administrative fines can be challenged in the judicial system.

The level of the fine is to be fixed for each specific case,[352] but section 59 of the Act also authorizes the use of fixed penalties. In the sentencing of the fine, consideration can be taken to factors such as the profit or potential profit, gravity of the offence, blameworthiness of the offender, and extra costs related to the control and processing of the case.[353] Section 5(2) in the regulations sets out that fines can be issued for up to 100 000 NOK for each legal entity. Cases where this is not a sufficient reaction are to be reported to the police for criminal prosecution.[354] It is furthermore explicitly laid down in section 59(6) that the same offence cannot both be issued a fine pursuant to section 59, or punishment pursuant to chapter 12 of the Marine Resources Act (see more on this in next sub-chapter). This is to prevent cases that contravene the prohibition from being tried or punished twice, in accordance with Article 4 in Protocol 7 (P7-4) of the ECHR.[355]

3.10.5 Criminal liability and punishment

There are provisions on criminal liability and punishment in the Marine Resources Act chapter 12, Participation Act sections 31 and 31a and the Fish Sales Organizations Act. The main emphasis in the following is on the Marine Resources Act as the majority of criminal cases related to unlawful acts and omission are under this statute. Section 60 of the Marine Resources Act sets out that *intentional* or *negligent* contraventions of the regulatory provisions on quotas[356] are punished with fines or imprisonment not exceeding one year, unless more severe penal provisions apply. A similar criminal liability is set out in section

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352 Forskrift 20. desember 2011 nr. 1437 om bruk av tvangsmulkt og overtredelsesgebyr ved brudd på havressurslova og deltakerloven (Administrative Sanctions Regulations) section 4.

353 Marine Resources Act section 59(3) and Administrative Sanctions Regulations section 5(1).

354 Se e.g. Fiskeri- og kysdepartementet: Høyring av 21. januar 2011 - Forslag til ny forskrift om lovbrotsgebyr og tvangsmulkt i medhald av havressurslova (Administrative Sanctions Hearing 2011) page 19.

355 See more on this in Rui (2009).

356 Marine Resources Act sections 11(2) and 12–14.

61 for contraventions of rules of conduct on fish grounds,[357] section 62 for contraventions of rules facilitating control[358] and section 63 for contravention of enforcement rules.[359] Section 64(1) sets out that *serious offences* committed intentionally or through negligence are punishable by imprisonment for up to six years. Section 64(2) establishes that if liability can be imposed on the vessel master under sections 60 to 63 for actions by crew members, a subordinate can only be punished if relevant provisions were violated intentionally. Section 64(4) establishes that the vessel master can accept an optional fine on behalf of the employer, and that the employer may be liable to a penalty in criminal proceedings against the vessel master. Furthermore, section 65 authorizes *criminal forfeiture* of catches, or gear, objects and vessels that was used regardless of ownership, in cases of contraventions of provisions set out in sections 60 to 63.[360] Corporations can generally be charged for the acts of employees or others that act on behalf of the company under the Penal Code section 27. It is set out that this "applies even if no single person meets the culpability or the accountability requirement;"[361] This provision is, however, currently under revision as there has been a case from the Supreme Court of Norway that ruled that the liability provision violates Article 6(2) and Article 7 of the ECHR.[362]

As seen above, offences which are to be considered for a fine under 100 000 NOK can be issued as administrative fines, but examples of fines under 100 000 NOK has been sentenced in criminal prosecution cases.[363] The sentencing level of fines issued by the police that are not challenged in courts are not investigated in this thesis, but there is no reason to expect that they differ from what the prosecutor seeks fined in court for infringements of a similar

357 Marine Resources Act sections 15, 16(2) and 18–24.

358 Marine Resources Act sections 34 and 36–42.

359 Marine Resources Act sections 45, 46(1) – (5) 48(2) – (4) and 50–53.

360 See more on this provision in Hauan (2021).

361 This is the wording in a translation of the Penal Code from Norwegian to English found at www.lovdata.no.

362 The case is found in HR-2021-797-A.

363 In Rt. 2014 s. 996, a captain was fined 36 000 NOK for violations of electronic monitoring and reporting duties, whereas a forfeiture of 150 000 NOK of the harvest was issued to the vessel company.

character.[364] The use of criminal forfeiture to the company, and fines to the skipper seems to be common for violations of the Marine Resources Act, but there are also examples of sentences of imprisonment and loss of the right to fish.[365]

The Participation Act section 31 similarly sets out that intentional or negligent contraventions of specific rules and requirements concerning commercial permits, licences and access restrictions[366] are punished with fines or imprisonment up to a year, and up to six years for serious offences. The liability for crew members is similar as to the rule in the Marine Resources Act. There is little case law on contravention of participation rules, and the use of administrative sanctions such as revoking of licences, whether temporary or permanent.[367] Pro forma arrangements in ownership has been pointed out as a possible case where criminal liability can be established.[368] Under the Fish Sales Organization Act section 22 intentional and negligent violations of some of the rules on sales of fish and

364 In LH-2012-194001 the captain was, for example, issued a fine of 15 000 NOK for illegal dumping of fish and omitted catch reporting, whereas the vessel company was issued a forfeiture of 100 000 NOK. In TALTA-2013-140553 a production worker was acquitted of counterfeiting landing documents. The prosecutor had asked for a fine of 12 000 NOK.

365 See for example HR-2017-1978-A where a former commercial lobster fisherman was sentenced to 21 days of imprisonment and lost the right to fish, apart from with rod and handline for eternity for repeated fishing of lobster outside the fishery season and partly with illegal gear. An older example of a serious and complex fisheries crime case is Rt. 2004 s. 1449 where the Supreme Court of Norway found that violations of landing rules (and accounting rules) had been going on for such a scale and time period that the infringements were regarded as serious. In this case the manager of the processing plant was sentenced to six months of imprisonment and prohibition to manage a company for three years, whereas the company was issued a fine of 700 000 NOK. Three other employees were issued fines of 50 000 NOK.

366 Participation Act sections 4, 5a, 7(3), 9, 12, 15, 20, 21 and 24.

367 One case is LB-2015-66678. This was a case that in practice concerned an administrative decision to revoke an annual permit and structural quotas as the Ministry (and the Directorate) found that the licence holder did not fulfil all participation rules. The Appeal Court found that the decision by the Ministry was building on incorrect facts, and it was therefore ruled invalid. An appeal by the state to the Supreme Court was not allowed, see judgment in HR-2016-1238-U.

368 LH-2008-34986.

enforcement by the sales organizations can be punished with fines or imprisonment up to a year, and up to six years in serious cases.[369]

4 Theory and key concepts underpinning fisheries governance

4.1 Introduction

This chapter presents some of the central areas in the theoretical landscape fisheries regulations are designed within and introduces important *concepts and objectives* in *modern fisheries management*. This is crucial background as it outlines what marine resource governance is all about, and points to important considerations a legislator needs to account for when erecting a legal framework. It also tries to demonstrate some of the complexity the different perspectives of the epistemic base represents, and that choice of perspectives to support and justify legislative design can have significant implications for how rules will function in practice. Lastly it aims at pointing to the relevance of law in the various research agendas, and where there are relevant legal discourses. The chapter is therefore not to be understood as the theoretical perspectives assumed in this thesis per se, but as a *general introduction* (that by no means is exhaustive) to central theoretical advancements that *undergird the current regulatory system* in many modern fisheries jurisdictions. These are also underpinnings reflected in international law, policy, best-practices and recommendations.

Chapter 4.2 introduces the neoclassical underpinnings of modern fisheries governance, and in chapter 4.3 the stock assessment methodology, biological research and modeling which formed the basis for the introduction of the quota system and development of management objectives is presented. In chapter 4.4, the issue of technological development and how it impacts fishing efforts assumed in the previous modeling is addressed. Chapter 4.5 moves over the emergence of what is often referred to as *rights-based regimes* in the fisheries

[369] HR-2016-895-A is an example of a case where a fish processing plant was issued a fine of 250 000 NOK and forfeiture of 2 233 293 NOK by the police for violation of section 10 of the Fish Sales Organization Act on minimum prizes. The plant did not accept the fine and challenged the case in the court system. After being acquitted in the lowest court, the Court of Appeal and the Supreme Court found that the relevant provision had been violated and criminal liability was established.

management terminology, and draws a linkage to rights-based frameworks developed in social sciences and legal theory. Some of the theoretical advancements that modify, criticize, or propose alternatives to neoclassical approaches that are most relevant in a Norwegian fisheries governance context are presented in chapter 4.6. Chapter 4.7 concludes the overview by introducing some research on public legitimacy.

4.2 The neoclassical underpinnings in fisheries governance

4.2.1 Natural resource economics

Fisheries governance is rooted across disciplines, but some influences are more fundamental for understanding fisheries regulations and its objectives than others. *Natural resource economics,* and *fisheries economics* more specifically, are disciplines within the *neoclassical economic tradition* that have been influential in the development of modern fisheries management instruments and concepts worldwide. These are disciplines that deal with the supply, demand and allocation of scarce natural resources.[370] As will be demonstrated in further detail in part II of the thesis, there was a gradual acknowledgement in the 1900s that marine resources are scare resources, and that there was a need to limit exploitation. Prior to that, *classical economics* and liberal influences promoting Adam Smith's ideas of *laissez-faire* and less state intervention dominated economic theory. Although the biological limits of natural resources were recognised by major thinkers in that time period, the political debates and policy actions were more concerned with economic growth, trade opportunities and colonial expansion.[371] With the introduction of neoclassical economics, the attention shifted from the aggregate level of economic activity over to *allocative efficiency* of the economic activities and *optimal use* of resources, which is central to natural resource economics.[372] These developments have also impacted the design of legislative frameworks and a shift over to rights-based regimes with limited entry in many fisheries jurisdictions. This is further demonstrated for the Norwegian and Canadian cases in parts II and III.

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370 Hackett (2011) page 4.

371 See for example Perman et al. (2003) page 4–5.

372 See for example Perman et al. (2003) page 6.

4.2.2 Neoclassical theory and common goods: Concepts and basic assumptions

Before going into key characteristics of fisheries economics, it is useful to take one step back and introduce a few basic economic concepts and reflect on marine resources as a common good.[373] The neoclassical approach is based on the *rational choice paradigm*. This is a paradigm that assumes that humans are economic *rational actors*. Within this concept there is an assumption that individuals will maximize their utility or net value (personal gain), and that outcomes are based on the acts of individuals (*methodological individualism*). Furthermore, it is assumed that the preferences of the actors are constant, but that different *constraints on behaviour* can change. Types of constraints can be restrictions laid down in legislation, e.g., prohibitions of certain activities, or constraints through income, price or information available to the actor. The neoclassical tradition also introduced *marginal analysis*, which plays an important part in the fishery economic modelling approaches introduced below. This type of analysis could also be put under the more general umbrella of *microeconomic analysis*, which is a branch transforming neoclassical ideas into mathematical calculations and modelling.

The above-mentioned allocative efficiency and optimal use of resources must also be seen in relation to *welfare economics*, another sub-field of neoclassical economics that uses microeconomic techniques. The core of this field is theorization on how resources could be allocated best in society. In addition to natural resources, labour and capital are the two other types of resources utilised by humans for different types of production that can have alternative uses, i.e. the chosen use comes with an *opportunity cost* for the lost opportunities the alternative use would have represented. Moving over to allocative questions naturally leads to questions of a more *normative character*, and with underlying *values* involved. In other words, what each individual considers the best use, or highest-valued use, of specific resources depends critically on the underlying value system, ethical criteria and the motivation of the person.[374] Central here is that decision-makers need a system upon which

[373] Hackett (2011); Tietenberg and Lewis (2015); Flåten and Skonhoft (2014) have been inspirational for the following overview, which is generally accepted knowledge in natural resources economics.

[374] See for example Hackett (2011) page 18; Perman et al. (2003) page 7.

policy alternatives of economic activities can be *ranked* and selected. This is an extremely important field within natural resource exploitation governance worldwide, but it is also a complex and extensive theoretical landscape.

Suffice to say for the purposes of this chapter, *utilitarian ethics* has been the normative base of much of traditional economics. Put simply, utilitarianism views social welfare as a weighed average of the total utility levels of all individuals in society. From a practical point of view, the concept of *cardinal utility* within these frameworks is important in that it presumes *quantification* of utility *numerically* so that the differences in utility of persons are directly comparable, and a net social utility can be calculated. More specific efficiency criteria have also been developed. The basic idea in the *Pareto efficiency criterion* is that resources are allocated in such a way that there is no potential to increase the welfare of some individuals without diminishing the welfare of others through policy modifications. If there is potential to increase some individuals' welfare without decreasing it for others through reallocation of resources, the action offers what is referred to as *Pareto improvements*. This could be conducted through agreements between individuals in society. In practice, Pareto-efficiency is little applied as it is difficult to know if some are worse off because of specific policies. It also has a bias towards preserving the status quo which could be ethically problematic if there are large inequalities in society. [375]

Another criterion is the *Haldor-Hicks criterion* which is based on the ranking of different policies according to *net social utility*. The option that leads to the maximum net social benefit among the policy alternatives under considerations is therefore the Haldor-Hicks efficient option. For a regulator, the assessment of different policy alternatives is *governance in practice*. The problem, however, is that it is challenging to measure the utility of individual persons and to sum up the net social utility for different actions. In practice, *cost-benefit analyses (CBA)* are contemporary tools developed with their origin in the Haldor-

[375] See for example Hackett (2011) page 24–25.

Hick criterion to assist decision-makers in *monetizing* the different policy options to make them *comparable.*[376]

Theories concerning the "market," or "market capitalism," are other fundamental developments under the neoclassical approach. In essence, the *market system* represents a system that is based on privately owned (scarce) resources that are allocated in a decentralized market of many individual market transactions on the basis of the self-interest of the individuals.[377] The idea is that "the invisible hand" of the market, as introduced by Adam Smith, leads to efficient allocation of the resources in contrast to allocation decided by a centralized government or other authority. There is vast theory on the *demand* and *supply* in the markets by consumers and producers maximizing, respectively, utility and profit. Marginal analysis is used to determine levels of *market equilibrium* of goods and services and efficient resource allocation by the market so that the total surplus is maximized. There are, however, several conditions that must be met in order for the market to be well-functioning. *Market failure* is the general term used when one or several conditions are not met. Important for this analysis are the conditions for the market to function: 1) ownership of the resources ais characterized by *well-defined* and *enforceable property rights*, 2) there are no positive or negative externalities and 3) transactions costs are sufficiently low. *Transaction costs* are the costs of making market transactions well-functioning, including to make, measure and enforce agreements, or costs that participants pay in obtaining necessary information to enter into the transaction. These are costs that will be central in some of the critique of neoclassical assumptions presented in chapter 4.6.

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376 These are ideas that have been advanced into a concept of *ecosystem services* in relation to management and use of natural resources and the environment. Put briefly, ecosystem services are seen as the benefits humans obtain from ecosystems directly or indirectly, and that contributes to our wellbeing. In the last decades, there has been a development of conceptual frameworks to assess and value ecosystem services (monetize the benefits), in order to support difficult trade-offs on the use and management of the resources. See MEA (2005); Costanza et al. (2017); NOU 2013: 10 Naturens goder - om verdier av økosystemtjenster for an introduction to the concept. There is also an increasing interest by legal scholars to explore these theories in a legal context, see for example Bell-James (2019); Ruhl, Kraft and Lant (2007); Mauerhofer (2018a); Mauerhofer (2018b); Mauerhofer and Laza (2018); Pastén, Olszynski and Hantke-Domas (2018); de Graaf, Platjouw and Tolsma (2018). These are perspectives that have been explored for coastal zone planning in a Norwegian context, see for example Kvalvik, Solås, and Sørdahl (2020).

377 See for example Hackett (2011) page 35.

Externalities are impacts on society that are side effects from production and exchange of goods and services in the market. Negative externalities are when these side effects have an uncompensated harm on society. In other words, the *social cost* of an activity is higher than the *private cost* (cost to the producer) if some costs are not borne by the private actors. The producers in those situations do not have the external cost internalized in their costs. In other words, the costs for the producers are lower than they should have been had the *private impact on society* (e.g. pollution from an industrial plant) been accounted for. Furthermore, there are certain goods that do not fit perfectly into the market system model. *Common goods* and *public goods* are two important types of such goods. *Public goods* are problematic in the market system because they represent large, fixed costs, and use of them by members of society *cannot be excluded*. Additionally, the use of public goods by one actor does not affect the use of others, so there is *no rivalry* for these goods. *Common goods* are similarly characterised as a use that *cannot be excluded*, but for these goods the activity of one user can affect the use of another negatively, thereby creating *competition for the goods* (rival activity). Table 2 summarizes four traditional categories of goods in economics on the basis of excludability and rivalry.

Table 2 Categories of goods

	Excludable	**Nonexcludable**
Rival	Private goods: Food, clothing, car, house	Common goods: **Marine resources in open sea,** public waterways, air
Non-Rival	Artificially scarce goods/Club goods/ Low- congestion goods: Satellite television, private park, access to copyrighted works	Public goods: Legal system, police force, national defence, free-air public tv

As seen in the table, marine resources are typical common goods, or what could also be referred to as common pool resources (CPRs). The management of the marine resources has, as will be demonstrated for both the Norwegian and Canadian case in the thesis, had an increasing market orientation in the last decades. How this development is to bee seen in relation to the resources as common goods is, as indicated in chapter 1, one of the topics

that will run through the thesis. Related to this is also different property-right conceptualizations of access to the resources. Theoretical advancements in that regard is further elaborated after an introduction of basic theories of fisheries economics and biological modeling, including the concepts of maximum sustainable yield (MSY), maximum economic yield (MEY) and *resource rent*.

4.2.3 Bioeconomic modelling: Limitation of access to achieve highest sustainable and economic yields (MSY and MEY)

Increased knowledge of the dynamics of renewable natural resources as fishery resources was an important step in developing fisheries economics.[378] The basic idea is that a fish stock, being a *renewable resource*, has the potential to reproduce itself up until a certain size of the stock, which is referred to as the *carrying capacity* of the stock. Changes in the size of the fish stock are simplistically expressed by the following equation:

Change in stock = recruitment + individual growth – natural death (1)

Biologists have from these basic mechanisms developed *biomass models* and *growth functions* through empirical investigation and theoretical developments.[379] In a simple logistic growth function, the growth dynamic is expressed by the following equation:

$$F(X) = g(X - Xmin)\left(1 - \frac{X}{Xmax}\right) \qquad (2)$$

F(X) is the *biological growth* of the stock *X*, with a *growth rate* of *g*, which can be expressed in a maximum stock level at X_{max} (carrying capacity) and a minimum stock level X_{min}. An example of a growth function is presented in figure 3.[380]

[378] See more in Shaefer (1954) for an introduction to developments that played an important role in the decades to come.

[379] Logistic growth was first applied to fisheries by Shaefer (1957). This is referred to in Perman et al. (2003) page 558 where it is also expressed that the logistic form is a "good approximation to the natural growth processes of many fish, animal and bird populations."

[380] This is a growth curve which is referred to as pure compensation.

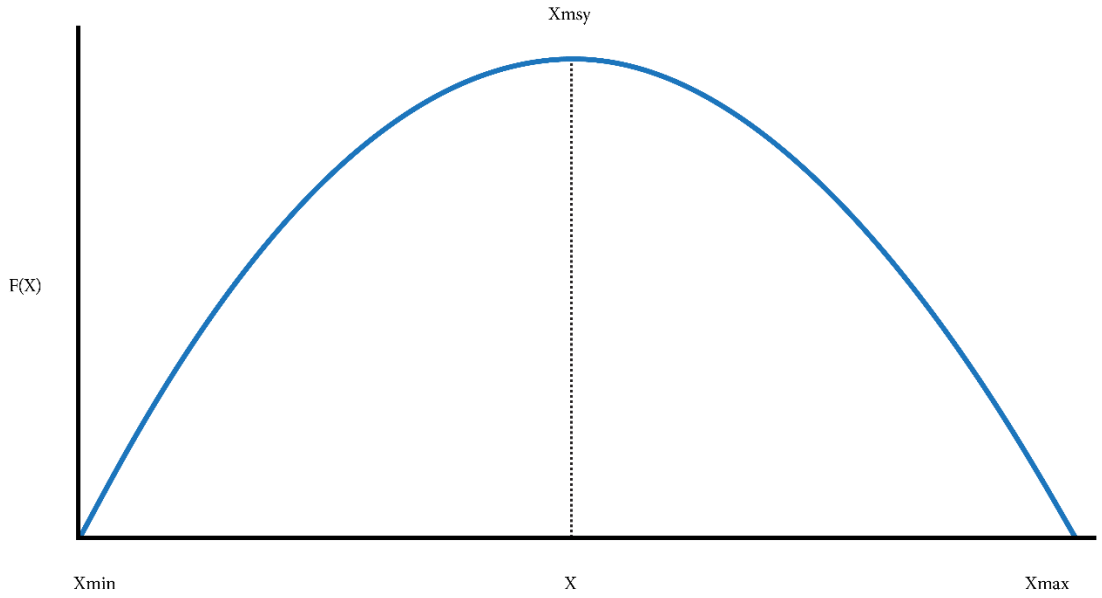

Figure 3 Basic growth model

The growth function in the blue line is therefore showing the *surplus* at the vertical curve that is produced at different levels of the *size of the stock X* on the horizontal curve. At the top is the highest growth level, i.e. X_{msy}, which is the stock size that produces what is referred to as the maximum sustainable yield (MSY) of the stock. In other words, this is the size of the stock that will produce the highest surplus when no fishing on the stock takes place (just natural death). This also represents the highest level that can be harvested without a decrease in the size of the stock, as it is *the surplus of the stock* that is harvested. It is important to get an understanding of these concepts, as MSY is a management approach widely applied in modern fisheries management, and called for globally.[381] By expanding the model to include harvest and economic parameters we move into a discipline often referred to as *bioeconomic modeling*.

In the following, a simple *bioeconomic model* is presented to show some of the basic features of fisheries economics, and how a fish stock in theory is affected by harvest. This is a static

[381] See more in chapters 3.2 and 4.3.

single species model often referred to as the *Gordon-Shaefer model.*[382] The inclusion of fishing effort into the basic stock dynamic equation above (1) simply expresses the following:

Change in stock = recruitment + individual growth – natural death – harvest (3)

We see from the equation that fishing effort is a factor that affects changes in a stock negatively. A fish stock can therefore achieve negative growth (decrease in the stock size) if the harvest is larger than the natural rate of increase (recruitment + individual growth). In a next step, harvest in the form of fishing effort *E* can be included in the Gordon-Schaefer model of growth. Many factors influence the size of the harvest, but in the Gordon-Schaefer model the harvest is a *function* of both the fishing effort (e.g., number of trawling hauls, sets of nets etc.), and of the size of the stock. This can be expressed as follows in a harvest function:

$$h = f(X,E) \quad (4)$$

Mathematically, the actual *rate of change* of the renewable stock at a certain stock size is expressed as the derivative of X in $F'(X)$. The rate of change of the stock is therefore:

$$F'(X) = F(X) - h \quad (5)$$

If the stock is to grow, i.e., $F'(X) > 0$ (positive rate of change), the harvest rate must be smaller than the natural growth. The fishery is in a *bioeconomic equilibrium* when the rate of catching is equal to the natural rate of increase for that specific level of population and fishing effort.[383] There is therefore no increase or decrease in the stock at this level of harvest. Mathematically this is expressed by $F'(X) = 0$, so that equation (5) can be transformed into:

[382] Two major references in this regard are Gordon (1954); Shaefer (1954). For an overview of these developments, see Munro (1992); Flaaten (2011).

[383] Shaefer (1954) page 30.

$$F(X) = h \qquad (6)$$

The surplus yield of the stock is there for the amount harvested. In figure 4 a *constant harvest* at hmsy is assumed in the purple line. It could be natural to assume that harvest at the MSY level would ensure that the fishery is sustained over time.[384] This does, however, depend *critically* on the size of the stock when the MSY management approach was put in place. If the stock is larger than X_{msy} at the time of implementation, the net growth of the stock will become negative, but will stabilize at the equilibrium in X_{msy}. On the contrary, if the stock is smaller than X_{msy}, the net growth rate will become negative ($h > F(X)$) and the stock will decline. If the harvest rate is continued, this ultimately will lead to a full depletion of the stock to X_{min} in the figure, which is another bioeconomic equilibrium.

A more realistic assumption of the harvest in bioeconomic theory is that it is a function of effort E and the stock size X, and not a constant as in the example above. It can be expressed as:

$$h = qEX \qquad (7)$$

The constant q represents what is referred to as the catchability coefficient for certain types of fisheries. This parameter expresses how efficient the effort is in relation to the size of the stock. Two examples of different harvest function are expressed in qEX_2 and qEX_3 in figure 4, with the corresponding bioeconomic equilibrium in X_2 and X_3.

[384] See more on this reasoning in Hackett (2011) page 120–122.

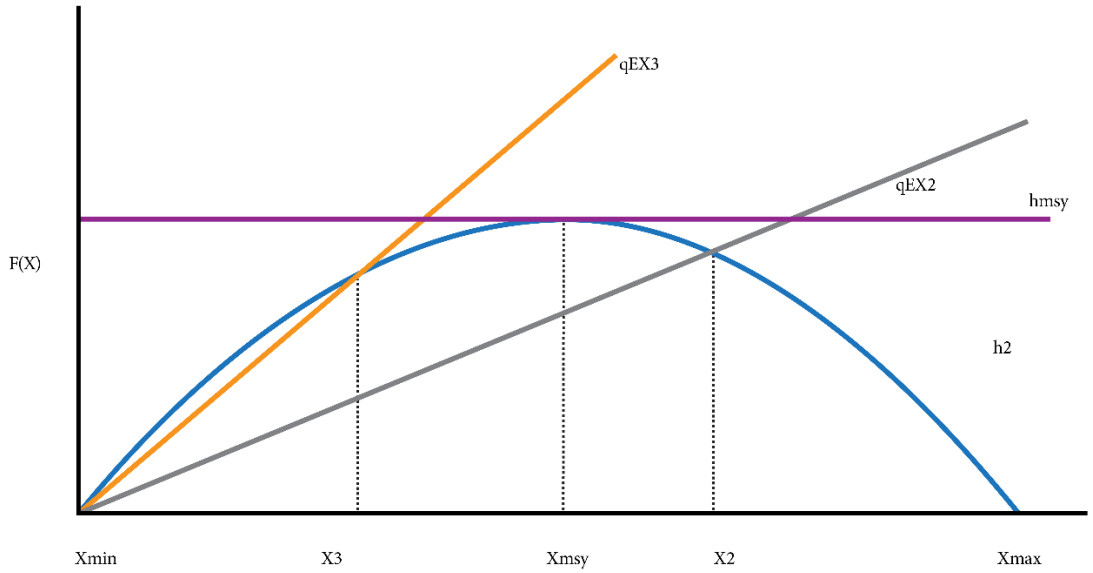

Figure 4

From this model a sustained yield-fishing effort curve can be derived mathematically, expressing the relationship between sustainable yield and fishing effort. Figure 4 is an example of a yield-effort curve is presented in the blue cure, where harvest at different levels of efforts is shown.

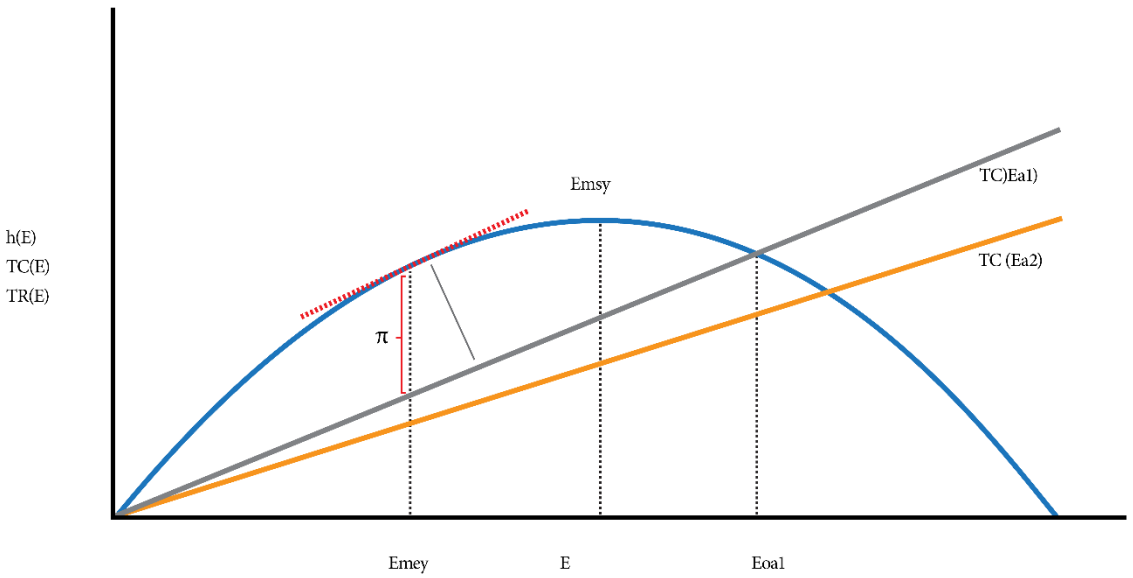

Figure 5

By introducing prices and costs to the model the analysis continue into finding optimal levels of fishing efforts. If we operate with a constant price of landed fishing, the total revenue of the fishery could be expressed as follows:

$$TR \text{ (total revenue)} = h(E) * \text{price} \quad (8)$$

If the price equals 1, the total revenue (TR) will coincide with the effort curve through mathematical calculations. This is assumed in figure 5. The next step is to include costs. The efficiency of each actor can vary, but for simplicity it is assumed that there is unlimited access to a constant cost (a) per unit of effort in the model. This gives a linear function of:

$$TC \text{ (total cost)} = a * E \quad (9)$$

Two different cost functions are included in figure 5, at the constant a_1 and constant a_2. In a situation with *open access* (free entry), the effort has stabilized at the level where the total costs equals total revenues. It is assumed that new entrants will enter the fishery up to that level. For the cost with the constant a_1 this is shown as the effort $E_{oa1.}$

An open access fishery is often used as an example of a "tragedy of the commons," a conceptual model widely cited in literature after introduced Garret Hardin's 1968 paper on population growth, human problems with no technical solution and overuse/misuse of natural resources and the environment.[385] This points to the relevance of *game theory*, another subfield within economics analysing strategic behaviour of rational actors maximizing their personal gain in different games, in a natural resource management context. The core of the tragedy is that the rational behaviour of individuals leads to inefficient outcomes for society, with fish stock depletion as a worst-case scenario in an ocean context.[386] Important in these ideas is the assumed constraint that the actors do *not cooperate*, which has been formalized in the well-known standard analysis in the prisoner's

[385] Hardin (1968).

[386] Hardin (1968) page 1245.

dilemma game. This assumption has been criticized on the basis of *empirical evidence* from real world settings.[387] Important to note at this point, is the proposition by many theorists that there are only two approaches dealing with the problem with the commons, with 1) *state coercion* to limit behaviour one side, and 2) the *privatization* and establishment of *private property rights* on the other. The issue of rights-based management is further outlined in chapter 4.5.

To return to the bioeconomic modeling, another important advancement in the theorization is to find the optimal levels of the fishing effort (e.g. how many boats should harvest) based on different objectives. The effort with the largest *biological outcome* is found at E_{msy} in figure 5. This is the fishing effort that produces the largest yield of the stock (potential harvest quantity), which in the model involves reducing the effort from the open access effort. This is the level which in theory would feed most people, and create a basis for a larger export or fish production on land, and thereby potentially the most employment in the production sector (depending on to what extent the processing is automatized). It is, however, an even lower fishing effort that represents the largest *economic outcome* in the model, and which is important to reflect on to understand the potential of accruing a *resource rent* from a fishery.

The largest divergence between revenues and costs are at the same time at an effort even lower, found in the point where the economic yield is maximized, in point E_{mey} (*maximum economic yield*). By fining the partial derivative of the various functions, E_{mey} can be found where the *marginal costs* equal the *marginal revenues*.[388] At this point, a rent is created as there is a positive divergence between the total cost and revenues, the so-called *resource rent* or *super profit* from the fishery. It is therefore an extra profit a natural resource in theory can generate after normal remuneration to labour, capital and other production factors are covered. A potential resource rent is showed as π in figure 5. This is therefore the most economic optimal fishing effort in the model, generating the largest profit with the least

[387] See more in chapter 4.6.

[388] Se more details on this in Flåten (2011); Perman et al. (2003) chapter 17; Munro (1992).

effort. As mentioned, this simple model is a static model. There are many more elements that could be included to make the model more realistic, but the above concepts are most relevant for the purposes of this thesis.[389]

4.3 What can be harvested: Total allowable catches (TAC)

As noted, stock assessment methodology played an important role in the development of fisheries economics. As will be demonstrated in more detail in part II, the establishment of a quota system was to become another fundamental component of the regulatory system. This chapter briefly outlines the role of biological advice in the legislative framework and introduces and explains some key terminology.

4.3.1 MSY and the precautionary approach

The national TACs established by Norway, mostly as a result from coastal state negotiations (for the lager commercial stocks), are based on advice from the ICES (se chapter 3.5.2) requested by the relevant parties. The approach by ICES when advising on fishing opportunities is an integration of ecosystem-based management with the objective of achieving MSY, unless otherwise requested.[390] The biological conceptualization of MSY was introduced in chapter 4.2.3, and there is as seen in chapter 3.2 a duty for states to establish measures that maintain or restore stocks at levels capable of production under UNCLOS (and UNFSA). The concept is, however, criticized and the obligation under international fisheries law gives the states some discretion to deviate from MSY when setting management and conservation targets.[391] The concept must also be seen in relation to the principle of the precautionary approach, which is laid down with different articulations in various international treaties. In the preamble to CBD it is articulated as "where there is a threat of

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389 The model therefore does not encompass a time horizon that estimates optimal fishing over time. In Clark and Munro (1975) an investment rule of a fishery was developed. The new element to this modeling was the introduction of capital theory, in which the maximizing of future revenues from the fish stock was conducted through the use of present values to find the dynamic bioeconomic equilibrium. In this way, the fish stock cold be seen as nature capital, not very different from the ideas originating from the aforementioned cardinal utility and valuation of goods from nature. For an overview over some areas for future research, see Clark and Munro (2017).

390 ICES (2019) page 6.

391 See for example Harrison and Morgera (2017); Garcia, Rice and Charles (2016)

significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat." UNFSA Article 6 sets out more specific rules on the application of the precautionary approach. ICES has since 1988 used a precautionary approach in its assessments and advice to describe stocks that are inside or outside safe biological limits (see more below).[392] All ICES advice is therefore in accordance with the precautionary approach, and its interpretation of MSY is "maximizing the average long-term yield from a given stock while maintaining productive fish stocks."[393] In the management of several of the stocks in the Northeast Atlantic, *management plans* or *strategies* have been agreed upon by the coastal states. These are plans that are evaluated by ICES to ensure that they are consistent with the precautionary approach.[394] The plans can have different types of pre-agreed operational harvest rules (also referred to as harvest control rules) that determines the establishment of TAC, and thereby providing some predictability.[395]

4.3.2 ICES advice on fishing opportunities

The ICES advice process is presented in more detail in ICES (2019), from which the following overview is built on. The main elements of the process are based on four stages: 1) the request stage, 2) the knowledge synthesis stage, 3) the peer review stage and 4) the advice production stage. In the first stage it is important to clarify the request and advice question. The second stage could be expressed as an operative stage where all the data collection takes place. This includes research cruises, catch sampling and catch statistics compilation. Data is also analysed at this stage. This is conducted by an expert group consisting of researchers in the field. From Norway this includes researchers from the Institute of Marine Research (IMR). The next stage is peer review of the analysis by scientist who are not connected to the expert group and with no interest in issues reviewed. Lastly, stock assessment and advice is produced in a transparent process a competent authority can

[392] NOU 2005: 10 page 38.

[393] ICES (2019) page 6.

[394] ICES (2019) page 6.

[395] See more on this in Kvamsdal et al. (2016).

observe. The final advice is agreed by the Advisory Committee (ACOM), which consists of scientists appointed by the government of each ICES member country.

Advice on fishing opportunities comes in different forms depending on the stock and whether there are established management plans or strategies. It can be useful to introduce some of basic terminology used this stock advice. Fishing mortality (F) is a measure for fishing pressure and is basically the only variable in fish stock dynamics that can be directly controlled by fisheries management. Stock size (B) and Spawning-Stock-Biomass (SSB) are two other main notions in the advice. The use of *biological reference points* or similar is to assess the long-term sustainable levels of fishing mortality and the stock biomass.[396] The conceptualization is exemplified in figure 6.

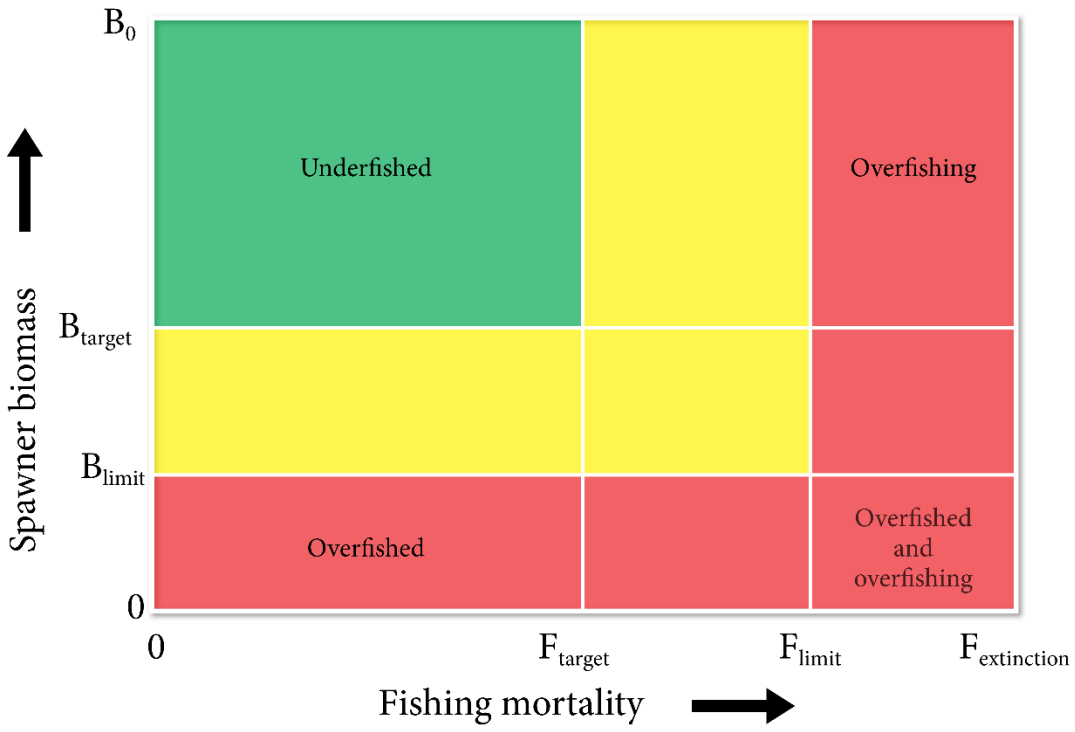

Figure 6 Example of biological reference points in stock advice

In the illustration reference points for the SSB are set at B_{target} and B_{lim} on the vertical axis. Depending on the management objective in question, the target could be set at MSY or

[396] See more on this in OECD (2012) page 27.

Precautionary Approach (PA), respectively B_{msy} or B_{pa}. A stock size that is lower than B_{lim} represents a risk of stock collapse. If the target is the precautionary approach, this indicates a level of the SSB that gives a reasonable certainty that the stock size will stay above B_{lim}. On the horizontal axis are the corresponding fishing mortalities (fishing pressure). A fishery at F_{lim} is therefore a fishing pressure where the expected long-term result is an average stock size at $B_{lim,}$ with the aforementioned risk of stock collapse. There are many definitions of stages of fishing pressure.[397] "Underfished" is a fishery found within the green area, but I have also seen the terms "safe fishing" or a "healthy" status used. Similarly, "overfished and overfishing" in the red zone in the corner down to the right have by some been referred to as "critical" or "high risk zone." The yellow area could also be referred to as a "buffer" or "cautions" zone.

4.3.3 Other environmental law principles and scientific knowledge

S*ustainability* is a concept that is at the forefront of the international agenda these days, setting out targets for the development of basically all economic activities in modern society, and steers the management of the wild-living marine resources in a Norwegian context through the purpose clause of the Marine Resources Act. I do not attempt to define this concept in the thesis, but assume environmentally sustainable use of resources within the broad definition in Article 2 of CBC which means "the use of components of biological diversity in a way and rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations." As will be demonstrated in part II of the thesis, the idea of regulating a marine resource in order to sustain it for later fisheries was on the agenda of the Norwegian Parliament in lobster fisheries as far back as 1821.There is also research demonstrating that the idea of long-term maintenance of forestry developed in England and Germany in the 1600 and 1700s.[398]

An *ecosystem-based approach* is also a concept widely referred to and laid down as one of the fundamental considerations the Norwegian management must emphasize. In Article 2

[397] OECD (2012) page 24–25.

[398] See more on the origin of the concept on sustainable use, also in a Norwegian context, in Voigt (2010).

of CBD an ecosystem is defined as "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit." An ecosystem-based approach in relation to fisheries management has been seen as a holistic approach to the whole ecosystem as one to ensure that use of the resources does not lead to loss of biodiversity or damaged habitats and that all parts of the ecosystem are managed sustainably.[399] Also the cumulative environmental effects on the ecosystem from pressures now and in future must be assessed, although these assessments are acknowledged to be challenging.[400] How to set out these broad and vaguely articulated responsibilities is of course another and complex issue, but the Malawi Principles for the Ecosystem Approach[401] and FAO Technical Guidelines for Responsible Fisheries[402] from 2003 gives relevant guidance. Some key operational-oriented features are decentralized management, broad stakeholder participation from society and scientific disciplines and the recognition of uncertainty, change and the human dimension. The idea of *adaptive governance* in the form of effective monitoring, well-defined performance indicators and evolutions systems has also been regarded essential for addressing uncertainties and learning from experience to improve performance and outcomes.

Connected to all of the above is reference to "scientific knowledge" or "scientific evidence" throughout international fisheries law and what type of information is to be used to inform a decision-maker. In Article 6.4 of the FAO Code of Conduct for Responsible Fishing it is laid down that conservation and management decisions should be based on "the best scientific evidence available, also taking into account traditional knowledge of the resources and their habitat, as well as relevant environmental, economic and societal factors." I will use a similar wide definition when speaking of *science* or the *knowledge base* more generally, but specify methodology or forms of knowledge when relevant. In Article 7.4.4 of the FAO Code of Conduct for Responsible Fishing it is expressed that states should ensure that "timely, complete and reliable statistics on catch and fishing effort are collected and

399 Ot.prp. nr. 20 (2007–2008) page 33.

400 Nature Diversity Act section 10. See also Ot.prp. nr. 52 (2008–2009) page 104.

401 CBD (1998).

402 FAO (2009a).

maintained in accordance with applicable international standards and practise and in sufficient detail to allow sound statistical analysis. Such data should be updated regularly and verified through an appropriate system."

Related to scientific knowledge are theories in *sociology of knowledge* concerning the production, interpretation and use of science and technology in society. Science and Technology Studies Theory (STS) are studies of the mutual influences of culture, politics and society, in which analyzing and understanding science and technology as *social relations* and *constructs* is central.[403] There has been critical examinations on the modern quota system (in literature referred to as the "TAC-machinery"[404]), especially pointing to inherent uncertainties and ambiguities in the management objectives, and research on new forms of knowledge production that includes stakeholder participation, rooted in Actor-Network theories, which originates from STS-perspectives.[405]

4.4 Technological development and increasing fishing effort

To understand some of the rationale for limiting fishing effort in a fisheries management context, it is also important to reflect briefly on the impact of technological progress and fishing effort. The issue of "harvest capacity" is, as will be demonstrated in part II, a central justification for the use of market-based instruments for capacity reduction. The issue is at the same time not straightforward, as harvest capacity can increase due to technological developments, although the number of vessels in a fishery is reduced.[406] The issue of continuous technological improvement is often referred to as the "capacity creep" and is extremely important in an interwoven regulatory system where vessels depend on being allocated their share of the quota-cake.[407]

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403 See for example Bauchspies, Croissant and Restivo (2006) chapter 1.

404 Nielsen (2008) page 106.

405 See Nielsen (2008); Bjørkan (2011) for two doctoral thesis addressing respectively ICES advisory processes and the Norwegian case of co-production of knowledge with the reference fleet. See Holm et al. (2020) for a worldwide overview of how knowledge practices in fisheries management are changing.

406 See for example Standal and Aarset (2002) studying the capacity of the coastal fleet in Norway in the time period 1990–2000. This development of capacity expansion has in Johnsen (2005) ben referred to as the evolution of a "harvest machinery."

407 See for example Standal and Hersoug (2014).

There is, however, more than one approach to measure and define capacity. Two important ways to classify capacity are *technical capacity* and *economic capacity*. The former represents vessel size tonnage, engine power, gear types and such, i.e., how much the vessel basically could harvest with no other limitations. The latter is capacity measured from economic criteria, e.g., to optimize the operating margins, return on total assets or other key economic numbers. Furthermore, economic capacity could be divided into profitability for the individual actor, and profitability for society as such. A minority faction in a Norwegian policy advisory commission from 2006 highlighted that there is no consensus on how capacity should be measured, or what it is, and calls for attention to the "social fisherman," which is an individual not necessarily driven by self interest.[408] As seen above, is it the rational self-maximizing fisherman that is assumed in the neoclassical economic (bioeconomic) modeling. Alternative approaches to this *rational-choice* approach have been proposed in theory. These are further introduced in chapter 4.6, but it is first useful to introduce different conceptualization of limited access to the marine resources, which could also be seen as *rights-based fishing* approaches.

4.5 Rights-based fishing and market mechanisms

4.5.1 Fisheries management regimes[409]

The introduction of catch limitations in the form of TACs transformed the resources into quantities that could be divided and assigned to individual fishermen or vessels, see more on this shift in Norwegian and Canadian contexts in parts II and III. Catch limitations are today used in combination with *access restrictions* to fisheries in many jurisdictions worldwide.[410] The notion of *rights-based management* is commonly used when referring to fisheries management regimes with various types of user and harvest rights.[411] When

[408] NOU 2006: 16 Strukturvirkemidler i fiskeflåten page 27–27. Johnsen (2005) also offers a critique of how the authorities view capacity expansion based on a purely rational choice approach.

[409] I use the word "regime" in a neutral way, and interchangeable with systems, approaches, instruments and mechanisms, when referring to different regulatory designs for fisheries governance. This is widely used terminology in fisheries management literature.

[410] An overview of how commercial fishing effort is managed is provided in Anderson et al. (2019).

[411] FAO (2009b) page 253.

economic instruments and incentives are used to reduce fishing effort (capacity) or reallocate harvest right to promote *allocative efficiency* (as opposed to government regulation), the term *market-based management mechanisms*, or use of *market-based instruments*, is also commonly used terminology.

Table 3 gives an overview of different variations in regulatory instruments in a fishery, with *access rights* (often referred to as input regulations) and two types of *withdrawal rights* (often referred to as output regulations) as the three main categories.[412] The table is not intended to be exhaustive as to typology used on management regimes worldwide, but it provides a useful point of departure to convey some of the complexity of fisheries management. Instruments found in Norwegian and Canadian policies are pointed out in the table. As seen, several instruments can be combined within fisheries policies in one jurisdiction. The notion of individual transferable quotas (ITQs) and individual vessel quotas (IVQs) are highlighted as these are terms that will be put in a Norwegian and Canadian context in parts II and III.

[412] Based on OECD (2006) and table 4.1 in OECD (2013). It is also inspired by table 6.1 in Hackett (2011) page 127.

Table 3 Fisheries management instruments

Regulatory instrument	Key characteristics	
Access rights (input regulation)		
Limited transferable licences	Access privileges in the form of a fixed number of licences that can be transferred. Give fishers incentive to adjust capacity and effort in response to natural and economic conditions	Norway
Limited non-transferable licences	Licences that can be attached to a vessel, owner or both. Must be limited in number and applied to a specific stock/fishery to be considered "market-like" instrument.	Canada
Territorial-use rights (TURFs)	A defined area is allocated to a group whose users share the right	
Withdrawal rights (catch shares/output regulation)		
Vessel catch limits/Individual vessel quotas ***(IVQ)***	The amount of catch that each vessel can land for a given period (e.g. annual quota) or trip is restricted	Norway, Canada
Individual transferable quotas ***(ITQs)***	A right to catch a given percentage of TAC that is transferable (to individual or vessel)	Norway, Canada
Individual non-transferable quotas	Grant one user a right to catch a given amount of fish (mostly share of TAC)	Norway, Canada
Community based catch quotas	Quotas allocated to a fishing communities and rights allocated to users on co-op basis	Canada
Withdrawal rights (effort shares/input regulation)		
Individual non-transferable effort quotas	Rights are attached to the quantity of effort units that a fisher can employ for a given period of time (for example allowable fishing days)	Canada
Individual transferable effort quotas	Same as above, but transferable	

4.5.2 Rights-based fisheries within property rights frameworks

When speaking of rights-based fisheries it is natural to reflect briefly on licences within the theoretical construct of *property rights*. This is a huge and complex topic, complicated by

the elusiveness of the concept itself and the nature of wild-living marine resources that most of the time appears in areas outside of private ownership (when in their wild state). From a *legal practical* point of view, which is briefly noted in chapter 3.7 and further reflected on in part IV, the paramount question in a Norwegian fishery context is to what extent the issuing of licences establishes *legal positions* that are afforded protection under sections 97 and 105 of the Constitution and the ECHR P1-1. In other words, whether the licence entitlement constitute "property" under the Constitution or "possessions" under the ECHR, or that the position is protected from state interference in statutory provisions or by customary law.[413]

This section addresses rights-based fisheries from a *theoretical perspective* by introducing some of the discourse and conceptualisations of "property rights" and "ownership" within legal theory and other disciplines. The rationale for this is: 1) to provide a basic introduction to how the concept is used in some of the multi-disciplinary research a legislator will naturally look to when designing management regimes, and 2) to provide theoretical input for the understanding and clarification of objectives in fisheries legislation that is further reflected on in part IV. It starts by summarily outlining different property rights conceptualizations in legal theory in chapter 4.5.2.1, followed by reflections on the interface to private law and exclusive fishing rights in a Norwegian context in chapter 4.5.2.2. Some relevant approaches to the rights-based concepts in economic theory and social disciplines are presented in chapter 4.5.2.3, before moving on to types of ownership to common pool resources in chapter 4.5.2.4. Lastly, some of the questions in the multi-disciplinary discourse on the proprietary nature of fishing licences most relevant in a Norwegian fisheries governance are introduced in chapter 4.5.2.5.

4.5.2.1 Property rights in legal theory (types of rights)

In legal philosophical literature the concept of "property" is seen as a ubiquitous, complex, controversial and socially important legal and social institution with a dual function of *governing the use of things* and as a mechanism for *allocation of social wealth* that has no

[413] The property right concept in the ECHR is thoroughly studied in Solheim (2010).

univocal definition.[414] "Property" in everyday speech is understood as a tangible thing someone possesses physically and can own, but is in legal theory not necessarily seen as an object, but as a concentration of power over a thing that can be enforced to the extent enforceable *property rights* have been established.[415] In philosophy it has been assumed that there is an obligation in society not to intervene or use the property of others unless authorized by a particular right, and that the owner of a property can use it freely.[416] Real estate, movables and instruments of debt are pointed out as the *objects* of property rights in Norwegian legal theory,[417] whereas a variety of different rights such as user-rights attached to real estate (profit à prendre) or common property rights are labelled as *limited property rights*.[418] Types of ownership in relation to common pool resources (CPRs) are addressed in chapter 4.5.2.4.

One influential interpretation of property rights popularized by common law legal realists is that it is a "bundle of rights."[419] This is a theory that has similarities to the prevailing *functional approach* in Norwegian (Scandinavian) legal doctrine, in which the functions embedded in a property, and mapping out the factual characteristics of these functions, is at the core.[420] Eleven often cited standard legal incidents were set up in Honoré (1961), which are right to possess, to use, to manage, to the income, to the capital, to security, to the incident of transmissibility, the incident of absence of term, the prohibition of harmful use, liability to execution and to residuary.[421] In Norwegian theory it is common to see property rights delineated *negatively* (owner has all rights other than those exempted), and the

414 Harris (2003) page 3–6. The multi-faceted nature of conceptualization of private property is also highlighted in Waldron (1988) page 31 which states that "private property is a *concept* of which many different *conceptions* are possible …"

415 Barnes (2009) page 22–23; FAO (2004) page 8.

416 Stavang and Stenseth (2016) page 22.

417 Whether intellectual property rights should be included as objects to property or not is subject to theoretical discussion, see for example footnote 4 in Falkanger and Falkanger (2016) page 31.

418 Falkanger and Falkanger (2016) page 32–33, 62–69.

419 See for example Glacking (2014); Wyman (2017) page 188.

420 Solli (2020) page 301; Baldersheim (2017) page 21 and 136.

421 Honoré (1961). See an overview of historical origins in Glacking (2014); Jenner (2020) chapter 1.

limited rights delineated *positively* (content of the rights depends on interpretation of the legal basis).[422]

The functional approach has been subject to recent criticism in Norwegian legal theory,[423] and the "bundle of rights" theory has been under criticism for decades by scholars referred to as *new essentialists* by Wyman (2017).[424] The new essentialists claim that the "bundle of rights" approach does not present a definition of property, or a stable core of what's distinctive with property, and thereby allows for reshaping of property with changing values and policy goals that might violate constitutional protection of property.[425] There is therefore an *ideological dimension* to this discourse with respect to the scope of governments to regulate and redistribute resources that is theoretically interesting from a highly policy driven fisheries governance perspective.[426] The new essentialists' ideas point to the former prevailing theory in Norwegian legal doctrine based on a *substantive conception* of property rights, which is the prevailing theory in continental civil law doctrine.[427] A third approach promoted in the Norwegian property rights discourse is a *relational approach.*[428] The essence of this concept is that rights are created through relations between an owner and others. Another important point is that lawyers are concerned with how "property" is defined in different contexts.[429] As will be shown in part III contextual definitions of "property" are found in case law concerning fisheries law in Norway and Canada.

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422 Falkanger and Falkanger (2016) page 41–42.

423 Baldersheim (2017). Baldersheim analyses the functional approach to the transfer of ownership and asks how many "sticks" there are in the "bundle" that constitutes ownership. One of his points is that seemingly no one is able to specify the number of sticks the vendor originally had, which again impacts the ability to make contractual arrangements for all of the sticks. Furthermore, he finds that the idea of transfer of ownership on a "stick by stick" basis through a package, makes the functional approach "look like a cliché." Baldersheim (2017) page 14.

424 Wyman (2017) page 207.

425 Wyman (2017) page 184–185, see also Merrill and Smith (2001) page 683; Merrill and Smith (2001) page 365.

426 Wyman (2017) page 184–185.

427 See an overview in Solli (2020) page 297–299.

428 See more on this approach in a Norwegian context in Sunde (2007); Solli (2020) 302–304; Myklebust (2010) 46; Baldersheim (2017) 15–18.

429 Harris (2003) page 12.

4.5.2.2 Interface to private law and exclusive fishing rights in a Norwegian context

The thesis has a public law perspective, but the interface towards private law rights in the coastal zone and potential exclusive fishing rights, and relevant research in that regard, should be noted. When it comes to *use and enjoyment of beaches* the general rule is that, apart from harvest of mussels and seaweed, there is no exclusive fishing right for the owner.[430] The property owner has an exclusive right to fishing for salmonid fish as far as the owner's grounds go.[431] For fishing rights related to a person with geographical connection to an area of a certain size, so-called *area rights,* or what in Norwegian literature has been referred to as *local fishing rights*, the status is more complex and disputed in literature as there is no legal regulation of these types of rights in statutory law. Of particular relevance for this thesis is the distinction between an *exclusive right* and a *public right*, and the question of whether there can be a *particularly protected public right*. This is an essentially different right than other public rights to natural resources, as the traditional view in Norwegian legal theory is that saltwater areas are ownerless.[432] The wild-living marine resources are also considered ownerless until harvested.[433]

In her doctoral thesis, Skogvang (2012) has, on basis of analysis of jurisprudence, concluded that both types of rights can be established, and she has identified important criteria for possible claims or questions regarding rights of the two distinctions.[434] Skogvang concludes that there is a need to investigate the influence private rights have on the public authority

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430 Rt. 1985 s. 1128 page 1131–1132; Myklebust (2010); Falkanger and Falkanger (2013) page 103–107.

431 Lov 15. mai 1992 nr 47 om laksefisk og innlandsfisk mv. (Salmonids and Fresh-water Fish Act) section 16. See more in Skogvang (2012) chapter 8.

432 Skogvang (2012) page 75 and 177; Myklebust (2010) page 84 and 87. Both Skogvang and Myklebust highlight that the question of state ownership to these areas of the sea is less pertinent as the state has broad regulatory authorities and exclusive territorial jurisdiction to ensure sustainable use and management of resources and areas at sea.

433 See for example Rt. 1999 s. 14 page 23. It is the state of law in many countries that an animal (*ferae naturae)* is a property acquired by occupancy only, which also has root in the ideas of philosopher and political theorist John Locke. See more in Macinko and Bromley (2004).

434 Skogvang (2012) page 202 and 242.

to regulate fisheries.[435] This thesis acknowledges this and takes notice that the authorities are not rejecting potential private rights to saltwater fishing, but the government did not (as seen in chapter 3.4) agree to the existence of certain fishing rights for the population of Finnmark as concluded by the policy advisory commission that examined the issues.[436] As seen in chapter 2.4, the main rule in Norwegian law is that there is a *public right to harvest marine resources* in Norway, but access to commercial fisheries has, as will be further demonstrated in Part II, been restricted for various purposes.[437]

4.5.2.3 Property rights and natural resources in economics and social sciences

Building on the functional approach, Norwegian law and economics literature sees a property right as an enforceable right to conduct certain actions (factual or legal) related to a "thing" or intangible rights.[438] Eide and Stavang (2018) subgroup the various types of combinable rights under: 1) user rights, 2) right to make revenue from a resource by entering into agreements with others and 3) right to transfer the thing or resource to others.[439] For natural resources specifically, they also point to *exclusion* of who can access the resource, *withdrawal* of the resource, *alienation, access to* and *management* as five central property rights (see more below on these types in the next sub-chapter).[440] In economic literature a concept of property rights is similar to the functional approach built up from its characteristics.[441] In figure 7, six commonly used characteristics in a fishing rights context are presented through a visualisation from Scott (1989).

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435 Skogvang (2012) page 281. Important in that context is also the question as to whether relevant exclusive fishing rights are best understood under a property rights framework or under the legal concept of common lands (in Norwegian "allmenningsrett") in Norwegian law. This are complex question that this thesis will not pursue any further. See Sunde (2009); Hutchinson (2009); Sunde (2010a); Ørebech (2010); Stenseth (2012) for some of the discourse on this topic in Norwegain legal theory. In his doctoral thesis, Stenseth (2005) studies common lands comparatively with co-ownership in respect of uncultivated outfields in Norwegian law.

436 See more in Prop. 70 L (2011–2012). Sunde (2016) comes with a critical view of how the government handled the issues of exclusive private fishing rights in relation to the adoption of the Marine Resources Act and follow-up of the proposals in NOU 2008: 5.

437 See Sund and Fjørtoft (2018) page 22–29 for an overview of the development and legal theory on these matters.

438 Eide and Stavang (2018) page 164.

439 Eide and Stavang (2018) page 164.

440 Eide and Stavang (2018) page 165, with reference to Schlager and Ostrom (1992).

441 See for example Scott (1989). Lane (1999) similarly assumes this approach in a Canadian context.

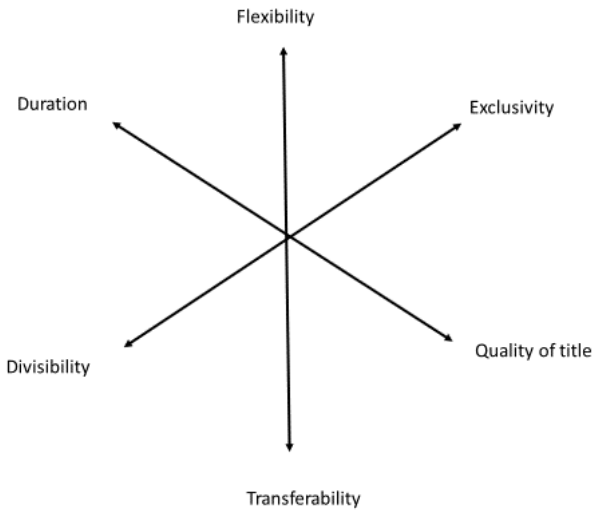

Figure 7 Property rights characteristics, Scott (1989)

The idea is that each of these characteristics could be measured on a scale represented by the axis of each characteristic, which would provide a measure of the quality of the rights.[442] OECD (2006) demonstrates in practice how these characteristics have been used to compare management instruments. Figure 8 rendered from OECD (2006) gives an example of comparison of two management instruments, with a scale from 0 to 5, where 5 is the highest

[442] In OECD (2006) page 27–28 *exclusivity* is described as whether an owner can use his rights without others interfering or damaging with the owner's right. Few property rights are fully exclusive and the greater the possibility for excluding a right, the lower the common nature of the resource is. *Duration* is seen as how long of a period the owner may exercise his ownership. The shorter the period, the more uncertain of a situation. *Quality of title* says something of how certain, secure and enforceable a property right is. High quality is seen as valuable as it gives security for banking purposes, or investments in a fishery, and the quality increases the more predictable the entitlement is and the higher the level of enforceability. *Transferability* is to which degrees the entitlement to a right can be transferred through leasing, selling or trading. It is valued because it can ensure an allocation of rights to the most efficient operators. *Divisibility* can be seen as the ability to divide property rights into more specific rights, for example, dividing a national TAC into individual or group quotas. *Flexibility* is the last characteristic, and it says something of how "freely" an owner can operate to achieve the objectives of the business. In other words, the operations are not regulated and restricted. Higher flexibility is considered valuable as it allows the owner to find the most effective ways to operate and use gear types and technology found most efficient. These are all seen as important characteristics that are largely interrelated, and with a role to play in the global goals of sustainable fishing practices.

quality (maximized). In this example, management instrument 1 maximizes all characteristics, whilst instrument 2 has lower levels of transferability and flexibility.

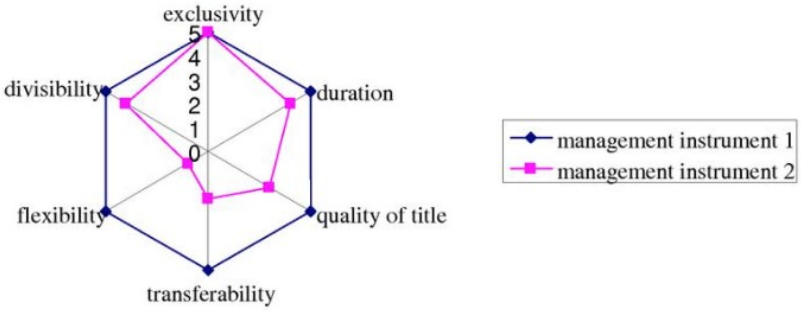

Figure 8 Example of comparison of two management instruments

4.5.2.4 Types of ownership of common pool resources (CPRs)

Moving on from types of property rights to *types of ownership*, a common way to classify four types of property regimes in relation to common pool resources (CPRs) is presented in table 4 below.[443]

Table 4 Property rights regimes

Regime type	Owner	Owner Rights	Owner duties	Access
Private property	Individual	Socially acceptable uses, control of access	Avoidance of socially unacceptable uses	Closed
Common property (public closed access)	Collective	Exclusion of non-owners	Maintenance, restrict rate of use (rely on effective cooperation)	Group members only
State property	Government	Determine rules	Maintain societal objectives (rely on effective enforcement)	All
Open access (non-property)	None	Capture	None	All

This table expands the dichotomy conception of open access and limited entry regime with private property rights as the only options advocated by Hardin (1968) and others.[444] Bromley (1991) draws attention to the idea that there is no such thing as a common property

[443] Rendered from Hanna, Folke and Mäler (1996) page 5.

[444] See chapter 4.2.

resource but property *regimes* in which natural resources are controlled and managed as common property.[445] Ostrom and Schlager (1992) and Schlager and Ostrom (1996) undertake another approach that combines *types of rights* and *types of ownership*. In table 5 their distinction of five classes of property rights holders on the basis of the bundles of rights associated with CPRs is presented.

Table 5 Bundles of rights associated with common pool resources (CPRs)

	Owner	Proprietor	Claimant	Authorized user
Access and Withdrawal	X	X	X	X
Management	X	X	X	
Exclusion	X	X		
Alienation	X			

This conceptual schema was developed to contribute to analytical clarity regarding the term CPRs, as the authors found it repeatedly confused.[446] They first outline the most relevant property rights related to day-to-day activities (operational level) by individuals as: 1) access (right to enter a physical property) and 2) withdrawal (right to obtain the "products of a resource").[447] Rules can be changed by collective-choice action pursuant to a set of *collective-choice rules* that specify *who* can participate in *changing* operational rules.[448] To illustrate this distinction in a Norwegian context, the statutes (adopted by legislative authority) provide the collective-choice rules in which authority is conferred to the Ministry to establish and change operating rules in the form of regulations.[449] The distinction between rights at the operational level (right to use) and at collective-choice level (authority to devise

445 Bromley (1991) page 2.

446 Schlager and Ostrom (1992) page 249.

447 Schlager and Ostrom (1992) page 250.

448 Schlager and Ostrom (1992) page 250.

449 The authors also notes that a third level of action could be at Constitutional level.

future operational-level rights) is regarded as crucial.[450] What is included in the collective-choice rights is: 1) management (right to regulate internal use patterns), 2) exclusion (right to determine who will have an access right) and 3) alienation (the right to sell or lease either or both of the types of collective-choice rights).[451] The main point of this classification is that a right holder can hold several rights cumulatively, e.g., the right of withdrawal and access are closely connected and mostly paired, but they can also exist independently of another.[452] Another point of the authors is to demonstrate that it is not only "owners" that make long-term investments in maintaining and sustaining the resources (as advocated in neoclassical theory). Some of the related ideas concerning collective action is presented in chapter 4.6.

4.5.2.5 Multi-disciplinary discourse on the proprietary nature of fishing rights

Although there has been legal attention to rights-based fisheries more recently, see chapter 1.2 for the Norwegian case, this came many years after the above-mentioned economic theories and influence of biologists had set much of the terms of environmental policy debates.[453] At the supranational level, FAO (2004) provides insights on legal aspects of *rights-based fishing regimes* more generally. A main conclusion is that it possible to establish a form of property less than fully owned in the full sense of private property law, in which transferability, exclusivity, security and durability are not fully present, with New Zealand as the jurisdiction studied with the strongest property system with "full property rights language" in the wording of the ITQ system in legislation.[454] Furthermore, it concludes that it is not possible to propose a single "model fisheries rights law" for implementation of

450 Schlager and Ostrom (1992) page 251.

451 Schlager and Ostrom (1992) page 251. These specifications are also rendered in Eide and Stavang (2018) page 165.

452 See also Solli (2020) page 301.

453 See for example Barnes (2009) page 313; Rieser (1999) page 396.

454 FAO (2004) page 34.

fisheries rights, as the theoretical constructs of the different management regimes vary considerably and with different geographical, social, political and economic contexts.[455]

The introduction of private harvest rights has, as indicated in chapters 4.2 and 4.5.1, been promoted among fisheries economists for creating incentives for responsible stewardship.[456] The market is also seen as the way to produce the most efficient allocation outcomes of harvest rights, in contrast to a government regulated allocation on the basis of various policy objectives, e.g. securing settlement in remote areas and similar. Some legal literature acknowledges ITQs (or similar rights-based constructs) as instruments to address over-fishing, but also points to potential redistributive effects and the difficult questions of equity and fairness.[457] As to ownership, the problem of establishing *individual property rights* with *fugitive*[458] *resources* such as marine resources is acknowledged in economic and

455 FAO (2004) page xv. Wyman (2008) also suggests that there is no single property arrangement that is optimal in fisheries more generally and that a property rights regime needs to be designed so that it reflects local conditions. Rieser (1997) similarly highlights that choice of property regimes should not be narrowed and that the case described in the paper "provided an opportunity to explore a diverse array of property-based arrangements to manage competing demands on these limited resources." As to more specific cases, Einarsson (2015); Doukas (2015); Maguire (2015) comes with a critical review of the Icelandic ITQ system in the wake of the financial crisis, where the former points to the majority conclusion of the UN Human Rights Committee (HRC) in 2007 that deemed the allocation of quota shares of harvest rights in the Iceland violated the general rule of equality in Article 26 of the ICCPR. Gretarsson (2010); Gretarsson (2011) go into the allocation of the harvest rights more specifically and highlight that the HRC build the case on wrong facts, and demonstrates that the Icelandic system in demersal harvest has evolved more by trial-and-error than by design. Enduring conflicts and changing social dimension with the evolution of fishing rights in a finish context is presented in Salmi (2012). The formation of individual rights in US federal fisheries is presented in Wyman (2005). The developments in a Norwegian context are addressed in more detail in part II, III and IV, but Holm and Nielsen (2007); Johnsen and Jentoft (2018) represent some relevant literature.

456 See for example Pearse (1992); Hannesson (2004). Grafton and Squires (2000) is a study of the gains of introducing ITQs in the Pacific halibut fishery in Canada, which is the case study in part III.

457 Wyman (2019); Song and Soliman (2019); Soliman (2014a); Soliman (2014b); Soliman (2014c); Soliman (2014d); Rieser (1999); Black (1997).

458 This is another commonly used term for nonstationary and migratory marine resources.

legal theory and that "even when particular rights are unitized, quantified, and salable, the resource *system* is still likely to be owned in common rather than individually."[459]

This points to the issue as to whether to characterize a transformation from open access to ITQs as a *privatization* of fisheries or not. Macinko and Bromley (2004) comes with a critical review of the "hegemonic and conceptually flawed" rights-based fishing movement, which they believe constricts *alternative policy options* to privatization of fisheries resources.[460] They see the distinction between *annually assigned quotas*, and competitive Olympic[461] fisheries, as the explanation of why ITQs work, and that property rights have nothing to do with it at all.[462] In a Norwegian context, Holm (2006) makes a theoretical distinction on how the fisheries resources as an object can be divided into the stock on one side, and the quota on the other. To the extent there are private rights to the marine resources Holm sees those related to the annual established quota, whereas the stock represents the object to which the management responsibilities of the state is connected, see visualisation in figure 9.

A main point by Holm is that the closing of the commons strengthened and formalized the right of the public to the fishery resources, but he advocates caution in making individual rights stronger as it can potentially impede necessary environmental reforms into new management regimes.[463] Macinko and Bromley (2004) view the introduction of private property rights as "privatization," and highlight how leading proponents of rights-based fishing movements have suggested not only to privatize 1) access to fish, or 2) the fish stocks

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459 Ostrom (1990) page 13, referring to Clark (1980). On the attention to developing private rights to common pool resources Ostrom states, "It is clear that when they refer to land, they mean to divide the land into separate parcels and assign individual rights to hold, use and transfer these parcels as individual owners desire (subject to the general regulations of a jurisdiction regarding the use and transfer of land). In regard to nonstationary resources, such as water and fisheries, it is unclear what the establishment of private rights means." See also Eide and Stavang (2018) page 169, which points to both the problem of delimiting a property rights in relation to CPRs and enforcement of it. The fugitive characteristics are also acknowledged in Wyman (2019).

460 Macinko and Bromley (2004) page 623.

461 These are typically fisheries where no individual quotas are issued an all vessel can fish until the total quota is reached.

462 Macinko and Bromley (2004) page 625.

463 Holm (2006) page 146–147.

themselves, but 3) also the marine ecosystem itself.[464] There are also different viewpoints as to what extent private fishing rights and market mechanisms are the best instruments to ensure good stewardship for a fishery or not, and the proprietary nature of fishing rights, in more recent literature.[465]

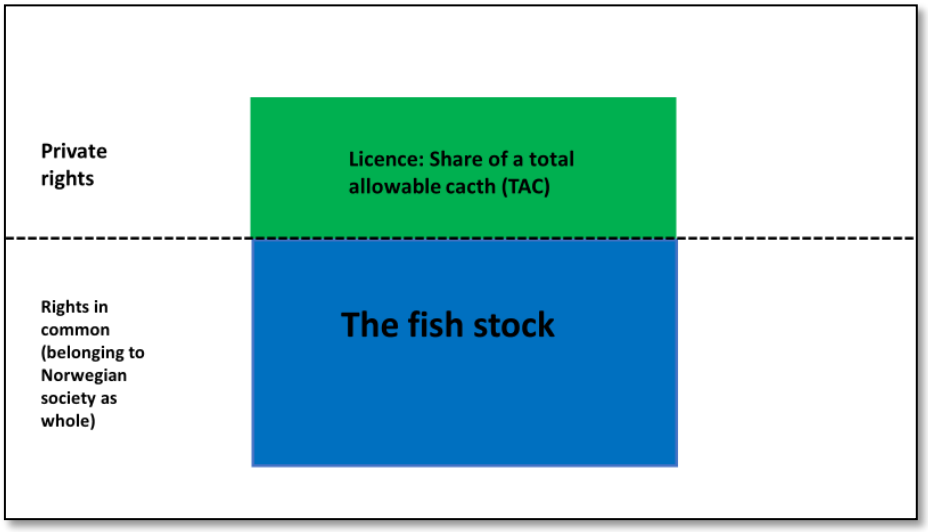

Figure 9 Rendering of Holm (2006) page 141.

This thesis will not make use of privatization terminology in relation to the ownership questions in the Norwegian context, nor directly enter this discourse itself. Attention will instead be drawn to the pressing need for increased legal research, and to the importance of licences in a legal cultural context and to how the use of unclear or ambiguous terminology and convincing political narratives in policy discussions at the domestic law level can

[464] Macinko and Bromley (2004) page 624. Reference is made to Scott (1989), see especially page 27 and 33.

[465] See for example Kahui, Armstrong and Foley (2016); Bromley (2016); Bromley (2015); Soliman (2014b); Bromley (2009). Soliman (2014b) concludes that individual transferable quotas (ITQs) do not satisfy full private ownership in a legal sense, although a "proprietary interest" is conferred upon quota owners. He finds that the property rights provided by the ITQs are neither "necessary nor sufficient to guarantee good stewardship for a fishery," but argues that the rights have created strong incentives for stewardship and improved sustainability in many fisheries around the world. Bromley (2016) continues to echo the sentiments of Macinko and Bromley (2004) on what he refers to as a challenge for marine policy to "understand what rights-based fishery means in the law – and in actual practice." He argues that an ITQ is simply an "aspirational claim right entitling the holder to look for, capture, and deliver to the dock (or a buyer) a specified quantity of fish."

impede fruitful discussions on the scope and practical legal implications of the regulatory design in access regulations.[466]

4.6 Critiques of neoclassical approaches and alternative theories

4.6.1 Introduction

Over the years there have been various modifications and critiques of neoclassical approaches and underlying assumptions that are highly relevant to a fisheries legislator. Some are already reflected on in a rights-based context in the previous chapter, but this chapter presents an overview of some of the advancements that respond to the lack of consideration to *collective action*, *social behaviour, informal norms* and *empirical settings* in the neoclassical models. This chapter therefore gives a broader, but synoptic, outline of the theoretical landscape the perspectives that this thesis builds on are found within (see above in chapter 1.3.1).

It is also important to highlight that many of the alternative approaches are interdisciplinary and use a mixed methodology, but some systemization is attempted, starting with an introduction to basic ideas in new institutional economics (NIE) in chapter 4.6.2. Chapter 4.6.3 moves on to addressing collective action in relation to common pool resources (CPRs) more specifically, and chapter 4.6.4 goes into the realm of social-legal approaches. Chapter 4.6.5 further elaborates these topics by going into broader approaches and an increasing environmental law attention to some of the approaches. Chapter 4.6.6 presents modifications of behavioural assumptions for issues of compliance and enforcement within the field of economics of crime. The overview is concluded by introduction to alternative

[466] Asdal (2011); Asdal (1998) address some of these points in a general environmental policy context in Norway. Bromley (1991) page 1–3 points to the intellectual problem with the incoherent concepts of property, rights and property rights in the academic discourse. Schwartz (2017) highlights that some legal instruments that provide individuals with an exclusive right to something are more like licences and permits, and that Congress and agencies should avoid calling such marketable permits "rights." This point is referred to in Wyman (2019) page 215, footnote 2. Lane (1999) highlights from a Canadian perspective how the fisheries literature is not precise in defining private property in fisheries. Hannesson (2004) page 81 highlights that rather than being irreconcilable options, differences in how the proprietary nature of ITQs is understood reflects some of the multi-dimensionality of property rights. The definitional ambiguity and to shift attention over from property rights to management and governance is emphasized in Macinko and Bromley (2004).

enforcement strategies under theories of *responsive regulation* and more recent advancements in chapter 4.6.7

4.6.2 New institutional economics: Bounded rationality, transaction costs and the free rider challenge

New institutional economics (NIE) is a diverse field of economics that has been pivotal in revisiting the role of institutions in economic theory. It includes a wide range of subfields and theories with different hypotheses, methodologies and conclusions that differ, and can be conflicting.[467] Although NIE innovations are multifaceted, three important modifications to assumptions in the neoclassical theory are central to many NIE theorists:[468]

1) *bounded rationality* instead of perfect rationality,
2) consideration to cost of change, instead of assuming transaction costs to be zero/low and
3) collective action: That members of a group can act together as a group to achieve a common object.

A concept of bounded rationality implies that humans in real life have to make decisions in a context where information is incomplete and imperfect, and with limitations in time and computational abilities. The rational actor does therefore not exist in reality. The second point modifies the assumption of zero or low transaction costs when using the market (entering agreements, or other ways in which change occurs). Typical costs are those related to collecting information, negotiating agreements and ensuring compliance to agreements (enforcement costs). Transaction costs are, however, not limited to the use of the market, but also what could be referred to as *political transaction costs.*[469] NIE is generally occupied with both studying intuitions as mechanisms to structure human interaction and reduce uncertainty, and as means to reducing transaction costs. NIE can be usefully classified into

[467] Prévost and Rivaud (2018) page 371.

[468] For an introduction to evolution and research status, see Voigt (2019); Chavance (2008).

[469] North (1990); North (1981), see also more in Voigt (2019) page 11. In political context it would be the exchange of votes for specific policies that would be the analogy to exchange of goods and services in the market.

two main areas of interest, with "institutional environment" on one hand, and "institutional arrangements," as distinguished by Davies and North (1971), on the other.[470] The former is occupied with background constraints, or "the rules of the game," that impact how individuals behave, in which aforementioned Nobel laurate Douglass C. North has been influential (see chapter 1.3.1).[471] The latter is concerned with specific governance structures (or the "play of the game"[472]) between trading partners to mediate particular economic relationships, in which the work of Nobel laureate Ronald Coase and aforementioned Nobel laurate Oliver Williamson on transaction costs economics is seminal. There are different works under an umbrella of "institutional environment" that are most relevant to the topic of the thesis.

Although there is a diverse spectrum of NIE approaches and proximity to neoclassical economics, two NIE strands can be distinguished in terms of the *notion of rationality.*[473] The first is by some labelled as "neoclassical institutionalism" or a neoclassical wing of NIE economics, in which the mainstream economics rational choice model prevails (institutions/constraints structure the incentives and steer behaviour through calculation of cost and benefits of different actions), but with acknowledgment of the social environment and informal norms, and thereby including high information costs to make a more realistic choice process.[474] The second is concerned with more multi-disciplinary approaches in which "sociological" and "psychological" mechanisms are included to explain preferences and choices humans with interface to economics of sociology advocated by Granovetter and Sweberg.[475] As seen in chapter 1.3.1, the issue of "social embeddedness" is acknowledged by Williamson (2000), and he and other scholars under the neoclassical wing see a potential for increased understanding of the deeper cognitive functions of institutions, and how

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470 Davis and North (1971) page 6–7; Williamson (1998) page 24

471 In Furubotn and Richter (2008) North is labelled under a *New Institutional Economics of History* line of neoinstitutional thought, whereas Willamson under a *Transaction Cost Economics* line.

472 Willamson (1998) page 24.

473 See for example Prévost and Rivaud (2018); Dequech (2006).

474 See for example Dequech (2006) page 110–111; Prévost and Rivaud (2018) page 373; Eggertsson (1996) page 157.

475 See for example Dequech (2006) page 111; Prévost and Rivaud (2018) page 373–374.

peoples goals and preferences are formed and changed, which can be compatible under NIE.[476]

As seen above, the tragedy of the commons is a powerful game theoretical modeling of human behaviour in relation to common pool resources (CPRs). Another closely related *social dilemma* for CPRs is the problem of *free riding* by resource users when a user cannot be excluded from the benefits and does not have to pay for it (or underpays).[477] An individual actor that does not contribute to the stewardship of a CPR shared collectively by a group by, for example, overfishing the quota intentionally, is an example of free riding when the other participants follow the rules. If all (or a large portion) of group members overfish, the tragedy of the commons in the form of a depleted resource could be the outcome. For many NIA scholars one paramount questions is therefore how institutional settings can influence the behaviour of economic actors to solve these social dilemmas. In the book *The Logic of Collective Action*, Mancur Olson found that unless the number of individuals is small, or there is some kind of device to make individuals act in their common interest, rational individuals will not act in the interest of the common or group,[478] but there is a more recent study that suggests that the prospects of successfully organizing collective action of larger groups and solving central public good problems is much higher than previously presumed.[479] Nobel laureate Elinor Ostrom has come a critical view of the models of the tragedy of the commons, prisoner's dilemma and the logic of collective action by mixing game-theoretical and empirical approaches to governance of CPRs.[480] Ostrom has also been active and influential in developing approaches to fisheries governance.

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476 See for example Williamson (2000); Eggertsson (1996).

477 See above in chapter 4.2.2. on common goods.

478 Olson (1965) page 2.

479 Weimann et al. (2019).

480 Fritz Scharpf is a legal scholar who uses game theory analysis and empirical research when reviewing institutions and policy-making. See for example Scharpf (1997), where he develops conceptual tools within a framework referred to as actor-centered institutionalism, based on an assumption that social phenomena can be explained as outcomes of interactions between different actors, but that actions are structured and shaped by institutional settings. He stresses the importance of thinking game-theoretically in policy-making as many disciplines "tend to ascribe policy choices to a unitary 'policy maker' or 'legislator' rather than to strategic interactions among independent actors." Scharpf (1997) page 5.

4.6.3 Multi-method approaches to governance of common pool resources (CPRs)

Ostrom (1990) was a ground-breaking challenge to the assumption that the policy prescriptions of privatization or state control were the "universal institutional panaceas" to solve CPR problems.[481] She warned of using models uncritically and in a metaphorical way and went on to explore how the rules of the game could be changed by providing a theoretical alternative in a self-financed contract-enforcement game.[482] She furthermore started developing an empirically supported theory of self-organizing and self-governing forms of collective actions. On the basis of empirical material, she identified the following eight seminal *design principles* characterizing communities that had successfully managed CPRs:

1. Clearly defined limits as to which individuals or households have rights to withdraw resource units from the CPR and a clearly defined geographical CPR.
2. Congruence between the appropriation and provision rules and local conditions. By this she means all rules concerning appropriation, including time, place, technology, quantities that can be withdrawn, reflect the specific attributes of the particular resource.
3. Most individuals affected by operational rules can participate in modifying the operational rules.
4. Active audit of CPR conditions and behaviour of appropriators through monitoring accountable to appropriators, or by appropriators themselves.
5. Graduated sanctions (depending on the seriousness and context of the offense) that is also undertaken by the participants themselves, and no external authority.
6. The appropriators and their officials have rapid access to a low-cost conflict resolution mechanism to resolve conflicts among appropriators or between appropriators and officials.
7. There is a minimal recognition of the rights of the appropriators to devise their own institutions. The right is not challenged by an external authority.

[481] Ostrom (1990) page 182–183.

[482] Ostrom (1990) page 15–18.

8. For larger and more complex systems, appropriation, provision, monitoring enforcement, conflict resolution and other governance activities are organized in multiple layers of nested enterprises.[483]

One important lesson drawn from her work was that there were other alternatives to solve CPR problems than imposing full private property rights or centralized regulation, including mixtures of public and private instrumentalities.[484] She acknowledged that other models could predict behaviours and outcomes when the conditions assumed in the models approximated real world conditions, which according to her would be "large-scale CPRs in which no one communicates, everyone acts independently, no attention is paid to the effects of one's actions, and the costs of trying to change the structure of the situation are high."[485]

The design principles are widely commented on and quoted in literature,[486] although the work of Ostrom has developed significantly since 1990, see some of the work referred to in chapter 4.6.5. Throughout her academic career, she pursued diverse and multi-disciplinary approaches and did not necessarily see different theoretical paradigm as incommensurable, but engaged with other scholars in what has been referred to as "creative synthesis."[487] Theories on participatory governance in different forms have also evolved within the realm of sociology of law, sociology, political science and anthropology.

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483 Ostrom (1990) page 90.

484 Ostrom (1990) page 182.

485 Ostrom (1990) page 183.

486 A contemporary example is found in Voigt (2019) page 100–101. An example from Norwegian fisheries governance literature is found Maurstad (1997). She concurs with the critiques by Ostrom of neoclassical approaches, but at the same time points out that there is limited analysis of how, and whether, the social and cultural norms work to realize objectives of sustainable fisheries practices over generations. More specifically, she refers to the idea that users in the model of Ostrom through cooperation, defines the resources and use of them, including problem solving and allocation, but that its not clear how the conservation component is to be understood. Maurstad (1997) page 30–31 and 161.

487 Poteete, Janssen and Ostrom (2010) 11; Lara (2015) page 575.

4.6.4 Sociology of law and other socio-legal approaches to rule compliance (internal legitimacy)

As introduced in chapter 1.3.1, there has been attention to the impact of legislation on human behaviour and law-abidingness in relation to resource governance in sociology of law with the work on Swedish forest management in Stjernquist (1973). No similar research is found by Norwegian legal scholars, but use of theories from sociology relevant to socio-legal studies of fisheries are for example found in the doctoral thesis and various works of Stig Gezelius.[488] Building on their previous work and empirical material, Gezelius and Hauck (2011) start to develop a theory of compliance in state-regulated livelihoods based on a presumption that promotion of compliance in a state is formed by an understanding of compliance motivations and its causes.[489] They identify three *governable preconditions* for compliance, with *enforcement* as the first referring to the use of surveillance, control and penalties to prevent and respond to non-compliance. The compliance motivation for this precondition is *deterrence*, and they highlight the dominating position of economics of crime literature in fisheries compliance literature.[490] *Empowerment* is the second government precondition, with the *moral support for the law's content* as the compliance motivation.[491] One way to distinguish this precondition from the former is that enforcement gives power to the state, whereas empowerment gives power to its citizens.[492] By moral support, they mean compatibility between fishermen's moral beliefs and the regulations, i.e.

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[488] Gezelius (2002a); Gezelius (2002b); Gezelius (2004); Gezelius (2007); Gezelius (2009); Gezelius and Hauck (2011). See also Tirrell (2017) on the role of sociocultural institutions within the quota system in Norway. According to Christophersen (2011a) page 27, there is little research on fisheries crime specifically within criminology research, so that general advancements in criminology and criminal law would have to be applied. Christophersen (2011b) provides some theoretical input. Hauck (2008) draws on criminology and security discourse in a paper arguing for a new approach to understanding small-scale fisheries in a South-African context. See Stølsvik (2019) on the development of the fisheries crime concept and some efforts to combat crime in the international arena.

[489] Gezelius and Hauck (2011) page 437.

[490] Gezelius and Hauck (2011) page 442–443. See more in chapter 4.6.6.

[491] See also Jentoft (2005), which reviews the concept of empowerment in a co-management context, see more below. He finds that "community empowerment and co-management are, if not one and the same thing, at least closely related …" Jentoft (2005) page 3.

[492] Gezelius and Hauck (2011) page 443.

the content of the law is a "significant reason for compliance."[493] *Civic identity* is the third government precondition identified. The corresponding compliance motivator here is the *legislator's authority*, referring to the moral obligation to obey to the law even if discontent with its content.[494] They see civic identity as a "sense of community" between enforcement and empowerment and of belongingness to a state as a part of their social identity.[495] This and further theorizations on a typology of state is further reflected along with some of the observations in the case studies by Gezelius of Norway and Canada in part IV.

Socio-legal perspectives and law-abidingness are also central in various multi-disciplinary theorizations on *co-management*, which broadly speaking are ideas of sharing the authority and responsibility of a resource between resource users and the state that intensified from the 1990s.[496] In a Norwegian context the topic is widely studied, including co-management in a historical context,[497] through vertical and horizontal conflict behaviour in decision-making,[498] through the arrangement of fish sales organizations,[499] through the role of fishermen organizations[500] and by studying compliance of Norwegian and Russian

493 Gezelius and Hauck (2011) page 443, with reference to Gezelius (2007).

494 Gezelius and Hauck (2011) page 44, with reference to Gezelius (2009). In Gezelius (2007) this resembles what is referred to as *The Durkheiminan mechanism*, building on the view of law by sociologist Durkheim in opposition to *the Hobbesian view,* that Gezelius finds has been unjustly neglected in the compliance research. The third approach is an intermediate *Habermasian position,* in which rational aspects of normative actions are at the fore.

495 Gezelius and Hauck (2011) page 444.

496 Linke and Bruckmeier (2015) page 170. An overview of the evolution of different co-management approaches is given in Linke and Bruckmeier (2015).

497 Jentoft and Kristoffersen (1989). The case study of Lofoten is revisited in Holm, Hersoug and Rånes (2000). They argue that the co-management of the Lofoten fisheries was more about managing fishing space than fish stocks and argues that there is "a general tendency to read too much resource management into traditional fishery regulations" and that the paper suffer from this. They believe that the co-management concept should be narrowed down and made more specific, and that attention should be shifted over to challenges co-management institutions needs to overcome to be effective in a modern context. At the same time, they acknowledge that the paper is an important piece of work and that the Lofoten fisheries were a "paradigmatic case of co-management."

498 Gezelius (2002c).

499 Hersoug and Rånes (1997).

500 Jentoft (1989).

fishermen in the Barents Sea fisheries.[501] There are also relevant studies on co-management approaches in relation to compliance in Swedish and Danish fisheries,[502] and in a Canadian context.[503]

A common observation in many of these studies is that a higher internal legitimacy leads to a higher compliance of regulations, and that participation in both decision-making and the actual management, trust in regulations and compatibility between regulations and fishing practices are factors that contribute to this. Emphasis is at the same time given to unresolved issues and questions as to which co-management designs are particularly conductive to compliance. In more recent literature the bewildering array of diverse arrangements is highlighted, as well as the fact that early discussions have tend to over-emphasize the formal features of power sharing and neglect the *functional dimension* of co-management as an approach to solving problems, e.g. through allocation of tasks, exchange of resources, linking different types and levels of organization, reducing transaction costs, risk sharing and conflict resolution mechanisms and power sharing.[504] Some literature points to the importance of continued state involvement in fisheries management and the likelihood of co-management not fulfilling expectations of user groups.[505] There has in the last two decades been various re-interpretations of co-management into broader and holistically oriented participatory approaches and increasing environmental law attention.[506]

4.6.5 Broader approaches and environmental law attention

Following the entrance into a new millennium there has been an increasing *interdisciplinary* and *transdisciplinary* research and more holistically oriented approaches of how to govern natural resource governance that have impacted policy and *environmental law*

501 Hønneland (2000).

502 Eggert and Ellegård (2003); Jagers, Berlin, and Jentoft (2012); Nielsen and MAthiesen (2003)

503 See for example Pinkerton (1994)

504 Linke and Bruckmeier (2015) page 171, building on Carlsson and Berkes (2005); Jentoft (2005).

505 Jentoft (2000); Jentoft (2005).

506 Linke and Bruckmeier (2015) page 172.

developments globally.[507] As seen in chapters 3.2 and 3.5.1, the ecosystem-based approach has become a seminal environmental law principle that has been implemented in international fisheries law and Norwegian fisheries legislation. A lot of the emerging approaches further try to conceptualize (and operationalize) ecosystem-based approaches. One common feature of the vast theorization is that a non-linear understanding of nature and traditional command and control management approaches fall short and do not addresses the nature of ecosystems as complex systems characterized by *surprise* and *uncertainty*.[508] Another is that humans and natural systems do not work independently, but are complex, intertwined and constantly evolving social-ecological systems.[509] The concept of adaptive management, in which learning-by-doing in an interactive way and incorporation of resource user knowledge are important components, has gained wide support in an array of management options to address social-ecological complexity.[510]

Through the Millennium Ecosystem Assessment process in the UN system the concept of *ecosystem services* has evolved and become influential in the international environmental research agenda.[511] Ostrom continued her research efforts and developed an *institutional analysis and development framework (IAD)* for analysis of how institutions affect human incentives, actions and outcomes, and a *social-ecological systems (SES) framework* building on the IAD to identify variables that affect outcomes as support to a *diagnostic approach* to

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507 There seems to be no consensus on the terms interdisciplinary or transdisciplinary in academic environments. I will refer to *multidisciplinary* research (or research from multiple disciplines) as research that is conducted from different perspectives, but where the researchers remain side-by-side within self-contained concepts and methodology and do not necessarily share the same objectives. See for example Lawrence (2010) page 126. By *interdisciplinary* I refer to contributions that involve different forms of collaborative exchange between disciplines and perspectives, by integrating concepts, methods and principles, and working on a common and shared goal. Lawrence (2010); von Wehrden et al. (2019) page 876. By *transdisciplinary* I refer to way the interaction, collaboration and cooperation between scientific disciplines is extended by including *non-academic actors and stakeholders* in the process, with the aim to integrate different types of knowledge as a basis for policy-making. Orderud et al. (2018) page 828; von Wehrden et al. (2019) page 876. When referring to specific studies in the thesis, the definitions of the relevant work will be assumed.

508 See for example Folke et al. (2002); Armitage et al. (2009)

509 See example Folke et al. (2002); Ostrom (2009).

510 See for example Ostrom (2007); Armitage et al. (2009).

511 See more on ecosystem services above in footnote 376 above.

avoid panacea solutions with use of simplistic models that might not be fit to local circumstances; these provide researchers with a common language to compare and build theory across cases.[512] *Resilience*[513] *in social-ecological systems* is another theoretical framework for research on environmental governance that has a transdisciplinary perspective. In that theorization there have been calls for the creation of flexible platforms for collaboration and allowing for learning and building adaptive capacity, development of indicators for gradual change and use of structured scenarios.[514] Another related area of relevance to fisheries is the concept of *adaptive co-management* which involves efforts to foster ecosystem management through collaboration, institutional development and social leaning.[515]

In environmental law, Bohman (2021) explores ecological resilience governance and its compatibility with international law and EU law, in which both potential and limitations are identified.[516] Based on an assumption that social-ecological resilience governance is the best fit to face emergencies of the planet, she creates a legal design that can be a tool for assessing new laws and the effectiveness of current laws and legal systems. This is a model that can provide a useful benchmark for review of environmentally oriented regulatory frameworks, but its emphasis on international law and EU law, general nature, and less attention to equity and distributional issues must be recognised. An Ecosystem approach in an environmental law context is addressed in the doctoral thesis in Platjouw (2015), using case studies of ocean governance in the North Sea. She highlights how vague environmental legislation, discretionary powers and fragmentation impede the implementation of the ecosystem approach.[517] The univocal identity and interaction of diverging, and even

512 Ostrom (2007); Ostrom (2009); Ostrom and Cox (2010). See also efforts to formalize the socio-ecological system framework in Hinkel, Bots and Schlüter (2014)

513 Resilience in this context is "generally described as a concept for assessing the resistance to pressures within a system. In an environmental context, this is seen as a state where a system can cope with threats, such as pollution or depletion of biological resources, and sustain its main structures and functions, thus avoiding a collapse or abrupt change." Bohman (2021) page 5.

514 Folke et al. (2002).

515 Armitage et al. (2009)

516 See for example Bohman (2021) page 204.

517 Platjouw (2015); Platjouw (2016).

irreconcilable, ideological projects of the ecosystem approach concept in international law are identified and examined in De Lucia (2019).[518] Wakefield (2019) has found that the ecosystem approach has been marginalised in fisheries management under the EU common fisheries policy.[519] Some of the findings in this and other relevant environmental law literature in a Norwegian and Canadian context is further reflected on in part IV of the thesis.[520]

There have also been more fisheries-relevant transdisciplinary advancements with operationalisations of delegated responsibilities to the fishermen in a modern context in a result-based-management (RBM) framework in EU countries,[521] establishment of a "full-spectrum sustainability" framework in Canadian fisheries governance after work in a Canadian Fisheries Research Network Project,[522] and co-development of an institutional toolkit using ITQs as a case to facilitate a distilling of the vast amount of information on fisheries governance.[523] There is literature drawing on cybernetic system-oriented theory that proposes new understandings of governability due to limitations in holistic approaches (such as Ostrom's social-ecological systems framework) as they are tasks observed to be "exceedingly arduous," and created a "paradoxical situation where an approach grounded in holism is never able to deliver a holistic picture."[524]

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518 De Lucia (2019).

519 Wakefield (2019).

520 Other relevant literature on these topics in a Norwegian context is Bugge (2013a); Bugge (2010); Bugge (2013b); Jakobsen and Henriksen (2012); Henriksen (2010); Jakobsen (2012). In a Canadian context some relevant literature is Stacey (20189; Stacey (2015); Pardy (2010); Bankes, Mascher and Olszynski (2014); Olszynski (2015); Boyd (2003).

521 Nielsen et al. (2018); Nielsen, Holm and Aschan (2015); Santiago et al. (2015). Bohman (2019) finds that giving more influence to the industry is the best way to create a control system and appropriate fishing methods in relation to the implementation of the landing obligation in the EU common fisheries policy.

522 See for example Foley et al. (2020); Stephenson et al. (2019)

523 Young et al. (2018)

524 Song, Johnsen and Morrison (2018). See also more on cybernetic approaches to fisheries governance in a Norwegian context in Johnsen (2014); Johnsen et al. (2009).

4.6.6 Economics of crime: Expansion of models, empirical research and behavioural economics

Before concluding this theoretical overview, important advancements in more specific enforcement research should be noted. This sub-chapter will address developments neoclassical approaches to compliance through *economics of crime*, and chapter 4.6.7 will introduce a mix of approaches in what is referred to as *responsive regulation* and modern enforcement strategies. Economics of crime approaches have as noted above been dominating fisheries compliance literature for a long time.[525] These are theories that use microeconomic analysis to study criminal behaviour that has been influential in law and economics.[526] In a seminal paper from 1968 Becker studied what levels of enforcement (i.e. detection probabilities) and punishment by the authorities minimise the social loss from offences.[527] This is the work from which many basic *deterrence models* originates from, in which probability for conviction and severity of punishment are key components of compliance.[528] In Becker's basic model the offender is a rational utility-maximising person who is assumed to commit a crime if the expected utility exceeds the utility that he or she would get from doing something else. The model assumes that the number of offences will decrease if both level of conviction (risk of being discovered, prosecuted and convicted) and punishment increase.[529]

The original model has been criticized by many, including sociologists, criminologist and other economists, for lack of emphasis on social and moral norms and because the models do not explain empirical evidence and are impractical for policy prescriptions.[530] As seen, these are also critiques related to the discourse that evolved in new institutional economics. There have been many expansions and modifications in the modeling in fisheries law

525 See for example NOU 2019: 21 chapter 4 in a Norwegian context.

526 See for example an introduction an overview of economics of crime in a Norwegian law and economics context in Eide and Stavang (2018); Eide (1994).

527 Becker (1968). See also an introduction in Nøstbakken (2008).

528 See for example Kuperan and Sutinen (1998) page 310.

529 Nøstbakken (2008) page 294.

530 Nøstbakken (2008) page 294; Kuperan and Sutinen (1998) page 311; Garoupa (2003).

enforcement literature.[531] On the theoretical side there has been developed a model that includes both informal and formal enforcement,[532] another model that includes self-reporting and differentiated inspections,[533] some literature has looked further into the problem of uncertainty and asymmetric information,[534] and there is one study with a corporate crime perspective that studies liability rules and non-compliance in a principal-agent analysis.[535] Other literature use empirical material to further advance theory on determinants of compliance.[536] There is also numerous literature in behavioural economics that uses experiments to study human behaviour in different settings.[537]

4.6.7 Responsive regulation and regulatory plurality

Lastly, there has evolved theory that emphasizes a mix of enforcement strategies that is seen to represent a convergence of rational choice and sociological approaches in the form of *responsive regulation*, which merit a brief introduction before this chapter is concluded. The book *Responsive Regulation: Transcending the Deregulation* from 1992 by Ian Ayres and John Braithwaite has been an important work in advancing these alternative ideas.[538] To Ayres and Braithwaite it was important that enforcement is adjusted to the regulating sector and motivational complexity, and that "[g]ood policy analysis is not about choosing between the free market and government regulation. Nor is it simply deciding what the law should proscribe."[539] Responsive regulation was therefore not to be seen as a clearly defined set of prescriptions, but as an idea of developing enforcement strategies that account for

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531 See Nøstbakken (2008) for a survey on fisheries law enforcement literature up until 2007.

532 Nøstbakken (2013).

533 Hansen, Jensen and Nøstbakken (2013).

534 Jensen, Frost and Abildtrup (2017); Jensen and Vestergaard (2002).

535 Jensen and Nøstbakken (2015).

536 Kuperan and Sutinen (1998); Sutinen and Kuperan (1999); Hatcher and Gordon (2005).

537 In NOU 2019: 21 page 39 it is highlighted that results from behavioural economic literature largely address decisions made by individuals, whereas the fisheries authorities in practice must relate to groups of individuals in companies. In that respect, reference is made to Kocher, Schudy and Spantig (2018), which indicates that individuals behave more immorally in groups, and Charness and Sutter (2012), which indicates that groups act more rationally (in the neoclassical sense) than individuals.

538 Ayres and Braithwaite (1992).

539 Ayres and Braithwaite (1992) page 3.

context, regulatory culture and history.[540] Central in the approach was to develop strategies that would punish the worst offenders, while at the same time encouraging voluntary compliance by the regulated actors.[541] This was conceptualized through an enforcement pyramid exemplified in a simple model in figure 10.

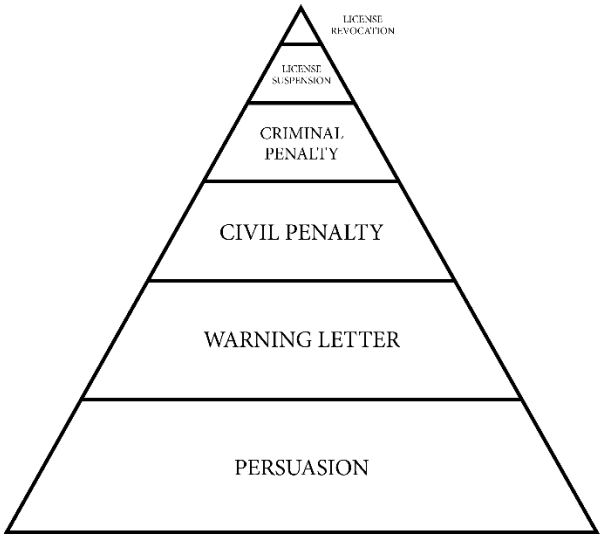

Figure 10 Example of an enforcement pyramid, Ayres and Braithwaite (1992)

The basic idea is that regulators are to employ *persuasion* and advisory measures at the bottom level, milder reactions and sanctions at the middle level, and *punishment* in the form of punitive sanctions at the top level.[542] It therefore promotes a need for *gradual escalation* of reactions towards the top of the pyramid, and that milder reactions is sufficient to deter most of the offenders. It is at the same time a model that assumes interactions between regulators and the regulated actors, so that regulators could find out which type of offenders they are dealing with and adjust the reactions accordingly. The basic model has been criticized and further modified in theory.[543] Issues of how to build and remain trust and

[540] Ayres and Braithwaite (1992) page 5.

[541] Gunningham (2010) page 126.

[542] Gunningham (2010) page 126.

[543] See an overview in Gunningham (2010).

cooperation if frequently moving up and down on the pyramid, and how the system can ensure predictability and coherence are questions to address.[544]

In the last decades, ideas of *smart regulation*, *meta-regulation* and *situational crime prevention* and *compliance by design* approaches have also evolved in theory. Smart regulation originates from a "regulatory pluralism that embraces flexible, imaginative, and innovative forms of social control which seek to harness not just governments but also business and third parties"[545] It is an approach that combines formal and informal instruments (and government and industry involvement) such as developing business standards and requirements, group pressures or self-regulations and pressure from NGOs and society. Meta regulation involves similar mechanisms, but represents the more explicit move of monitoring and enforcement responsibilities over to the industry. Under this form the primarily role of the public agency:

> becomes that of 'regulating at a distance[,]' relying upon the organisation itself to put in place appropriate systems and oversight mechanism, but taking the necessary action to ensure that these mechanisms are working effectively."[546]

The idea of delegating responsibilities to the industry has, as seen above, also been advanced in fisheries governance and environmental law literature. Situational crime prevention and compliance by design are approaches in criminology that seeks to limit the opportunities for persons to commit offences.[547] With the new age of digitalization and information technology, compliance by design, which more specifically addresses the architecture of information exchange between government and industry actors, have been seen as a new theoretical dimension that could improve effectiveness and change the resource control in fisheries over from physical controls to collection and handling of digital data.[548]

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544 See also NOU 2019: 21 chapter 4.2 for some of these theories in a Norwegian context.

545 Gunningham (2010) page 131, partly rendered in NOU 2019: 21 page 42.

546 Gunningham (2010) page 15.

547 See for example Bjørgo (2016) page 12 and Bharosa et al. (2013).

548 NOU 2019: 21 page 43.

4.7 Public legitimacy issues (external legitimacy)

Closely related to the choice of overall regulatory design and use of management instruments as responses to different social-ecological challenges are issues related to external legitimacy, values and conflicting policy objectives that run through this thesis. As seen in chapters 1.1 and 3.5.1, the main objectives of the Norwegian fishing legislation are to provide for socio-economic profitability, for employment settlement in coastal communities and for value-creation that benefits the coastal population. These are vague goals that to some extent are inherently contradictory, and how to best fulfil them is subject to interpretation, controversy and conflict. But who defines the public interest in a modern context? And who are to be seen as user-groups and stakeholders in the fisheries sector and what is the public?[549] There is research in a Norwegian context that sheds some light on these questions.

Holm (2001), Johnsen (2002), Finstad (2005) and Sønvisen (2011) are four doctoral theses addressing the transition and modernisation of Norwegian fisheries through different perspectives.[550] Common to all of this is that the role of fisheries in Norwegian society has significantly changed over the last decades, as have goals and understandings of the role of fisheries and the fisherman profession. From being the "corner stone" of many coastal communities that employed a majority of the male population, the fishermen role has become professionalized, commercialized and transformed into a more distinct professional group.

Under a social contract frame, a case study from 2015 demonstrates that the social contract for fisheries in Norway, Iceland and Greenland has gone through a similar transformation from an initial contract of open access to common pool resources, into closed access regimes with less emphasis on fishing as a backbone for coastal livelihood that have "generally improved the ecological and economic sustainability but undermined the social

[549] These are issues discussed against the backdrop of stakeholder theory from a Norwegian perspective, with comparison to Canada and US, in Mikalsen and Jentoft (2001).

[550] Holm (2001); Johnsen (2002); Finstad (2005); Sønvisen (2013)

sustainability."[551] The study furthermore points to how economic objectives have been important in shaping a "new" social contract for fisheries in these countries, but that specific social objectives that were embedded in the "old" social contracts are sustained in varying degrees in fishery policy discussion. A central question identified is whether the value of the fisheries primarily lies in the economic value it brings to national welfare or if it will continue to hold on to the social aspects of the industry in a modification of the social contract. These are findings that points to some of the current debates on the lack of social performance of the Norwegian fisheries legislation.

The identification of a more professionalised harvesting sector does not answer the question of what constitutes the public or stakeholders, but it draws attention to challenges of *defining the public interest* in a contemporary fisheries context that a legislator should be aware of, and discuss openly, in a legislative design context. There is Norwegian literature on external legitimacy that calls for a revisit of the social contract in a modern Norwegian fisheries management context.[552]

4.8 Concluding remarks

All of the above are theoretical developments that are relevant for a legislator to include, assume and use in the shaping of future fisheries. A main purpose of this chapter has been to demonstrate the complex landscape with many perspectives and concepts, and different levels of detail and addressing different problems, in which a legislator (and the public discourse) must navigate. Moreover, it has tried to demonstrate some of the theoretical underpinnings of central concepts, for example MSY, ITQs and co-management, which are influential and prescriptive in international fisheries law and best-practices, but that are not necessarily assessed critically (especially with regards to basic assumptions made) when implemented at national level.

To try summarizing this theoretical complexity, which by no means is to be considered exhaustive, would be futile, but some general remarks can be made. A general trend is the

[551] Holm et al. (2015) page 70.

[552] See for example Holm and Henriksen (2016); Hermansen and Isaksen (2016); Holm and Henriksen (2014).

increasing use of inter- and transdisciplinary approaches to fisheries governance. The complexity and uncertainty connected to marine ecosystems and our limited understanding of human behaviour runs through the presented material. Many of the identified remedies and practices advanced in different disciplines increasingly converge or overlap cross-disciplinary, and seem to be rooted in many of the same original ideas, but the terminology and concepts used might differ and cause confusion. At the same time, a common challenge is that domestic legal issues and particularities that are crucial to the implementation, and applicability of instruments and approaches into specific regulatory sector, gain little attention, but is to be assumed. The theoretical plurality does at the same time resonate mix of management and enforcement strategies identified from empirical research, but the inquiries in part II and III can contribute to further illuminate these issues in a Norwegian and Canadian context. It is therefore time to move over the empirical parts of the thesis.

PART II EMPIRICAL MATERIAL: A LEGAL HISTORICAL INQUIRY

5 Establishing fisheries legislation (up until end of 1800s)

5.1 Introduction

This part starts with the first empirical inquiry of the thesis turning attention to the legal historical developments in the Norwegian case. The scope and methodology is addressed in chapter 2.2, but the objective is to gain insights into how the current legal framework has evolved, which rationale it is based on and factors that have influenced decision-making over the course of time. The study will therefore try to reveal when the main components and central norms in the regulatory system first emerged. Chapter 5 opens by identifying when the main structures of the legal framework were established, from the codifications by the King Magnus Lagabøte in the 1270s up until the end of the 1800s. Chapter 6 continues with the transition of legislation into an age of engines, automation and electrification up until the 1960s. Chapter 7 subsequently addresses the transformative shift into a quota regime in the 1970s up until the end of the millennium. Finally, chapter 8 demonstrates how the legislation has evolved into a contemporary context labelled as an age of digitalization. The findings are summarized and briefly reflected on in chapter 9. The different sub-chapters, to the extent possible, outline events and processes in a chronological order, but in order to finish the chain of events for one regulatory tool there are deviations from this order.

5.2 Commercialization: Fish becoming a commodity

Exploitation of fish and marine resources by the coastal population of Norway dates far back in time. It is assumed that marine resources have been used as food since the colonization of the coast of Norway in the Stone Age (9500–6500 BC.) A gradual commercialization of fishery activities evolved in the late Iron Age/Viking Age (800–1066) when *dried fish*

(stockfish) from the seasonal *cod fishery*[553] in areas outside the archipelago Lofoten in the north became a commodity for trade and export.[554] *Herring fisheries*[555] are assumed to have been commercialized around 1170–1180 on the southwest coast of Sweden (the region Skåne) and along the region Båhuslen.[556] Norwegian fishermen and traders were involved in this fishery and the commodity was *salted* herring in barracks. The *Hanseatic League (the Hansa)* in northern Germany was strongly involved in both the cod and herring trade, with the city of Bergen on the west coast of Norway as the centrum of the stockfish trade around the year 1200.

Natural conditions, macroeconomic trends and fish availability fluctuated in Norway the following centuries. These are factual events and externalities that, as will be demonstrated throughout the inquiry, influence the evolution of legislation. In the 1400 and 1500s conditions were favourable for the cod, whereas the 1600s was a century of crisis due to resource collapse and unfavourable market conditions.[557] The herring fishery in Båhuslen also fluctuated up through the centuries, until it ended abruptly around 1588–1589.[558] The geopolitical circumstances also changed in this period, with the economic centre moved from the Hansa activities in the Baltic, over to the North Sea with the Netherlands as the

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553 This is a fishery on the cod stock we today classify as the Northeast Arctic Cod, also referred to as "skrei." The Northeast Arctic Cod is a migratory stock that spawns outside of the archipelago Lofoten during the winter months (January–April), but also as far north as Western Finnmark and as far south as Møre and Trøndelag areas. After spawning the stock migrates up to the Barents Sea for feeding. I will in the following refer to it as *the Lofoten fishery* or just the *cod fishery* unless otherwise specified. Also, stocks of the North Sea cod, local coastal cod stocks and other stocks in the cod family as haddock and saithe have been exploited along the coast throughout times, but it is the Lofoten fishery that has been the most significant of the *groundfish fisheries* (fish mainly found on the bottom of the sea, can also be referred to as *demersal fish*). It will therefore play a significant role in this study. Of the shoaling, *pelagic species* (fish swimming neither at bottom, nor near the shore), the evolution of herring legislation will play a prominent role in the inquiry.

554 See more on this evolution in Larsen (2014).

555 I will use the term "herring fishery" for fishery of different herring stocks in Norwegian waters. Later I will make some distinctions, and fishing for other pelagic species such as mackerel, sprat, capelin and blue whiting will be mentioned when relevant.

556 See more in Vollan (1971); Fasting (1962). Båhuslen included areas that were Norwegian at that time. Today all of Båhuslen is Swedish.

557 See for example Hutchinson (2014) page 430–434.

558 See for example Vollan (1971) page 17.

dominant power. Both southern and western Norway, and to some extent northern Norway, were connected to this emerging North Sea economy. It is assumed that the Dutch contributed to a lobster fishery in Southwest Norway, to gear innovation and to developing a new industry of *drying salted cod* (klippfisk) in the northwest coast.[559] These were all elements in opening up new fishing and trade opportunities that would also affect the regulation of fisheries.

The herring fishery became important on the northwest coast, in particular outside the county of Trøndelag, in the 1500s and 1600s.[560] There were periodic fluctuations until a stable spring herring fishery was established from around 1815 and onwards.[561] The migratory and periodic nature of the herring stocks is important to bear in mind when assessing the development of regulations. One important characteristic is the approaching and schooling of large amounts of fish on small areas for shorter periods of time, until disappearing completely, and not returning until many years later.[562]

As to general institutional context in the same time period, Norway was unified as a kingdom in the period 900–1000, followed by centuries of internal disputes and struggles among families claiming power. Norway was in the period 1397 until 1525 in a union,[563]

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559 Hutchinson (2014) page 408.

560 This herring was, however, probably another stock than the herring harvested outside Båhuslen. See more on this in Svihus and Haaland (2009) 8; Hutchinson (2014) page 419–420. New research suggests that the fishery in Båhuslan was on a subgroup of the big stock of *the North Sea herring*, while the herring fishery on the west coast and further north was a subgroup of *the Atlanto-Scandian herring* stock. That the stocks in one area historically declined, more or less simultaneous with an increase in other areas, could be explained by the populations feeding on the same prey, not that the same stock finds new areas for feeding. There are also many local herring stocks that have been an important element in local fisheries along the coast throughout times.

561 Vollan (1971) page 20.

562 There are many terms of variations of herring harvested depending on size, maturing and time of the year of the harvest. *Spring herring* (In Norwegian "vårsild") is a sexually mature and feeding herring harvested in the spring. Just before spawning the herring is referred to as *big herring* (In Norwegian "storsild"). Spring herring and big herring are both categorized as *winter herring* (In Norwegian "vintersild"). All other types of herring go under the term *summer herring* (In Norwegian "sommersild"). Summer herring is further subgrouped into *small herring* (In Norwegian "småsild") and *fat herring* (In Norwegian "feitsild"), which are respectively 1–2 years, and 2–5 years, and not sexually mature yet.

563 Referred to as "Kalmarunionen."

sharing the same head of state, with Sweden and Denmark. Norway became a province under Danish rule from 1536, which lasted until 1814.[564] The above-mentioned herring fishery on the Båhuslen coast was therefore under Danish jurisdiction.

5.3 The first regulations: Rules of conduct to secure order on fish grounds

Even though the Lofoten fishery was first commercialized, it was in the herring fishery that the ruling authority first laid down provisions regulating harvest operations. In *Frostatingslova*, dated back to the time period 1000-1200, we find rules that restricted the herring fishery on holy days and Sundays.[565] In Magnus Lagabøters landslov, from 1274, more extensive regulations for the herring fishery were laid down.[566] In the first provision in chapter 50 of this Act it was set out that "all lawsuits must be put off during the herring fishery." This indicates that the fisheries were important activities. In chapter 51 there were rules for how to operate on the fish grounds, including rules of due care, damages, and that violations could be punished with fines.[567] As noted above, the fishery normally happened on limited geographical areas over a short period of time, with scarcity of space as a consequence. The rationale of the rules was therefore most likely to prevent gear collisions and other conflicts.

Furthermore, we find traces of the current *first cast rule* in section 25 of the Marine Resources Act in the second provision in the chapter, which set out "No-one shall do another first cast; the person shall have casted that first released his rope and the harvest belongs to him, who did the first cast."[568] It can be assumed that the rule established that the

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564 I will refer to the jurisdiction as "Norway" or "Norwegian" when referred to in the text even though Norway was under Danish authority.

565 Frostatingslova is one of the oldest Norwegian Acts. It was compiled and written in the time period of 1000-1200. I have studied the translation of the relevant rules concerning fishery in Hagland and Sandnes (1994) page 28–29.

566 Magnus Lagabøtes landslov was an extensive and consolidated Act with all of Norway as ambit. I have studied the translation of relevant rules in Taranger (1970).

567 Several rules are found in new forms in today's legislation, see for example Marine Resources Act sections 24 and 30.

568 Norwegian wording: "Ingen skal gjøre en anden forkast (brigdeverpi); den skal ha kastet som først gav ut sit taug og fangsten er dens, som han gjorde forkast."

first who put out his gear on the fish ground (first cast) was entitled to the harvest. The current rule similarly establishes an *exclusive right* to fish for the person that first sets the gear in relation to other fishermen and non-fishermen that encounter the area.[569] From the provisions in the Act it can be derived that both fishing with nets and shore seines were common at that time. How the harvest operations are conducted is, as will be demonstrated, an important factor when tailoring regulations for specific gear types.

Regulation of sales and trade of fish is a diverse and comprehensive topic that this inquiry does not aim to pursue beyond main trends and as legal historical backdrop to the later regulation of sales through the Fish Sales Organization Act. These are also issues closely connected to general developments and trade policies. The linkage between harvest and trade has, however, at all times been strongly connected. During the early years of Norway as a Kingdom, the Kings through regulations issued various types of privileges that established certain rights for a specific person, cities/*market towns*[570] or groups of persons. During the 1200s, regulation of industries and trade intensified through the use of privileges, which also were issued to the Hansa in Bergen from the 1200s.[571] There is a regulation from 1384 that affirmed a rule that all trade (sales of raw material like fish, and buying of goods) from different explicit listed districts had to be done through specific market towns.[572] Regulations issuing privileges were legal instruments that would dominate trade and export of fish in different ways throughout the centuries. The majority of fishing commons have especially in two ways been affected by a trade system involving merchants

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569 Ot.prp. nr. 20 (2007–2008) page 197.

570 I will use the use the term "market town" when describing towns or cities that were issued trade privileges in the following. In Norwegian the term "kjøpstad" is used.

571 Blom (1967) page 172, 182–183. The city of Bergen was the main trade centre for the stockfish with an increasing hanseatic influence. However, also the city of Trondheim was an important export city. Additionally, the later market town of Vágar in Lofoten was important in the sales and trade of stockfish that grew in the 1200s and were issued market town privileges and with administrative functions for Northern Norway. Borgund was a market town that was a regional center for stockfish on the north-west coast of Sunnmøre. See more in Nielsen (2014a) page 196–201, 289–292.

572 In Fishing Village Commission 1888: Indstilling fra den ved Kongelige Resolution af 13de Oktober 1884 nedsatte Kommission til Undersøgelse af Væreierforholdene page 16 this is referred to as a rule from 1385. This seems, however, to be the Stadfestingsbrev 19. august 1384 (Regulations 1384), which is rendered in Pettersen and Sprauten (1997).

in market towns in the first centuries of commercialization; first, through rules on *how* and through *whom* the trade had to be conducted, and second, through how the *credit system* in conjunction with the trade has been organized.[573] The latter is important as the nature of the fishery demands capital and equipment prior to the start of the fishery.

There were extensive regulations of Danish herring fisheries during the 1500s.[574] Regulations that also applied to areas of the southeast coast of Norway was adopted in 1575.[575] These laid down rules of conduct for the harvest, inter alia that peace be kept at sea (1), that every fisherman needed a signal from a customs officer before they could put nets into the sea (8), that no one was to damage the net of the adjacent fishermen (9), that it was not allowed to take nets out of the sea at nighttime (11) and that it was not allowed to handle nets on Sundays (13). All these are typical rules of conduct that to a large extent can be found in current legislation in some form. Furthermore, it was set out that no one could use a fake scale for weighing (17) and that the customs officer had to be notified of all fish landed, and made ready for shipping (15). Through these rules there are traces of typical *reporting obligations* found in current regulations. It is likely that the rationale at that time was to secure revenues to the King, in contrast to resource control and conservation considerations underpinning the current obligations. Infringements of most of the provisions could be punished with the issuing of fines.

It is assumed that fixed gillnets and driftnets were the most common gear types in the 1500s.[576] As noted, use of seines from land are also well-known gear types this far back in time, but the legal historical sources indicate that seine fishery was controversial in this time period. In 1583 the King laid down a regulation that amended the regulation from 1575 and

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573 This perspective is used by a public commission that was established to investigate the conditions of proprietors/owners in fishing villages in 1884. See more in Fishing Village Commission 1888 14. The trade system is later going to be further complicated with the use of land and relations to landowners in relation to fisheries. See more in chapter 5.5.

574 See more in Fasting (1962) page 14–29.

575 Rettsordning i Marstrand og andre fiskeleier i Viken (Herring Regulations 1575). I have studied the versions reproduced in Winge (1988); Petersen (1862).

576 Fasting (1962) page 16.

introduced a prohibition on fishing with seine, articulated as "it shall for those, that visit the same Norwegian herring fishery, be prohibited to use any seine, as long as the herring fishery is ongoing."[577] The justification of the prohibition was that the seine fishery prevented the herring from accessing inshore areas where the fishery took place. It was underscored in the regulations that the people that fished inshore suffered from it, and that the revenues of the Kings decreased. As will be seen throughout this inquiry, the development of new and more efficient gear has always raised controversy as they often have become strong competitors in the race for fish for the majority, and less affluent, fishing commons.

As noted, however, the fishery in Båhuslen ended abruptly around 1589. The herring fishery along the west coast of Norway had moved in a more commercial direction around 1518 and spread further up north outside the county of Trøndelag towards the end of the 1500s.[578] Through privileges it was the state of the law that all the trade from different coastal areas was shared between, and had to be conducted through, merchants in the cities of Trondheim and Bergen.[579] Activities taking place on the northwest coast were channeled through Trondheim only, and the trade in southern areas of the west coast through Bergen only. It was, however, laid down in a Royal order of 1603 that the inhabitants of Bergen were permitted to take part in the herring fisheries in Trondheim County when the fishery was excessive.[580] More specific rules for this fishery were laid down in regulations of July 26 1640 to regulate the conduct of the fishery.[581] A particularly interesting legal newcomer, which lines with current legislation, is provision 16, which set out that:

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577 Rettsordning ved sildefisket i Viken (Herring Regulations 1583). I have studied the versions reproduced in Winge (1988); Lundh (1863). Norwegian Wording: "… thi skal det være alle dennem, som besøge samme Norges Sildefiskende, forbudet at bruke nogen Vode eller Vode-Dræt, saalænge som Sildefiskende staar paa …" This is a prohibition that could be interpreted to apply to all seine fisheries in Norway, see the historical overview of fisheries regulations in a public report from 1934 in Herring Commission 1934: Innstilling fra komiteen til revisjon av lovene om sildefiskeriene, utarbeidelse av lov om brislingfisket page 4.

578 Nedkvikne (1988) page 472.

579 Fishing Village Commission 1888 page 16.

580 This royal letter is reproduced in Ewensen (1786).

581 I have studied the reproduction of Forordning av 26. juli 1640 for sildefjordene i Trondheims len (Herring regulation 1640) in Ewensen (1786); Lundh (1880).

> Whoever intentionally discards Herring from its Dock or Vessel or by other Means dishonor the Blessings from God, shall be Punished according to the Regulation and specific circumstances in the Case.[582]

We can here see a rule with resemblance to the current duty to land all catches (discard prohibition) in section 15 of the Marine Resources Act. It is not unlikely that the motivation first and foremost was to secure the King as much tax revenue as possible, in contrast to the environmental considerations of today, but a principle of prohibiting discards is nonetheless articulated. None of the sources investigated gives any information on whether the rule was actually enforced.

The herring fisheries in these areas had increasing participation from visitors towards the end of the 1700s.[583] There were reports of conflicts between majority fishing commoners using nets and merchants and inhabitants of market towns using the more costly seines. A commission was appointed to investigate the conditions, which resulted in a biannual *temporary prohibition* of seine fishing in various areas and times in the regulations of January 26, 1784.[584] This was followed by the adoption of permanent regulations on December 21, 1792 in which the seine fishery strengthened its position. It was stated at the outset that the regulation intended to:

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582 Original text in Lundh (1880). Norwegian wording: "Hvo som forsætlig utkaster Sild fra sin Brygge eller Baad eller i andre Maader vanvarer Herrens velsignelse, straffes efter Loven og Sagens Leilighet."

583 See an historical overview of the developments in Ewensen (1786) page 3–17. The following builds on some of this overview.

584 See more in Rescript 26. januar 1784 om sildefiske i Fosen (Herring Regulations 1784). The regulations are reproduced in Ewensen (1786).

> prevent the numerous Disorders and Conflict, which so far have taken Place in the Herring and Cod fishery in the Fosen Region, and to the Promotion this significant Industry, by permitting a larger Degree of Freedom …"[585]

Thus, although the seine fishery still was prohibited in certain areas for certain times to prevent conflict, the seine fishery was acknowledged and supported, and efficiency considerations were some of the rationale for the liberalization.[586] Nevertheless, some consideration was given to the local fishing commons when the second provision set out that:

> Merchants from the Market Town should be regarded as Market Town people, and who trade and do bourgeois Industrial affairs, and must therefore not appear on the Herring fjord with Seines to the Insult of fishing Commoners.[587]

The herring fisheries on the west coast at the end of the 1700s attracted large groups of people in small and more remote areas during the short time the stock was available.[588] This caused several challenges and were some of the reasons why local regulations of March 12 1783 established a *special jurisdiction* to prosecute law violations during the fisheries in areas

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585 Forordning av 23. desember 1792 ang. Sild- og Torskefiskeri i Fosens Fogderier under Trondheims stift (Herring Regulations 1792). The regulation is reproduced in Schmidt (1851). Norwegian wording: "at forebygge de mange Uordener og Stridigheter, som hidtil have fundet Sted ved Sild- og Torskefiskeriet i Fosens Fogderie, samt til desbedre Forfremmelse af denne betydelige Næringsvei, ved en større Friheds Bevilgelse, …"

586 See also Solhaug (1983) page 435. In Sunde (2006) page 382; Skogvang (2012) page 93 these regulations are discussed in a private law context. It is argued that landowners had an exclusive right to fish with seine outside their land, and that the King could not regulate this fishery.

587 Norwegian wording: "Kjøpmend fra Kjøbstæderne bør anses som Kjøbstadsfolk, og der drive handel og borgelig Næring, og maa derfor ikke paa nogen Sildefjord indfinde sig med Nødter til den fiskende Almues Fornærmelse." Solhaug (1983) page 435, however, points out that the regulations did not clearly define who the visiting fishermen were, and that curtailments of the regulations were not enforced.

588 See for example Fasting (1962) page 55.

on the southwest coast.[589] Establishment of special or extraordinary jurisdictions in seasonal fisheries was, as will be shown, to become a tool in the enforcement system.

To summarize, the above examinations demonstrate that the first regulations of herring fisheries primarily concerned how to secure order on fish grounds, and how to handle gear conflicts between different user groups. A key characteristic is that the herring fisheries in the time period studied were conducted close to shore, which led to overcrowding of narrow spaces, and that tensions between fishing commoners and more visitors connected to market towns occurred. Several rules of conduct of the fishery and curtailments of use of certain gear in specific times and areas are commonly used in the current regulatory system, although the fishery operations to a larger degree happens off the coast, and commercial fishing from land in practice is non-existent. This is also the reason why the arrangement of paying a fee to the land owner when fishing on a private property is of little relevance to this inquiry.[590] The evolution of herring legislation above must also be understood in the institutional context of the same time period. In 1660 an absolute monarchy was introduced in Denmark-Norway, with unlimited powers to the King.[591] This led to the development of an extensive civil service apparatus around Norway that could execute the will of the king.[592] Later herring regulations with legal newcomers in the enforcement system will be addressed after the emergence of a harvest principle in the lobster fishery is introduced in chapter 5.4, followed by the evolution of participatory governance and rules of conduct in the cod fisheries in chatper 5.5.

5.4 Origins of a harvest principle (an "open-access fishery")

Lobster is a sedentary species. A lobster fishery is therefore quite different from a fishery on large migratory stocks of herring and cod. In addition to other typical stationary species such as crab, shellfish, urchins and others, there are also *fish stocks* in saltwater that have a

589 Rescr. ang. en Speciel Jurisdiction for de Forbrydelser, som ved Skudesnæs Fiskeri begaaes, og dettes Drift om Søndagen (Herring Regulations 1783).

590 See more in lov 14. mars 1930 om landslott.

591 This is referred to as "enevelde'" in Norwegian and was introduced when the Danish-Norwegian king Fredrik the third was the monarch.

592 See more on this development in Sunde (2005) chapter 31.

more stationary life cycle.[593] The lobster fishery is particularly interesting from a *private law* historical point of view. However, some of these developments can also be viewed from a public law perspective in which one of the fundamental *fisheries management principles* in Norwegian fisheries legislation has its origins.

A commercial harvest for lobster gained increased importance when the Dutch, as seen above, became a major player in the North Sea trade at the end of the 1500s. Lobster fishery stations were established in the areas in Rogaland County (southwest of Norway) around 1660, and the activities continued to emerge north and southeast on the coast in the years to come.[594] The increased lobster fishing activity was an important contributor to the occurrence of disputes with property owners claiming customary exclusive fishing rights to the adjacent lobster grounds.

Customary rights to fishing in saltwater historically is thoroughly investigated in Sunde (2006) and Sunde (2009).[595] Sunde refers to a particular case where exclusive right to a lobster ground was acknowledged in a court decision from 1725.[596] However, this decision was later rescinded through a regulations dated April 23, 1728.[597] It was laid down in this regulation that the lobster fishery was "allowed to anyone."[598] Sunde argues that this was the introduction of a natural law principle of a "free fishery," inspired by ideas by Hugo Grotius and Roman law, in Norwegian law.[599] In other words, it was assumed that the commons was open to fishing from anyone, which could also be seen as an "open access" fishery.[600] There are examples of interpretation in accordance with the lobster regulation 1728 in the

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593 Examples of other species are halibut, flounder, other flatfish and coastal cod and herring stocks that stay locally in fjord ecosystems.

594 Dannevig and Eyden (1986) page 171.

595 See also an overview in English in Sunde (2010b).

596 See more in Sunde (2006) page 381–387.

597 Rescript av 23. april 1728 angaaende at Hummer-Fiskeriet er Enhver tilladt (Lobster Regulations 1728).

598 Norwegian wording (contemporary language): "Enhver tillatt".

599 See for example Sunde (2006) page 383.

600 The Lobster regulation 1728 did, however, codify customary salmon fishing rights.

following years.[601] However, regardless of whether the regulation introduced a free fishery or not, it did not mark a total regime shift in how customary fishing rights in saltwater were perceived by authorities through the next centuries and up until our times.[602]

As seen above in chapter 4.5.2.2, there is a discourse as the existence of private rights and customary law in relation to fishing at sea, whether in local fjords or larger areas. This thesis acknowledges this discourse and the complex private law questions. It is at the same time possible to see these issues from the perspective of the *legislator* and the many *regulatory* and *political* challenges fisheries management entails. This is especially pertinent due to the particular characteristics of key species resources, with a cyclic and migratory nature of cod and herring, the innovation of new gear types and technology that creates new regulatory patterns and challenges, and the pivotal role resources have had locally, regionally and nationally at all times in Norway. The coastal population has throughout times exploited available resources either locally as *native fishermen*, or pursued fishing in nearby areas, or the major seasonal fisheries, as *visiting fishermen* to make an income.[603] All of these factors can lead to factual situations that involve conflict and regulatory dilemmas that a legislator must address. It is therefore possible to argue that the first forms of herring regulations outlined in the previous chapter also were expedient curtailments in a fishery that generally was open to local commoners, and that social considerations triggered protections.

Considerations to the commoners was also underscored in the lobster regulation 1728 as it was assumed that affirming the court decision that acknowledged exclusive private rights "would lead to extensive harm, whereof many thousand People would be dispossessed, what they have had, should have and can have as their Bread."[604] We can here see that consideration for the coastal population was accounted for (on paper at least), which has a

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601 See for example reference to a court case from 1754 on a claim of a right to fish on a fish ground in the Nordmøre region that was not ruled in favour in Fugelsøy (1962) 56.

602 Strøm Bull (2005) page 10. This also documented in Sunde (2006); Sunde (2009).

603 See for example Fugelsøy (1962) page 12–17. These are terms that in Norwegian are referred to as "hjemmefiske" and "fremmedfiske."

604 Norwegian wording: "vilde drage den onde Suite efter sig, at mange tusinde Mennesker blev betaget det, hvorved de baade have havt, bør og kan have deres Brød."

line up until the purpose clauses in the Marine Resources Act and the Participation Act of today. The lobster regulation 1728 also draws a line up to the current state of law where the basic principle is that all fishery is allowed unless prohibited (*harvest principle*). This must also be seen in relation to the widely acknowledged common property characteristics of marine resources, see chapter 4, and the later closure of access to commercial fisheries that is studied in more detail in chapter 7.

The legal historical investigations of the thesis have not come across any privileges or permissions issued by the *ruling authority* that *explicitly* establishes a right to fish commercially (as defined in the thesis) in saltwater *per se* until the later introduction of limited entry licencing regimes. Only privileges related to trade, production, export and similar of raw material, or *curtailments* of certain activities on fish grounds to what could otherwise be seen as open and *unregulated fisheries* have been identified. This does not preclude the existence of exclusive and customary private rights to fish in specific areas, which is acknowledged in jurisprudence and for which there is a statutory mechanism to investigate if there are any claims of individual or collective rights to fishing grounds in sea and fjord areas of Finnmark.[605] As will be seen in the next chapters on the evolution of cod fishery regulations, questions of access to fish grounds was also a recurring topic, but it was first and foremost the emergence of participatory governance mechanisms and relations between fisherman and processors that marked important developments of significance to the regulatory system of today.

5.5 Institutionalization of participatory governance mechanism and the Finnmark case

5.5.1 The first cod fishery regulations

In contrast to the herring fisheries there was for a long time no regulation of the harvest operations of cod. The trade of stockfish was from early on regulated in connection to the

[605] See section 29(1) in lov 17. juni 2005 nr. 85 om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke (Finnmark Act). See more on this in Prop. 70 L (2011–2012) page 124.

city of Bergen and privileges issued to merchants and the Hansa.[606] The transportation and sales of fish from the north to Bergen was in the 1400s–1500s organized through an arrangement based on an *interdependent trade relation* between the fishermen and merchants in Bergen that provided goods and equipped the fishermen for the next season.[607] In 1572 it was laid down in regulations that the individual fisherman was bound to his merchant in Bergen as long as he was in debt to him.[608] In this way, the merchants established a dominant position as creditors that through the years put the fishery-dependent population in the north in debt.[609] The terms of the sales were often determined by the merchants, including setting the price and when payment was submitted. It is in retrospect, however, difficult to assess the extent of the imbalance between the seller and buyer.[610] There were laid down rules to protect the fishing commons from exploitation by merchants in 1685, but these were at the same time challenging to enforce given the nature of the business with large quantities sold over shorter periods of time, by many actors.[611] Another issue was that the overall system did not necessarily stimulate the fishermen to

606 From 1562 no foreigners were allowed to conduct trade north of Bergen. This was laid down in Forbud 11. april 1562 (Regulations 1562), which is rendered in Hammer (1835) page 275–276. There were at the same time attempts by England to establish trade in northern Norway and cases of German merchants that sailed north. Nielsen (2014a) page 295 and 333.

607 This is what is referred to as "jektefart" in Norwegian. In the prior centuries merchants of Bergen and Trondheim came north with vessels in June to buy the stock fish. This way of buying fish ended by the end of the 1300s and the new system with vessels transporting fish from the north and south in the vessel type "jekt" emerged. These transports were organized in collaboration between vessel masters and fishermen, and some fishermen had to participate in the transport to Bergen. Many of the vessels were owned by persons from the north. Another central element in this new system was the credit arrangements in which the merchants supplied the fishermen for the next season, in addition to goods as in particular grain. These merchants were referred to as "utreder," and the credit is often referred to as "Bergenkreditten" or "Nordlandsgjelda." The system is often generally referred to as the "bygdefartsordninga." See more on this system in Nielsen (2014a) page 324–326; Nedkvikne (1988); Bottolfsen (1995); Lindbekk (1978).

608 Anordning 1572 (Regulations 1572), which is rendered in Hammer (1835) page 276. Also referred to in Hutchinson (2014) page 432; Nedkvikne (1988) page 292.

609 See for example Døssland (2014) page 213.

610 Nedkvikne (1988) page 291. See also an overview of these issues in Døssland (2014) page 218–221; Løseth (2014) page 527–528.

611 See section 12 in Forordning 5. februar 1685 om avskaffelse av ulovlige byrder på allmuen i Norge (Regulations 1685), which is rendered in Fladby and Foslie (1983) page 199. The same regulation is referred to in Fishing Village Commission 1888 page 22–23.

produce the best quality.[612] All of these challenges are similar challenges that occur in today's system, although, as will be shown, with a completely different regulatory and modernized context.

The trade had to go through specific market towns, and for the Lofoten fishery it was Bergen that had the central position.[613] After the absolute monarchy was introduced in 1660, adjustments were made to the privileges in alignment with prevailing *mercantilist* policies that further channelled the trade from districts through market towns.[614] The development of new villages with local merchants connected to merchants in market towns also evolved and contributed to more permanent settlements along the coast.[615] These were villages still strongly connected to their market towns, but that took over more of the relations to the individual fishermen in fishing districts.[616] Important in this inquiry is the increasing importance of the owners of land and shops in fishing villages along the coast, which from now are generally referred to as *village-owners*.[617]

As to the fishing of cod, the use of a simple handline with a few hooks from small vessels close to the coast was for a long time the only gear type and rules of conduct was not

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612 Fishing Village Commission 1888 page 22–23.

613 The city of Trondheim, however, also became influential in the early 1600s and the Hansa had lost its dominance after the mid-1500s. Hutchinson (2014) page 456; Nedkvikne (1988) page 275. In a period between 1681 and 1715, Bergen had a monopoly on all trade from Finnmark. Hutchinson (2014) page 509; Nedkvikne (1988) page 99. From 1729 a Danish trade company had exclusive rights to the Finnmark trade that would last until 1787 when the trade was liberalised. Døssland (2014) page 65–67, 250–253.

614 Hutchinson (2014) 509; Døssland (2014) page 211.

615 See more on this is Hutchinson (2014) page 502–510.

616 Merchants that were connected to merchants in the market towns or cities were often referred to as "utliggere" or "kremmere." As of cod fisheries in Lofoten and along the coast, the cities of Molde and Kristiansund were also given privileges in 1742 and were to be involved in the trade of fish. Especially for the production of salted and dried cod (in Norwegian "klippfisk") and towards late 1700s buying vessels from Kristiansund, Trondheim, Bergen went north to buy raw fish for this production. Døssland (2014) page 136, 144–145. The local populations in the districts surrounding the cities of Molde and Kristiansund also had an interdependency relationship to merchants in market towns, but it was at a smaller scale and more locally rooted than the population in the north which had debts to the Bergen merchants, see more in Døssland (2014) page 224–231.

617 In Norway these are often referred to as "væreier," but the types of ownership and role was diverse and changed through the years.

necessary as they were in the herring fisheries.[618] This would change when more effective gear types such as gillnets and longline entered the stage. Longlines started appearing in the Lofoten fishery in the beginning of the 1600s, and gillnets appeared around 1750.[619] As the seasonal cod fisheries gathered thousands of fishermen on small fish grounds over a short period of time, the introduction of new and more space demanding gear was, as in the herring fisheries, fuel for conflicts.[620] The majority commons that fished with handlines opposed the introduction of new and more *capital-intensive* gear types. As a consequence of protest and conflicts, local authorities adopted various restrictions and prohibitions on the longline fishery in areas of Lofoten in the period from 1627 up to 1768, when it was opened up for longlines in any areas.[621] The areas where longlines were still prohibited were, however, the most favourable fish grounds, so regulations in these areas were not always respected, nor enforced by local magistrates.[622] The conflicts therefore intensified with a peak during the winter fishery in 1774, when many long liners were reported and prosecuted for ignoring the prohibition.[623] After some lobbying towards the ruling authorities in Denmark, however, the sentences were nullified and the King temporarily allowed the use of longlines in 1784 and 1785.[624] The case therefore marked further liberalization of use of long lines in the Lofoten fishery, the fact that industry lobbyists were able to impact decision-makers this far back in time and the fact that law in action did not necessarily correspond to law on paper.

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618 Fisheries Commission 1949: Innstilling fra Komitteen til samling og revisjon av fiskerilovene page 7.

619 O. No. 2 (1856) Angaaende naadigst Proposition til Norges Riges Storthing betræffende Udfærdigelsen af en Lov om Torskefiskeriet i Nordlands Amt og Senjens og Tromsø Fogderi page 205–206; Bottolfsen (1995).

620 There were, however, also gear conflicts on the west coast. See for example Tufteland, Solbakken and Fagerbakke (1986) page 23–26, which is also referred to in Hutchinson (2014) page 479.

621 See overview of the different regulations in Fisheries Commission 1949 page 7–8; Bottolfsen (1995) page 206–208.

622 Døssland (2014) page 244. These were in particular areas that were more protected, and therefore safer, for the small vessels that were used in the fishery.

623 This case is described in detail in Bottolfsen (1995) page 210–214 and the following builds on this information. See also Døssland (2014) page 244.

624 Rescript 4. februar 1784 til Amtm over Nordlandene (Cod Regulations 1784). I have studied the version found in Wessel Berg (1843).

The space conflicts continued, however, and a public commission was appointed to examine the issues with the representative of six handline fishermen and six longline fishermen.[625] The commission also obtained statements from experts and commoners in the areas. The result of the process was the adoption of the Lofoten Regulations 1786.[626] The work of the commission marked an early example of a legislative process in a major fishery with broad stakeholder involvement, expert statements and a public hearing mechanism. The regulations set out several rules of conduct, including restrictions on where and when longline and gillnet could be used.[627] There were several provisions concerning fish processing, rentals of the fishermen accommodation and other conditions in the fishing villages.[628] The main legal newcomer was, however, the establishment of a *fishery supervision* with three or five people elected by the fishermen men as *supervisors* in every fishing village at the start-up of the fishery.[629] The village owner was always a part of the supervision, the rest were elected fishermen.[630] This was therefore an early form of participatory governance that, as will be shown, was to develop and become a central part of the regulatory system. The main duty of the supervisors was to ensure compliance with regulations. All infringements were to be prosecuted "Police way"[631] in every village.[632] Most violations were sanctioned with the use of fines, and forfeiture of illegal harvest. All these elements can be found in the present regulation and enforcement system.

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625 However, no gillnet fishermen were in the commission. According to Bottolfsen this would be unfortunate for the functioning of the regulation, see more on the case in Bottolfsen (1995) page 215 ff.

626 Forordning 1. februar 1786 ang. Fiskeredskabers Bestemmelse i Lofodens, Helgelands og Vesteraalens Fogderier, samt Bestemmelse for Sildens Fiskning og Virkning i Helgelands Fogderie udi Nordlandene (Lofoten Regulations 1786).

627 Lofoten Regulations 1786 sections 1, 2, 3, 4, 5, 13, 16, 17 and 18.

628 Lofoten Regulations 1786 sections 7 and 9.

629 Lofoten Regulations 1786 section 12.

630 Lofoten Regulations 1786 section 12.

631 The original text has this wording: "Politimaade." It is not elaborated whether this was an administrative or criminal authority.

632 Lofoten Regulations 1786 section 20.

As to the entitlements, half of the fines and forfeiture went to the relevant supervisor (or the informer), and the other half to funds for the poor.[633] The rationale for this could perhaps be to incentivize revealing and reporting of violations. This arrangement has some parallel to the current system of administrative confiscation of illegal catch, see chapter 3.10.1. There is of course a major difference that the entitlement in 1786 was on individual basis, whereas the forfeiture today is a part of a cooperative system. However, there are still traces of the current system as the revenues of illegal catches in both constructs goes back to the industry.[634]

Another interesting aspect of the supervisory function is that the supervisors also got a small share of the harvest as payment. The supervisor could by himself collect the payment, without law or a court decision, if payment wasn't received from the boat.[635] The arrangement could be seen as an early form of user payment for the management costs, in other words some sort of a "cost-recovery"[636] for the control function of the supervisors.[637] In the current system some of the management costs of the government are covered by a control fee that is levied on all first-hand sales (but very little), and a sales organization fee to fund the activities of the fish sales organizations, in which some include the control responsibilities. There were several examples of application and enforcement of rules in the regulations, at least in the first years after the adoption.[638] But it didn't put an end to the gear conflicts. Many neglected the prohibitions, there were cases of supervisors that also violated provisions, and eventually prosecutions ceased.[639]

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633 Lofoten Regulations 1786 section 19.

634 I have not come across similar arrangements in other industrial regulations this far back in time; however, this could be further investigated. In Forordning 17. september 1735 om Havners Istandsættelse i Norge (Harbour Regulations 1735) which is an early harbor regulation, fines were divided between the harbor bailiff, informers and the poor. Users of the harbours could potentially act as "informers," under these regulations, but were not delegated supervisory functions.

635 Lofoten Regulations 1786 section 12.

636 See for example more about cost-recovery as a fisheries management tool in Kaufmann and Green (1997).

637 I have during my investigations not yet found any similar user payment in other industrial regulations this far back in time, but this is also a topic for further investigations.

638 Some examples are presented in Bottolfsen (1995) page 215. Bottolfsen mentioned that 113 vessel masters were issued fines for gillnetting in prohibited areas.

639 Bottolfsen (1995) page 218 ff.

5.5.2 Foreign participation in the Finnmark fisheries and border issues

In the fisheries outside the county of Finnmark there were in the same time period some legal developments that merit some attention. Three features particular to Finnmark should be noted in that regard.[640] First of all, Finnmark played an important strategic role in jurisdictional matters with Sweden and Russia (and areas that today are under Finnish jurisdiction). Secondly, there were rich marine resources of more temporary character outside the coast that the government wanted to exploit and trade. And thirdly, the Sámi population and nomad lifestyle with a varied use of natural resources that included marine fishing was salient. There is a lot to say about all these factors, and their impact and legal implications, which are thoroughly studied from different perspectives in other works, but suffice to say for now the protection of the activities of *native* fishermen, from competition from *visiting* fishermen, whether Russian or from southern Norway, were in different ways implemented in legislation.[641]

In 1702 regulations that prohibited fishermen from southern parts of Norway to stay in inshore areas near the fishing villages of Finnmark were laid down.[642] This prohibition was reiterated in a regulation of 1778 and sources reveal that these regulations were enforced.[643] In 1747 it was laid down that Russians could fish outside 1 mile from the coast and that each boat had to pay a fee.[644] As international fisheries law is not emphasized in this thesis, only some major developments with important connections to domestic law issues in the Norwegian context are included in this inquiry. The developments in the Norwegian

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640 See for example Døssland (2014) page 247–253

641 See NOU 1994: 21 Bruk av land og vann i Finnmark i historisk perspektive - Bakgrunnsmateriale for Samerettsutvalget for a general overview on the history of natural resource exploitation in Finnmark. See Strøm Bull (2011) for a legal historical overview of fishing regulations more specifically. See Tønnesen (1979); Pedersen (2006) on Sámi rights and jurisdictional matters more generally.

642 Forordning 25. april 1702 Om Handelen paa Findmarken med videre Compagniet i Bergen og paa Landet vedkommende (Regulations 1702). The relevant section 24 is rendered in Schnitler (1985) page 227. They could, however, stay and fish in the outer part of the coast.

643 Forordning 20. august 1778 om den Findmarske Taxt og Handel (Regulations 1778) section 32. I have looked at a rendering in Schou (1795). See Strøm Bull (2011) page 20–21on the enforcement of the regulations.

644 Rescript 10. februar 1747 Ang. Fiskerie af Russere paa Strømmene for dette Amt imod Recognition (Regulations 1747). I have studied a rendering in Fogtman (1787).

context can be seen in a boarder context in which states from the 1600s began to assert some jurisdiction over coastal waters.[645] Apparently, the fishing inshore continued and caused disadvantages for, and complaints from, locals.[646] There were also Finnish Sámi people that came to the coast for fishing as elements of seasonal reindeer migration that had been taking place long time before borders were established.[647] In the border treaty of 1751 between Norway and Sweden there was a supplementary codicil that regulated the Sámi relations between the two countries.[648] According to sections 10 and 12 of the codicil, mutual access was permitted for reindeer migration into the jurisdiction and also fishing and hunting rights, which included marine fishing.[649] All of the above rules represented legal newcomers in legislation as they regulated participation in fisheries more explicitly, and non-Norwegian participation was regulated. As will be seen below in chapter 5.8.2, however, this was a state of law that would change in the next century and further influence participation rules in Finnmark.

5.5.3 Further development of "traffic rules" to remedy conflicts in the Lofoten fisheries

The problems in the Lofoten fishery continued into the 1800s. Important general context in this time period was the end of the Napoleonic wars and the Kiel Treaty of 1814, in which Denmark had to surrender Norway to Sweden. The following months was an eventful and institutionally important time period leading to the adoption of the Norwegian Constitution and the establishment of the Norwegian Parliament as the supreme legislator. Norway continued in a personal union (shared king) with Sweden until 1905, but there was a large degree of independence with the Swedish King formally approbating Bills adopted

645 See for example Barnes (2011) page 439.

646 See more on this in Finnmark Fishery Commission 1894: Indstilling fra den ved Kongelige Resolution af 12te December 1891 nedsatte Kommission til Revision af Lovgivningen om Fiskeriene i Finmarken page 50–52 and Strøm Bull (2011) page 67–69.

647 Finnish areas were up until 1808 under Swedish rule. From 1809 until 1919 Finland was under Russian jurisdiction.

648 Første Codicill og Tillæg til Grendse-Tractaten imellem Kongerigerne Norge og Sverrig Lapperne betreffende (Lappekodisillen).

649 See more on these developments in Finnmark Fishery Commission 1894 page 60–61; Strøm Bull (2011) page 72–73.

by the Norwegian Parliament. Within this new institutional context, the Parliament tried to remedy the continued challenges in the Lofoten fisheries by adopting a new Act in 1816.[650]

The context of the statute must also be seen in relation to changes in ownership policies in coastal areas in the late 1700s and early 1800s. Up until these times most of the important fishing villages in Lofoten were owned by the King and the Church. Fishermen accommodation and areas for fish production on this land had for centuries been rented to fishermen for fairly reasonable fees.[651] There was, however, increased liberalization of ownership and sales of land to private buyers.[652] Also trade policies were liberalized in the time period. In regulations from 1753 it was laid down as a general rule that all fishermen could sell fresh fish to *whoever* they wanted, but processed fish still needed be sold through merchants in market towns.[653] In 1787 regulations were adopted that abolished the monopoly of trade in Finnmark that had lasted since 1683.[654] The last important step of removing the control merchants in Bergen had had of the fisheries in north came with the adoption of regulations in 1813 that established that inhabitants of the north could sell any fish to whoever they wanted.[655]

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650 Lov 1 Juli 1816 ang. Fiskeriet i Lofoden (Lofoten Act 1816).

651 Nielsen (2014a) page 262, 267–268. The fishermen therefore set up accommodation facilities, which in Norwegian are referred to as "rorbuer." In some cases, there were state-owned facilities. In both cases, the fishermen paid fees for the use of facilities and fee for land use (to produce fish) that were fairly reasonable. Access to the fisheries were generally regarded as unrestricted. See also Fishing Village Commission 1888 page 6–13 for a historical overview of the relations between landowners and fishermen before 1753.

652 See an overview of these developments in Solhaug (1983) page 88–90.

653 Forordning ang. Fiskeriene og Fiskehandelen Nordenfjelds, samt hvorledes Fiskens Virkning, Tilberedning og Saltning skal forholdes (Trade Regulations 1753), which is rendered in Schmidt (1851). See Fishing Village Commission 1888 page 25–31 for a more detailed overview of the regulations and their origin. According to the overview there had, prior to the adaptation of these regulations, been a proposal from the merchants of Bergen that they could unilaterally fix prizes. This was not pursued, but is an interesting issue that has a line up to the adaptation of legislation that established the current monopoly of the harvesting sector, through the fish sales organizations, to establish prices unilaterally. See more in chapters 3.8 and 6.1.

654 See more on this in Døssland (2014) page 251.

655 Forordning 20. oktober 1813 ang. Opgjørelse af Nordlandenes Indbyggeres Gjeld til Kjøpmændene i Bergen, samt den nordlandske handels frigivelse (Regulations 1813), which is rendered in Timme (1842). See more on these developments in Fishing Village Commission 1888 page 26–27; Døssland (2014) 252–253; Solhaug (1983) page 81, 122–123

The main legislative intent of the Lofoten Act 1816 was to increase the value of the fish resources for the benefit of the state through improved production and a liberalization of the trade and to put an end to the long-lasting gear disputes.[656] The legislators generally expressed liberal views with an aim of as little state intervention as possible. However, there were still enacted several detailed provisions regulating fishing operations. The arrangement of a supervision from the Lofoten Regulations 1786 was continued in the Act, but now with a stronger position of the village owner as a *Superior supervisor*.[657] An important difference from the Lofoten Regulations 1786 was therefore increased influence and control the village owners had over the fishery through this position, and with the control over necessary accommodation and processing facilities that followed the increased ownership of land. Former efforts of price regulations of basic accommodation for the fishermen were no longer included in the legislation.[658]

The regulation of the fishing activities on the fishing grounds was also further developed and refined in the new legislation. The operations were now to be organized by division of stretches *between* the sea areas adjacent to the fishing villages.[659] Moreover, each stretch was divided up into separate areas for gear types, and these areas were divided into different fishing sets, all further development of traces of similar types of *traffic rules* in the previous regulations in 1786. The division was based on established customs of where new fishing gear had been accepted.[660] It was the supervision that decided how many boats of gillnet and longline fishery were allowed in every fishing village.[661] The Act therefore laid down rules

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656 See for example Stortingsforhandlinger (1816), O. April 10, pages 314–315.

657 Lofoten Act 1816 section 1.

658 Solhaug (1983) page 93 ff describes the legislative process in which there were different viewpoints on the content of the statute and with two different bills drafted. One side included support for strengthening the position of the individual fishermen and protect them from exploitation by village owners, and thereby the more social dimension. The other supported liberalization on pure socio-economic grounds. In the final bill that was adopted the drafting had according to Solhaug been influenced by members of the Parliament with stronger connections in the fishing trade, which resulted in a stronger position to the village owner than in the first draft.

659 The Norwegian term "havskiller" is used for these divisions.

660 Døssland (2014) page 245 Also in Strøm Bull (2011) page 44. Strøm Bull points out that these types of divisions were laid down as far back as in regulations from 1775.

661 Lofoten Act 1816 section 7.

for deciding *where* the fishery could take place for each boat-team associated with the fishing village in question. It is, however, necessary to modify some of the *practical significance* of these rules. At daytime there were generally no restrictions for the use of handline and daytime longline fishery and the division between villages didn't apply at daytime.[662] However, daytime sets of longlines that were used in gillnet areas had to be taken up before the gillnet fishery started, and longline in other stretches than approved stretches, were only allowed when there was room for it.[663] During the night, however, it was only allowed to use gillnet and nighttime longlines in assigned areas. A regional Act was adopted for the fishery in the county of Finnmark in 1830 building on the same principles as the Lofoten Act 1816.[664]

The Lofoten Act 1816 did not work as intended. This is further elaborated below in chapter 5.7.1. The various interests and conflicts that the statute had tried to balance and remedy, illustrates first and foremost how the innovation of more efficient harvest tools changed fishery patterns, thereby creating new regulatory challenges and pressures for the legislator to account for. Similarly, trade policies, private ownership on land and market conditions in other ways impacted the regulatory developments as external outside forces. It has e.g. been argued that the breakthrough of gillnet and longline fishery went faster due to the increased use of a new process technique of *salting and drying the cod*[665] during the 1790s.[666] The historian Trygve Solhaug hit the nail on the head when he pointed out:

662 Lofoten Act 1816 section 5.

663 Lofoten Act 1816 section 9.

664 Lov 13 September 1830 om Fiskerierne i Finnmarken eller Vest- og Øst-Finnmarkens Fogderier (Finnmark Fishery Act 1830). See more on this in Strøm Bull (2011) page 32 ff.

665 In Norwegian this product is referred to as "klippfisk."

666 Solhaug (1983) page 87.

> The next step - the gradual legalization of the use of gear - came as a codification of a development that couldn't be stopped. The legislation refrained and tried to regulate. Thus, the many measures and regulations are reflections of how the "new" gear types pave the way by its own force.[667]

The essence of this quote will also characterize the further evolution of the fisheries legislation up to our time. Practice evolves, often through lack of enforcement or through administrative practice or other forms of acceptance, until it becomes codified in statutory law. Before moving on to the further evolution of cod fishery legislation that encompasses attention to efficiency considerations and the first delegation of rule-making authority to fishermen, there were some fairly under-communicated statutory innovations that accounted for biological consideration in fisheries on stationary resources that need an introduction.

5.6 The introduction of biologically based considerations and adaptive governance

5.6.1 Lobster regulations

The legal historical sources on lobster regulations not only pinpoint issues related to exclusive fishing rights and management principles, but they also reveal that knowledge on biology and conservation considerations can be traced far back in time. As far back as 1737 a proposal for protection for lobster fishing during the summer months, and a minimum size for harvest, was put forward by a local magistrate in southern Norway, but not pursued.[668] About a century later a prohibition on harvest of lobster in the period June 1 to September 14 on the grounds that "this is the time the Lobster releases its Eggs, and that the number of Juveniles will decline if Fisheries are conducted"[669] was forwarded by a member

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667 Solhaug (1983) page 87. Norwegian wording: "Det neste stadium – den gradvise legalisering av redskapene – kom som en kodifisering av en utvikling som ikke lot seg stanse. Lovgivningen holdt igjen og forsøkte å regulere. Således blir de mange foranstaltninger og forordninger et speilbilde av hvorledes de «nye» redskaper brøyter seg veg av egen kraft."

668 Dannevig and Eyden (1986) page 176.

669 Norwegian wording: "saasom Hummeren paa den tid kaster sin Rogn, og at Yngelen aftager naar Fiskeriet da bliver drevet."

of the Parliament in 1821, but also not pursued.[670] The proposal indicates biological knowledge of the lobster species and acknowledgement that fishery could impact the marine species negatively. It must be assumed that the commercial consequences of a declining stock were the main motivation underlying the proposal, and not concerns for biodiversity per se.[671] Another Parliament proposal was dismissed in 1830, in which some grounds for dismissal were that it was:

> questionable to recommend a Provision, partly because the proposed Curtailment in the lobster fishery is expected to severely impact the adapted industry of many, partly because the Proposer has not put forward information, that enable the Committee to with full Certainty to judge, whether the feared decline of the Fishery indeed can be predicted, or if it by the proposed Measure will be remedied.[672]

This quote indicates how the Parliament committee perceived uncertainty in the scientific knowledge and effectiveness of a proposed measure, with precaution to the negative economic effects as the decisive factor. It also indicates how *weighing* of different economic, social and biological concerns, and evidence-based decision-making, played a role in the legislative process in the first decade of the Norwegian Constitution. In 1848 the Parliament finally adopted an Act that prohibited a fishery of lobster during the summer months.[673] In the Bill proposition it was argued that it was "imperative for the Conservation of the Lobster that Provisions by Legislation is adopted, so that the excessive Harvest of This Sea-animal

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670 Stortingsforhandlinger (1821), Indst. Tillægshefte, August 20, page 66.

671 At the same time the concept of sustainability is traced back as far as the 1700s. The origin of the concept is outlined in Voigt (2010). Thus, the ideas were known, although probably not widespread at this time period.

672 Stortingsforhandlinger (1830), 5. del, O. June 28, page 650. Norwegian wording: "Betænkeligheder ved at tilraade nogen Lovbestemmelse, deels fordi den foreslaaede Indskrækning i Hummerfiskeriet forudsees at ville gjøre et voldsomt Indgreb i flere Egnes tilvante Næring, deels fordi Proponendten ei har tilveiebragt sadanne Oplysninger, der kunne sætte Committeen istand til med fuld Vished at bedømme, hvorvidt den befrygtede Formindskelse af Fiskeriet virkelig kan forudsees, eller om denne ved det foreslaaede Middel virkeligen kan modvirkes."

673 Lov 29. Juni 1848 om Fredning af Hummer (Lobster Protection Act 1848)

is somewhat curtailed."[674] Conservation considerations were therefore a part of the legislative intent, and overfishing consequences were acknowledged. The legislative process was thorough with expert (in biological sciences) and local involvement. An example of expert statement rendered in the Bill proposition was the following argument as a response to objections of whether fishermen would actually comply with a prohibition:

> [T]he Temptation to violate the Act is [not] so considerable, when accounting for the Risk, that the Fisherman expose himself to by offering the illegal Catch, whereof he even with Family is not expected to consume much, and furthermore have regard to the Probability, for the Fisherman, that the largest Part of the protected lobster will become his Prey at another Time, when Harvest will be far more beneficial for him. In addition, the Associate professor noted, that the Fisherman himself will be convinced, that the Protection in the long run will become beneficial for his Business.[675]

The expert was therefore seemingly of the opinion that the fishermen would understand the rationale for the rule, and therefore be likely to comply with it. The statute therefore set out a general prohibition on fishing lobster from July 15 until the end of September,[676] although the King was authorized[677] to curtail the prohibition period for the reasons that:

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674 O. No. 63 (1848) Angaaende naadigst Proposition til Norges Riges Storthing betræffende Udfærdigelse af en Lov om Fredning af Hummer page 9. Norwegian wording: "det til Hummerens Conservation af paatrængende Nødvendighet at der ved Lovgivningen fastsettes Bestemmelser, hvorved den overdrevne Fangst af Dette Sødyr noget indskrænkes."

675 O. No. 63 (1848) page 8. Norwegian wording: "Fristelsen til at overtræde Loven er [ikke] saa betydelig, naar man tager i Betragtning den Risiko, som Fiskeren utsætter seg for ved at falbyde sin ulovlige Fangst, hvoraf han ved selv med Familie ikke antages at ville fortære betydeligt, og man derhos haver Øie for Sandsynligheten, som Fiskeren har for, at den største Deel af den skaanede Hummer vil blive hans Bytte til en anden Tid, da deres Fangst vil blive langt fordeelaktigere for han. Dertil kommer, bemærker Lektoren, at Fiskeren selv vil blive overtydet om, at Fredningen i længden vil være hans Bedrift til Gavn."

676 Lobster Protection Act section 1.

677 Lobster Protection Act section 2.

> due to our Nations local Conditions, it is likely that the Lobster Egg release period can occur at somewhat Different times in the different coastal areas, and thus that it is most correct that the various County authorities with Royal Approbation adopt the more specific Provisions in that respect.[678]

This is the first identification of the legislative technique of delegating authority to lay down subordinate legislation in statutes studied in this inquiry. It is also an identification of some features of *adaptive governance* and an *ecosystem-based approach* with decentralized management, and use of local knowledge.

5.6.2 Regulation of stationary fish stocks

That stationary stocks were the first to be managed on the basis of conservation considerations is further supported by the evolution of legislation for the management of local fjord fisheries. In 1869 the government proposed to authorize the King to prohibit the use of fishing gear or harvest methods in saltwater fjords that could negatively impact the fishery.[679] The proposal originated from fishermen complaints of declining stocks, and the determination that there was need to adopt legislation that could remedy the situation.[680] Expert advice (in biological sciences) also informed this case. An example of assessment of causes of the decline in fish stocks by the expert, and possible measures and economic consequences, was e.g. that:

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678 Indst. XLVII (1848) Innstilling fra Næringscommitteen Nr. 1 i Anledning af den kongelige Proposition om "Fredning af Hummer" page 145. Norwegian wording: "det som følge af vort Lands locale Forholde er sandsynligt, at Hummerens Utklækningsperiode kan indtræffe til en noget Forskjellig tid i de forskjellinge kystdistricter, og at det saaledes forementlig rettest overlades til vedkommende Amtsformandskaper med kongelig Approbation at fastsætte de mere specielle Bestemmelser i saa hensende."

679 O. No. 42 (1868–69) Om Indskrænkning i Brugen af Redskaber til Fiskeri i Saltvandsfjorde.

680 O. No. 42 (1868–69) page 1.

> these fish species are generally stationary and rarely supplied by migrating fish from ocean areas. He [the expert] assumes the causes of this reduction is most of the time found in the gear arrangements or, that they are used at Times when they shouldn't be used. From all these areas, utters the Professor [the expert], Provisions are demanded, that can remedy this current Destruction, which to a large Extent damage one of the Inhabitants most important Livelihoods.[681]

The quote indicates that there was knowledge of the impact gear types and a fishery could have on local fish stocks, and that curtailments were necessary. The importance of local adaption in designing regulations was also underlined when it was assumed that:

> Provisions that would prove expedient in one Fjord, would due to the different Conditions prove inexpedient in another, so that one could, to target correctly, need specific Provisions for every Fjord, and even for the different Parts of it.[682]

The need for local adaptions was thus explicitly acknowledged. The Fjord Fishery Act 1869 was adopted with authority for the King, upon decision from local authorities, to prohibit a use of specific gear types or harvest methods.[683] Its jurisdiction was all fjords of Norway, except for saltwater fisheries where special legislation applied.[684] The Fjord Fishery Act 1869 did therefore also have features of adaptive governance and an ecosystem-based approach.

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681 O. No. 42 (1868–69) page 1–2. Norwegian wording: "disse Fiskearter i Regelen Stationære og saa sjelden noget Tilskud fra havet ved nye Indvandringer. Aarsagerne til denne Formindelskelse antager han oftest er at søge i Fangstredskabernes Indretning eller i, at de benyttes til Tider, hvori de ikke burde bruges. Fra alle disse didstikter, yttrer Professoren, forlanges der nu Lovbestemmelser, som skulle motvirke den stedfindende Ødeleggelse, der i betænkelig Grad forringer en af Beboernes viktigere Næringskilder."

682 O. No. 42 (1868–69) page 2. Norwegian wording: "Bestemmelser der vilde vise seg hensigtsmæssige i een Fjord, paa Grund af de forskjellige Forholde ikke sjelden vilde være uhensigtsmæssige i en anden, saa at man, for at ramme den Rette, kunde behøve særskilte Bestemmelser for hver Fjord, ja endog for de forskjellige Dele af en saadan."

683 Lov om Indskrænkning i Brugen af Redskaber til Fiskeri i Saltvandsfjorde (Fjord Fishery Act 1869) section 1(1).

684 Fjord Fishery Act section 1(2).

5.7 Public enforcement and efficiency considerations

5.7.1 Establishment of a specialized public supervision

As seen above, there were in place various regulations on herring fisheries in different areas of Norway in the late 1700s. In the first half of the 1800s it was, however, the fishery for a type of fishing on what is referred to as spring herring (winter herring) on the west coast that would become the dominant herring fishery.[685] In 1851 the Parliament adopted a Spring Herring Act after a broad legislative process that lasted almost a decade.[686] An intention of adopting a general statute for all fisheries was abandoned after both local authorities, experts and executives pointed out that the heterogeneous nature of fisheries called for several Acts and that the issues were not sufficiently informed.[687] In 1845 local authorities in the southwest coast (city of Stavanger area) proposed to lay down a provisional regulation that included rules on a *public supervision* with paid officials that would be assisted by fishermen.[688] After input from an expert group appointed in 1849, a Bill proposition was forwarded and adopted in 1851.[689] The Bill included a provision authorizing the establishment of a public supervision in the herring fisheries. This was the first time a *specialized* public supervision with policy authority in fisheries enforcement was laid down in statute, in contrast to the supervision of fishermen representatives established in the cod fisheries. The recommendation from the Parliament Committee expressed that a supervision should *not* emanate from the industry themselves as:

685 See more in Vollan (1971) page 20 ff; Fasting (1962) page 69; Løseth (2014) page 296–302.

686 Lov 24. September 1851 om Vaarsildfiskeriet (Spring Herring Act 1851).

687 S. (1851) Angaaende naadigst Proposition til Norges riges Storthings betræffende Udfærdigelse af en Lov om Vaarsildefiskeriet page 1.

688 S. (1851) page 2; Solhaug (1983) page 442. According to Solhaug the idea of a public paid supervision first appeared in an anonymous tip to a local newspaper in 1845.

689 The appointed expert group was chaired by th17e Director of Lighthouse Affairs, Oluf Arntzen, and consisted of three other officials and two merchants. Of the other three officials, Ketil Motzfelt, a Lieutenant in the navy, would become influential in later developments of the Lofoten fishery legislations. See more on the drafting process in S. (1851).

> Such a Provision would in most Cases miss the necessary Force. It would often lack Insights to deal with the partly complicated Cases, where the Supervision would have to intervene, and it would arouse unwillingness by the Commons by the Curtailments it would impact the fishermen in his real Business; further it would be an Impossibility, by necessary Power to control such a Supervision, that would consist of so many different Elements and of Persons that would even by name be unknown for the real Superior supervisors. The Supervision would altogether in this Way lack all unity.[690]

The Parliament committee (and the expert group) therefore did not think that a fishermen supervision would have the necessary force, motivation and knowledge to carry out the tasks. The thesis investigations have not found any quotes in the Parliament recommendation that support if these were views based on experience from system in the Lofoten fishery, or other types of knowledge, but it would seem plausible that the group, and at least the administrative staff of the Ministry that finalized the Bill proposition, had insights from other areas of the fisheries legislation that could have been influential.[691] As to a proposal to use navy vessels for supervision, it was assumed that it "could not be questioned, that such arrangement, when organized with appropriate Attention, fully will achieve the intent. One has in this regard drawn on Experiences from other countries."[692] Thus, experience from other countries seems to have played some role in the assessment of the supervision measures. The committee supported that the state should cover the cost of a supervision and that another purpose of the Act was to "provide for efficient and secure

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690 Indst. D4. (1851) Indstilling fra Næringskommitteen Nr. 1 til Lov om Vaarsildefiskeriet page 372. Norwegian wording: "Et saadant Opsym vilde i de fleste Tilfælde savne den fornødne Kraft. Det vilde ofte mangle Indsigt til at behandle de mange tildeels indviklede Sager, hvor Opsynet nødvendig maatte gribe ind, og det vilde fremkalde Uvillie hos Almuen ved de Indskrænkninger, det maatte paaføre Fiskeren i hans egenlige Bedrift; derhos vilde det være en Umulighed, med fornøden Styrke at kontrollere et saadant Opsyn, der vilde komme til at bestaae af saa forskjellige Elementer og af Personer, der som oftest endog af Navn vilde være ukjendte for de egentlige Overopsynsmænd. Opsynet vilde overhoved paa denne Maade komme til at savne al Eenhed."

691 As will be shown below, lieutenant Motzfeldt in the expert group, would play a role in the Lofoten fishery later, but I have not found material supporting the idea that he had any particular insights at this point in time. That does not preclude that he might have had special knowledge already at this time

692 Indst. D4. (1851) page 372. Norwegian wording: "ikke betvivles, at et saadant, naar det organiseres med fornøden Omtanke, fuldkommen vil svare til hensigten. Man har i saa henseende Erfaring fra andre lande."

Justice."[693] The chaotic conditions during previous fisheries were underlined, as was the fact that many had refrained from pursuing their cases, but also that "a Supervision, that could not ensure the forceful and efficient Contribution of the Court, would hereby lose its necessary Strength, just like its Measures that follow hereof would not bear any fruits."[694]

Efficient prosecution of cases was therefore acknowledged as an important element in securing actual enforcement of the fisheries, and we see indications of a transformation into an enforcement strategy with deterrence as a compliance motivator. Similar to the cod fisheries, traffic rules were laid down to prevent gear disputes. The Parliament committee, however, emphasized that the Bill proposition from the Cabinet did not sufficiently consider the various interests of the gillnet and seine fisheries. The committee stated that "Any Act, in which these considerations are not taken, would more easily bring about Discontent either by one or another Party, and in such a Case the Law would partly lose its Effect.[695]

From this statement it can be seen that the committee were concerned about questions relating to *internal legitimacy* and moral support as a factor to ensure compliance of the rules. The committee made amendments to the Bill proposition in favour of the gillnet fishery, partly because of protest from gillnet fishermen to the original draft.[696] From a *legal technical* point of view the Spring Herring Act was separated in chapters addressing different elements of the regulations. From the thesis investigations this appears to be the first time the law was structured this way in the fisheries legislation. This is a structure that would be maintained until today's legislation. The first chapter set out five provisions concerning supervision. Pursuant to sections 1 and 2 the King was authorized to establish a

693 Indst. D4. (1851) page 372.

694 Indst. D4. (1851) page 373. Norwegian wording: "at et Opsyn, der ikke kunde gjøre Regning paa Rettens kraftige og hurtige Medvirken, herved vilde komme til at tabe sin fornødne Styrke, ligesom dets Foranstatltninger som Følge heraf ofte vilde blive frugtesløse."

695 Indst. D4. (1851) page 373. Norwegian wording: "En Lov, i hvilken et saadant hensyn ikke er taget, vil lettelig fremkalde Misnøie enten hos den ene eller den anden Part, og i saa Tilfælde vil Loven tildeels tabe sin Virkning."

696 See more on this in Solhaug (1983) page 444.

supervision funded by Parliamentary grants that would have police authority when normal administration was regarded as insufficient.[697] The second chapter of the Act laid down old and new rules of conduct to *secure co-existence* between gillnet and seine fisheries. The third chapter set out general provisions on legal procedures, including the legal basis for the appointment of judges specifically during the fisheries and *extraordinary jurisdiction* according to section 23.[698] Rules concerning the processing of herring were almost non-existent, contrary to previous legislation.[699] The law appeared, at least the first few years it was in force, to function as intended, except for some minor amendments in 1854.[700]

5.7.2 Gear flexibility and efficiency considerations

The introduction of a *specialized public supervision* with the Spring Herring Act 1851 further influenced the evolution of the Lofoten cod fisheries legislation. There was at the same time a long chain of events that took place prior to the adoption of the Lofoten Act of 1857.[701] The revision process first and foremost seems a consequence of continued problems in the fishery that the 1816 Act couldn't solve, notwithstanding a few stable years right after the adoption due to lower participation in the fishery.[702]

The first major challenge, and multi-faced issue, was the strong influence and control the village owner had over the fishery being Superior Supervisor, and over the fishermen, providing them accommodation, credit and basic essentials, and thereby creating interdependency relations. As noted above, more land had gone over to private ownership, a process that further intensified with the adaptation of the Act on Beneficiary Estate of

697 According to Solhaug (1983) page 440 the supervision was established in 1852 with six vessels, which was extended to seven the following year.

698 According to Solhaug (1983) page 440 two judges were authorized on the west coast for the fishery season, which was extended to three the following year.

699 The circumstances related to production of herring and trade changed substantially in the 1800s. The harvest operations were separated from the production and as seen there were gradually liberalisation and abolishment of trade privileges. See more on these developments in Elstad (2014).

700 See more on this in Solhaug (1983) page 446.

701 Lov 23. Mai 1857 angaaende Torskefiskeriet i Nordlands Amt og Senjens og Tromsø Fogderi (Lofoten Act 1857).

702 Solhaug (1983) page 109.

1821, which facilitated for sales of lands from the state to the private sector that led to privatization of housing and production facilities, and thereby also control of fixing the prices.[703] It has been reported that there were years when fishermen were exploited due to the dependency of accommodation to participate in the fisheries.[704] Additionally, village owners were more and more directly involved in the trade of fish.[705] As seen, there was a liberal wave influencing trade policies that had opened up for more competition in trade than the previous Bergen and Trondheim control.[706] There was therefore a demand for stronger regulation of the rentals of accommodation and processing facilities.[707] This led to a law amendment in 1827 of the Lofoten Act 1816 back to the system with price regulation that was included in Lofoten Regulations 1786, but apparently this did not have the desired price dampening effect.[708] The second main challenge was related to conflicts on the actual fish grounds. This was not to escalate until around 1840.[709] Especially there was reported an increased demand to be based in the fishing villages in the eastern parts of Lofoten that were

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703 Solhaug (1983) page 108. According to Solhaug the authorities by this left the principle to secure the fishing villages as public property to the best for the fishermen and there was a prominent liberal influence in the time period. At the same time Solhaug has pointed out that this Act didn't represent a turning point, but facilitated for development in this direction. Solhaug (1983) page 90.

704 The character of such exploitation is, however, a highly debated topic with many nuances. See for example Solhaug (1983) page 108–124; Løseth (2014) page 522–529; Hartviksen (1988); Coldevin (1938) page 77–78; O. No. 2 (1856) page 67. As the rents in some cases were paid by fish, the price fluctuation would influence what was actually paid. There was also competition from visiting buyers that bought raw fish for production of salted and dried fish that reduced the need for stockfish drying facilities on land. It has also been pointed out that local merchants provided credit to poor fishermen that had lost credit from Bergen merchants.

705 Solhaug (1983) page 120. They were, however, not so involved with the actual harvest operations. Løseth (2014) page 509. It is important to mention that historians highlight differences between the Lofoten region and areas on the northwest coast (Nordmøre and Trøndelag especially), as there were more buyers in Lofoten that competed with local owners/merchants. On the northwest coast the village owner had strong control over land and the trade and the credit system, and the fishing population was obligated to sell the fish to this owner, through a pre-emptive right of buying, later a duty to sell to this owner. See more on this in Løseth (2014) page 523–524

706 There were also important developments in infrastructure along the coast that would influence developments in the coming years, including construction of lighthouses, mail, telegraph and public transportation. See more in Løseth (2014) page 311.

707 Solhaug (1983) page 109.

708 Lov 4. august 1827 Indeholdende nærmere Bestemmelser i Loven af 1. Juli 1816 om Fiskeriet i Lofoden (Lofoten Act 1827). See more on this process in Solhaug (1983) page 109–112.

709 Solhaug (1983) page 126.

more favourable for fishing in this time period, and with fewer risks connected to operations at sea.[710] Fishermen were therefore competing for fishing grounds in these particular areas. Although there were rules of conduct in the Lofoten Act 1816, there were reports that enforcement wasn't functioning as intended and that there were complaints of abuse and disorder.[711]

At first a commission was appointed in May 1840 to examine the legislation, but the report submitted March 3, 1842 was not pursued by the government after a round of hearings as the work was regarded as insufficient, and it was later thought expedient to gain experience from the application of the Spring Herring Act 1851.[712] There were carried out later investigations of the Lofoten fisheries in the period 1851–1853 by appointed experts, including former Lieutenant in the navy, Ketil Motzfeldt, who at that point was the public supervisor of the spring herring fishery. These efforts were, however, also regarded as inadequate by the government.[713] In 1854–1855 a new commission was appointed with a mandate to examine the conditions and propose a new Act for the 1857 Parliament. The commission was chaired by Ketil Motzfeldt and nine other members, including a lawyer, and six merchants and two fishermen from the different regions in the county of Nordland. The work of the Committee formed the basis of the Bill proposition that was submitted to

710 Solhaug (1983) page 127.

711 See for example an overview of the situation in O. No. 2 (1856) page 2.

712 According to Posti (1991) page 29 the space problems were also not so pressing in the following years, which is also reported in Solhaug (1983) page 142. See an overview of the work of the commission in Solhaug (1983) page 112–131. See also more in O. No. 2 (1856) page 3–4. The majority of the 1840-commission came up with a controversial proposal to transfer land back from the private to the public and reduce the power of the village owner. This of course not welcomed by many and not supported by the minority of the commission. Solhaug (1983) page 118 has highlighted that the majority of the commission were to some extent biased, but this process only underlines how persons involved in these processes, in combination with prevailing policies in administration more generally, influence how we regulate fisheries.

713 See more in O. No. 2 (1856) page 6.

the Parliament in 1856.[714] Motzfeldt is highlighted here specifically as he had an influential role in the legislative process, see more below.[715]

The commission report is fully rendered in the proposition and the majority proposal is supported by the Ministry.[716] The two factions[717] of the commission were divided as the proposal represented a substantial *political shift* from the 1816 Act. First, the majority of the commission proposed that there generally should be no gear restrictions and no division of fish grounds between the fishing villages. Second, there should be a specialized public supervision to oversee the fishery with no user participation (neither fishermen, nor village owners). In other words, the village owners would lose influence, the fishermen would not be participating in a supervision and the previous traffic rules to ensure order on the fish grounds were removed from primary legislation.

From a public law perspective, it is expedient to contemplate the changes in the 1857 Act in two ways. First, it appears important for the government to once more affirm that the resources belong to all inhabitants of the country, see chapter 5.4 on the principles referred to in relation to lobster regulation. It is stated in the Bill proposition that "[i]t is a common Presumption in our Country, just like Legislation in any other Country, that the Fishery is

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714 O. No. 2 (1856).

715 This were complex processes which are studied by several historians. See Solhaug (1983) page 140–145 for an extensive overview of the events. A shorter overview is provided in Løseth (2014) page 319–321. The liberalistic ideas and influence of Motzfeldt, and officials in the government, in the proposal is pointed out in several places. Motzfeldt was also appointed chair, and conducted investigations on his own, before the rest of the committee was appointed. At the same time, it is interesting that four of the committee members were members of the Parliament, including Motzfeldt himself, and that there different views between merchants and fishermen in the committee depending on geography and gear types they were associated with. According to the son of Motzfeldt, his father had also been drafting the recommendation by the Industrial Committee in the Parliament. Motzfeldt (1908) page 11.

716 According to Motzfeldt (1908) page 11 it was also Motzfeldt who articulated the Bill proposition of the Ministry. See the argumentation by the different factions in O. No. 2 (1856) page 63–72.

717 7 members in the majority and 3 in the minority.

free for Every one of the Inhabitants of the Country."[718] The Bill proposition is permeated with argumentation in support of, or perhaps more affirming, a state of law with a centralized government with full authority over all aspects of the fishery, and that a concept of *exclusive property rights* to areas at sea for property owners on land had become a widespread fallacy.[719] Looking at the evolution prior to this, and articulations in the proposition, the *social motivation* of securing access to fish for the majority fishing commons and protect them from exploitation by village owners, seems to underpin the main tenets of the new statute. Some of the arguments, and also *fishery specific circumstances* in Lofoten more generally in the time period could deserve renewed and more explicit attention in future legal historical analysis from a legislator perspective.[720]

The whole legal analysis in the proposition itself resembles to discussions on the scope of the regulating authority of the state, of ownership to natural resources and characteristics of property rights and the legal nature of fishing licences in the current state of law. The roles of the public interest have at the same time shifted. Today it is the fishermen which are licence holders on one side, and the commons represented by "the Norwegian society as whole"[721] that represents the tension between fisherman and landowners in the 1800s. The regulatory instrument that impacted access to fisheries, as will be further studied in the following, have also shifted from access to the best (and safest) fish grounds, into a licencing and quota system. As seen in chapter 4.5.2, questions related to ownership and rights to common pool resources (CPRs) are complex and with a diversity of conceptualizations and

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718 O. No. 2 (1856) page 37. According to Sunde this it marked a de facto return to the principle of a free fishery introduced in 1728, see for example Sunde (2009) page 7 and 12. Norwegian wording: "Det er en almindelig Forutsætning i vort Lands ligesom vel ogsaa i alle andre Landes Lovgivning at Fisket paa havet er frit for Alle og Enhver af Landes Indvaanere."

719 A customary right for fishermen to stay in a fishing village, and pay reasonable rents, is at the same time acknowledged. O. No. 2 (1856) page 32–33. The rights of landowners in fishery *from* land with seine (or similar) is also acknowledged. O. No. 2 (1856) 37.

720 Especially the role of long lines and nets in relation to traditional fisheries with hand lines as these gear types were fairly new in 1816 and had caused controversy and been challenged since they emerged. See more of the circumstances referred to by the government in O. No. 2 (1856) page 33–37. Sunde (2009) page 11 has emphasized that there is material that suggest the authorities, and Motzfeldt, had recognized customary rights in the Lofoten fisheries.

721 Marine Resources Act section 2.

terminology that might not always be defined or clear in discourse. To support the argument that the authorities had *not* acknowledged any customary rights to stretches of the sea the Bill proposition from 1856 pointed out that the sales documents when land was purchased by the private person or entity had no mention of such rights, and that, to the contrary, was set out as a condition that the buyer was "subject to endure all Curtailments in the Property right, that Legislation on the Fisheries in Lofoten currently or in the Future prescribes."[722]

In this quote we see a parallel to the wording of section 4(3) of the Participation Act that a commercial licence only gives right to harvest in accordance with provisions that at any time are laid down for fisheries in the Participation Act and the Marine Resources Act. How a court would have viewed the scope of the conditions referred to in 1856 is at the same time another question that the thesis has not pursued from a legal historical perspective. As will be demonstrated more in part 4, the regulatory scope of the state in relation to licencing regimes in commercial fisheries is a central topic in current jurisprudence and something that is important to reflect on in this thesis. Suffice to say for now, these principal issues from the Lofoten fisheries in the 1800s illustrates the legislator's dilemma of balancing more or less conflicting interests, as sell as the pivotal role of public interest in legislating for commercial fisheries.[723] The examples also illustrate that the boundaries between private and public law are blurry and difficult to grasp, which often is amplified by the peculiar and flux character of the fisheries and ownerless ocean areas, which does not always resonate well with conventional law.

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[722] O. No. 2 (1856) page 37. Norwegian wording: "være forpliktet til at taale alle de Indskrænkninger i Eiendomsfriheden, som Lovene om Fiskeriet i Lofoten nu eller i Fremtiden maatte tilsige."

[723] The use of a narrative in the historical legal sources investigated is also worth pointing out, and is obviously an element of historical research generally, but with a particular significance when used as an element in legislative processes. In O. No. 2 (1856) there was for example strong wording used when outlining the relations between landowners and fishermen, and in this way building an argument for the policy change that was proposed. It was for example pointed out that it was "unfortunate" (Norwegian wording "uheldigviis") that land had gone over in private ownership, that landowners "refused fishermen access" (Norwegian wording: "nægtede Fiskerne Adgang") to set up old housing, that they had taken more control of the fisheries that prescribed in the legislation. O. No. 2 (1856) page 2.

Second, the Lofoten 1857 Act represented a shift in *management and enforcement strategies*, including an introduction of *gear flexibility* and *efficiency considerations* more explicitly. On the use of gear, it was stated in the Bill proposition that "[t]he Majority of the Commission assumes that it should not, however, be of concern for the Legislation, whether the use of a gear type for the Individual is beneficial or not."[724] The majority by this quote, and generally in the proposal, emphasized that the legislation should facilitate flexibility so that fishermen could conduct the harvest operations as they found most profitable or expedient.[725] These are ideas that can be recognized in the current state of law, where there are several annual regulations that provide for gear flexibility.[726] Today it is often argued that the companies are the closest to knowing how to operate their business, and that gear flexibility therefore could contribute to increased profits. In a recent read green paper on competitiveness in the seafood industry it was stated:

> There has in some cases in the last few years been introduced a larger degree of gear flexibility within and between the different groups. Therefore, the individual fishermen can to a larger degree choose the gear types that give best economic result. However, it is possible that even more removal of restrictions can contribute to a more rational fishery and increased profitability in parts of the industry.[727]

To compare to the state in the time of the adoption the Lofoten 1857 Act, there was a statement from the majority of the commission rendered in the Bill proposition which set out that one should:

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[724] O. No. 2 (1856) page 30. Norwegian wording: "Nærværende Kommisjons Pluralitet antager imidlertid ikke, at det bør være Lovgivningens vedkommende, hvorvidt det for den Enkelte lønner seg at bruge et vist Redskab eller ikke."

[725] See for example O. No. 2 (1856) page 66.

[726] See for example forskrift 18. desember 2020 nr. 3024 om regulering av fisket etter makrell i 2021 (Mackerel Regulations 2021) section 14.

[727] Meld. St. 10 (2015–2016) En konkurransekraftig sjømatindustri page 40. Norwegian wording: "I noen tilfeller er det i de senere årene innført større grad av redskapsfleksibilitet i og mellom de ulike gruppene. Dermed kan den enkelte fisker i større grad selv kan velge de fiskeredskaper som gir best økonomisk resultat. Det kan likevel være at en ytterligere oppmyking kan bidra til et mer rasjonelt fiske og økt lønnsomhet i deler av næringen."

> not move away from a common Rule, that the provisions of the Legislation should be as few and intrusive in the Business of the Individual Man as possible, while securing necessary Safety for Others, on the other Side, however, proper funding to ensure compliance of these Provisions must be given.[728]

On this basis, the commission proposed rules that abolished the system of separation of fish grounds and only the rules that were "regarded absolutely necessary, so that these Fisheries can be conducted with Advantage"[729] and in which there was "secured a Supervision, that could ensure that the Dignity between Men is maintained"[730] and that this supervision would "regularly appear on the common fish grounds, under which Presence secure compliance to the Fish-Regulations and investigate Frauds, which occur under their Absence, and after Circumstances contribute to the Infringements prosecuted in Courts."[731]

The idea was therefore that a more liberal fishery would be more socio-economically profitable and promote innovation and progress, than a restricted one, which also resonates with the ideas of the current state of law rendered above.[732] The shift in policies was influenced by the liberal policies prevailing in legislation more generally at that time. The system was at the same time depending on an effective and forceful supervision. As will be demonstrated, the high expectations of what a public supervision could achieve was not met when the statute was implemented in practice. It is at the same time important to point out that some authority was conferred to the executive branch to regulate and restrict the fishery

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728 O. No. 2 (1856) page 70. Norwegian wording: "ikke at fjerne sig fra den almindelige Regel, at Lovgivningens bestemmelser bør være saa faatallige og saa lidet inngripende i den endkelte Mands Bedrift, som det kan bestaae med behørig Sikkerhed for Andre, men at der paa den anden Side bør give midler til, at disse Lov-Bestemmelser vedbørligen kunne overholdes."

729 O. No. 2 (1856) page 70. Norwegian wording: "maatte anses uomgjængelig fornødne, for at disse Fiskerier kunne drives med Fordeel."

730 O. No. 2 (1856) page 70. Norwegian wording: "sikrende et Opsyn, der kan paasee, at den Skikkelighed finder Sted Mand og Mand imellem."

731 O. No. 2 (1856) page 70. Norwegian wording: "have jevnlig at indfinde sig paa de almindelige Fiskepladse, under sin Nærværelse dersteds at overholde Fiskeri-Forskrifterne, at undersøge Misligheder, passerede under dets Fraværelse, og efter Omstændighederne foranledige de begaaede Forseelser bragte for Domstolene."

732 See especially O. No. 2 (1856) page 68–72.

through regulations.[733] The Act was therefore moving in the direction of delegating authorities and limiting the use of rigid provisions in primary legislation also when it came to rules to secure order at fish grounds.[734] The loosening of gear restrictions and introduction of more competitiveness in the Lofoten fisheries would, however, prove premature for the Lofoten fishery.

5.8 Introduction of self-governance and establishing specialized fisheries administration

5.8.1 Delegation of rule-making authority to fishermen

Considering the historical developments, diverse user groups and interests, and complex issues at hand in the Lofoten fisheries, it could not have come as a big surprise that the Lofoten 1857 Act didn't remedy the continued problems and controversies in the fisheries in respect to secure order at sea. In retrospect, it is easy to point out the lack of industry and local involvement in the legislative process, and the involvement instead of officials with little practical insight into actual fishery operations, as possible explanations. As with the prelude to the 1857 Act, there was a long series of events that led to a new statute on the Lofoten fisheries in 1897, which also was accompanied with one statute that applied to the rest of the county of Nordland and Troms and one statute that applied for the county of Finnmark.[735]

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733 Pursuant to section 11 of the Lofoten Act 1857 the local authorities could for example restrict the use of gear types in certain areas of the fish grounds, where no other gear types could be prohibited to fish. This discretion was at the same time to be exercised after consulting with knowledgeable fishermen and local persons. O. No. 2 (1856) page 71.

734 At the same time, it was meant only to apply for a short time and the aim was as unrestricted a fishery as possible. The conferred authority in section 11 was intended only to apply for a shorter time period after the Act would come to force, cf. Indstill. O. NO. 12 (1857) Indstilling fra Committeen for Næringsveiene NO. 1, i Anledning af den kongelige Proposition betræffende Udfærdigelsen af En Lov om Torskefiskeriet i Nordlands Amt og Senjens og Tromsø Fogderi page 64.

735 Lov 6. august 1897 angående Skrefiskeriene i Lofoten (Lofoten Act 1897); lov 3. august 1897 angaaende Fiskerier i Nordlands og Tromsø Amter (Nordland and Troms Fishery Act 1897); lov 3. august 1897 angaaende Saltvandsfisket i Finmarken (Finnmark Fishery Act 1897). In this inquiry the Lofoten Act 1897 will be highlighted. See Strøm Bull (2011) for an overview of the processes that resulted in the Finnmark Fishery Act 1897.

Almost immediately after the Lofoten 1857 Act entered into force it became troublesome and there were over the next decades various proposals from individuals, industry, private members of the Parliament, local authorities and several commissions submitted to the government and Parliament with actions to remedy the situation.[736] Important problems identified included that the few rules of conduct left in the statute weren't working as intended, or were practically impossible to comply to or enforce, and that the public supervision was not forceful enough.[737] There were also reports of fishermen that intentionally violated rules due to the Act's flaws.[738] The authority to separate fish grounds between gear types was apparently practiced only to a limited degree.[739]

Experimental efforts of using seine types in cod fisheries in the period 1859 until 1890 were also affecting the political discourse in this time period. The efforts had varied and limited success, but there was a growing skepticism by other fishermen towards this new use of seine.[740] In March 1890 the most famous effort to fish cod with seine happened in a fjord named Trollfjorden in eastern Lofoten, which is popularly referred to as the "Trollfjord

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736 See an overview on the processes before the third commission was appointed in Lofoten Commission 1893: Indstilling fra den ved Kgl. Res af 12te December 1891 nedsatte kommisjon til utarbeidelse av love om Skreifisket i Lofoten page 8–14. See also Solhaug (1983) page 146–155 for more information on some of the main actors involved in these processes.

737 See for example an overview provided by the fisheries supervisor in the fisheries in Lofoten Commission 1893 18–23. It was for example highlighted that the herring legislation had been a role model in certain respects, but that there were important differences between cod and herring fisheries which made some rules less practicable in the cod fisheries. One difference was the use of seine (as compared to gillnets and longlines) itself, which was easier to protect for each individual owner. Lofoten Commission 1893 page 24. Another difference was that fishing for herring to a larger extent was constantly moving at sea than the gillnet and long-line fisheries. Lofoten Commission 1893 page 27–28.

738 See for example Lofoten Commission 1893 page 21. This was concerning Lofoten Act 1857 sections 17–18, which laid down rules for how to deal with intertwined gear where no owner had showed up. This gear, and any fish in it, were to be kept and reported to the authorities with the potential of claiming a rescue fee. It had, however, apparently become a common practice that the fishermen kept the fish as compensation for their damages. This was to some extent justified by the fact that it was extremely challenging to determine which fish came from which gear, with typically tangled balls of nets and threads.

739 See Lofoten Commission 1893 page 30–41 for more details.

740 See an overview of the events in the period 1859 until 1890 in Oth. Prp. No. 4 (1891) Ang. Udfærdigelse af en Lov indeholdende Tillæg til Lov om Torskefiskeriet i Nordlands Amt og Senjen og Tromsø Fogderi af 23de Mai 1857 page 3–5.

battle." This is an event that has been thoroughly described in historical and fictional works, but the narrative and emphasis on factual circumstances can vary depending on the source.[741] The essence is that a steam vessel (that fished with seine) had cleared the icebound fjord for ice and subsequently blocked the entrance and charged gillnet and longline vessels a fee to enter and access the cod that were numerous inside it. This caused disorder and conflict at the actual incident, but most importantly it led to massive protest and broad political attention to the use of seine in the Lofoten fishery. The Parliament addressed the issue during the spring of 1890, and requested further inquiries and assessment of a prohibition by the Government to be finalized and presented to the Parliament the following year.[742] A general prohibition for the use of seine in the cod fisheries in Lofoten, with certain exemptions, was thereafter laid down in an Act of March 17, 1891.[743]

For this inquiry, there was nothing particularly new to this outcome as prohibitions of gear types were already established in regulatory instruments, and the controversy of new and more competitive gear types had been a recurring problem over centuries. The dimension of the protests, and the evoking of a *broader public attention* in relation to *social and equity considerations* the event led to, is however, important to acknowledge in this inquiry. Additionally, it is worth noticing that the possible effect certain types of seine fishery could have on the spawning process, and by that affecting the size of stock itself, was also acknowledged in the Bill proposition proposing the amendment of legislation, and therefore

741 See for example Posti (1991); Bojer (1977); Johansen (2014b) page 105–109; Sth. Prp. No. 68 (1890) Angaaende et i Troldfjorden under indeværende Aars Lofotfiske foretaget Notstæng af Vinterskrei. It is, however, again apparent how a narrative is used to raise engagement and receive political support. When reading the overview presented to the Parliament in the Bill proposition the story told is a different one with more favourable presentation of the seine industry using steam vessels than some of the other sources. All factual circumstances are not necessarily presented when the incident is described and referred to as a "battle" between the capitalist vessel owners against the common fishermen. This is also pointed out in Solhaug (1983) page 164–166. Obviously, there are nuances to this depending on the perspective, and how many sources are interpreted in retrospect of the events, but it still had an important significance as to evolution of fisheries legislation in Lofoten.

742 See more in Indst. S. No 165 (1890) Indstilling fra Næringskomiteen No 1 angaaende et i Troldfjorden under indeværende Aars Lofotfiske foretaget Notstæng af Vinterskrei.

743 The provisions that were laid down built on the work of a committee that had investigated the issue. See more on the process in Oth. Prp. No. 4 (1891).

arguments in the knowledge base that informed the decision.[744] This is, as far the legal sources investigated goes, the first time *biological considerations* are identified explicitly in relation to a Bill proposal regarding a major, seasonal cod fishery.[745]

Following these events, new steps to find a solution for the 1857 Act were taken in 1891 as a commission was appointed with a mandate to propose new legislation.[746] After a comprehensive process the Lofoten Act 1897 was adopted by the Parliament which had a new regulatory tool in the form of a provision that delegated *authority to the fishermen to regulate* the Lofoten fisheries, which was to be laid down in bylaws.[747] There were also other changes made in the new Act compared to the state of law in the 1857 Act, but most of these represented a shift back to instruments that had been established, although in different forms, in previous legislation. Most important was statutes that set out that fishermen were to elect representatives to a fishery based supervision that would supplement the public supervision by overseeing the fishery at sea, preventing and reporting infringements,

744 See for example Oth. Prp. No. 4 (1891) page 9, 14–15.

745 As to biological considerations, the Saltwater Fishing Act 1869 was in 1888 replaced with a new statute that had all of Norway as ambit, as it was acknowledged necessary to remedy the decline of stationary coastal fish stocks more generally. Lov 28. april 1888 angaaende Indskrænkning i Brugen af Redskaber til Saltvandsfiskeri (Saltwater Fishing Act 1888). The King was therefore authorized to prohibit certain use of gear types and harvest methods in specific times upon request from local authorities. Saltwater Fishing Act section 1.

746 There was also appointed a separate commission to assess fisheries legislation in Finnmark. At some point it was considered whether one common statute for all areas should be developed, but it was not pursued due to the particularities and contextual differences. It was at the same time highlighted that it was desirable that all sets of legislation would be based on the same principles. The commission was also chaired by the same person and a group of three that participated in all processes. A proposal for the Lofoten fishery was to be developed first and this set of legislation is used showing legal developments in this inquiry. See more on the formal arrangements in Oth. Prp. NO. 23 (1896) Om Udfærdigelse a en Lov ang. Skreifiskeriene i Lofoten page 1-2; Lofoten Commission 1893 page 1–4. The process regarding Finnmark fishery is thoroughly investigated in Strøm Bull (2011).

747 The main principles in the proposal by the committee are found in the new Act, although with modifications and some issues that were taken out of the final Bill recommendation, both by assessments made by the cabinet and in different stages of processing in the Parliament.

potentially being appointed as lay judges in civil lawsuits and assisting public officials in informally solving disputes.[748]

The Act laid down procedures of election of fishermen supervisor[749] that constituted the fishery supervision, one for every ten gillnet and long-line boats, and one for every twenty handline boats.[750] After the overseers were elected, there was an election of a fishing committee[751] (of four overseers in every supervisory district that would be the body that would adopt local rules of conduct.[752] Additionally, the fishing committee could make exemptions from the general prohibition on seine fishery that was continued from the 1891 rule in the Act.[753] Two of the elected committee members had to be longliners and two had to be gillnet fishermen. To chair each fishing committee the King appointed an independent person that would be the fifth member of the committee, and that had a decisive vote when needed.[754]

Neither the Ministry nor the Industrial Committee in the Parliament, and most local authorities and fisheries officials in hearing processes, expressed much enthusiasm for the main principles in the new Act. It had more the character of a solution of last resort due to lack of other alternatives, and that this way of regulation at least could be tried out.[755] Some also expressed worry that this delegated authority could hinder the development of new

748 Lofoten Act 1897 sections 10, 38 and 39. This was inspired by the use of informal arrangements in a fishery on the northwest coast of Sunnmøre, laid down in rules in Lov 6. juni 1878 angaaende Vaartorskefiskeriet ved Søndmøres Kyster .The Lofoten Commission 1893 had for example visited this area to observe that legislation in function.

749 In Norwegian these were referred to as "tilsynsmenn."

750 See the procedures for the elections in Lofoten Act 1897 section 8. The scope of the authority of the committee is set out in section 16, including establishing separation of grounds between gear types.

751 In Norwegian referred to as "utvalg."

752 The Supervisory districts were established pursuant to section 5, and the election procedures were laid down in section 11. The scope of the authority was laid down in section 16.

753 Lofoten Act 1897 section 17.

754 Lofoten Act 1897 section 14.

755 See for example Oth. Prp. NO. 23 (1896) page 8–10, 35–36; Indst. O. XVI (1896) Indstilling fra Næringskomiteen NO. 1 angaaende Udfærdigelse af en Lov angaaende Skrefiskeriene i Lofoten page 4.

gear types.[756] At the same time, the usefulness of practical and local knowledge of fishermen in the conduct of the fisheries, and the broad industry support of the new principles, was acknowledged in the Lofoten Commission 1893 report, the Bill proposition and Parliament committee recommendations.[757] It was not regarded as necessary to lay down any rules regulating prices for rentals of accommodation and production facilities.[758] With the new statute, the fishermen were thus delegated authority to lay down rules of conduct in the fishery, and to oversee that the rules were followed. In this way, a large degree of *self-governance* was conferred to the industry. The new principle of rulemaking authority in the new statute would prove justified as they have remained, although modified and with less significance, up to the present time.[759]

5.8.2 The Finnmark Act 1897 and nationality and crew rules

The statutes for the Finnmark region and Troms and Nordland were generally building on the same principles as the Lofoten 1897 Act. In the Finnmark Fishery Act 1897 there was, however, inclusion of several provisions that set out principles found in current *participation rules*. As seen in chapter 5.5.2, there were rules for Russian fisheries laid down in legislation and rights for fishing and hunting for Finnish Sámi individuals through the Lappekodisillen. For the latter, geopolitical circumstances would change the state of law when the Finnish areas came under Russian rule from 1809 and border jurisdictions and agreements were renegotiated over the coming decades.[760]

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[756] See for example Oth. Prp. NO. 23 (1896) page 9.

[757] The issue of trust and legitimacy is not explicitly articulated in the official documents, although mentioned and underscored by the head of the public supervision in a statement in the bill process. Lofoten Commission 1893 page 18, but still seem to underpin the final result more generally. See Jentoft and Kristoffersen (1989) for an analysis of the system historically and up until 1989 context.

[758] The Lofoten Commission 1893 for example pointed out that the relations between fishermen and village owners after the 1857 Act came into force had been satisfying, but as a precautionary measure it proposed that the state bought back villages around Lofoten where fishermen could establish accommodation at their own expenses. The conditions and strong position of the village owners in the areas of Fosen and Nordmøre on the west coast was not desirable. The Ministry did, however, find these measures necessary at that point and expressed that regulatory measures could be laid down in future if necessary. See more in Lofoten Commission 1893 page 66–69; Oth. Prp. NO. 23 (1896) page 78–79.

[759] See Marine Resources Act sections 32–33.

[760] See an overview in Finnmark Fishery Commission 1894 page 60–69. The events are also referred to in Strøm Bull (2011) page 72–77.

These are complex matters this thesis cannot pursue, but most importantly for the Finnish participation in marine fisheries in Finnmark was the closure of the border in 1852 which ended the reciprocal hunting and fishing rights, and the Finnish were no longer allowed to fish in Finnmark.[761] This was set out in section 5 of the Reindeer Grazing Act 1854.[762] The rule was, however, difficult to enforce, and as a consequence was modified in 1869 to allow foreign individuals to participate as employers on Norwegian vessels upon an annual fee prescribed by the King.[763] Shortly after these amendments the question of whether the captain had to be a Norwegian, and whether all crew members on a vessel could be foreigners, was raised. After temporary clarifications in regulations, these were some of several issues that found their solution in the Finnmark Fishery Act 1897.

Section 1 laid down that only Norwegian vessels and citizens were allowed to fish in the territorial sea.[764] Section 2 furthermore set out that the understanding of "Norwegian vessels" in section 1 was that the vessel was exclusively owned by Norwegian citizens.[765] This is the first traces observed of a nationality requirement to own fishing vessels in fisheries legislation that is currently regulated in Participation Act section 5.[766] Furthermore, it was clarified under section 45 that a Norwegian citizen could hire a foreigner as a crew member for a fee for each crew member, and that at least half of the crew (or one if it was a three-

761 See for example Oth. Prp. No. 21 (1897) Om Udfærdigelse af en Lov angaaende Saltvandsfisket i Finmarken page 27–28.

762 Lov 7. september 1854 indeholdende Bestemmelser med Hensyn til Benyttelsen af visse Strækninger i Finmarken til Reenbete og til Bevogting af Reenhjorde m.v. (Reindeer Grazing Act 1854).

763 Oth. Prp. No. 21 (1897) page 28.

764 It was codified although it could be regarded as superfluous, as this was established under international law. Oth. Prp. No. 21 (1897) page 3.

765 This was also corresponding to Norwegian maritime legislation more generally at that time. Oth. Prp. No. 21 (1897) page 3.

766 There were indications of use of pro forma arrangements to circumvent the nationality requirement in this time period in the form of a foreigner selling the vessels to a Norwegian trader at the start of the fishery, and buying it back when the fisheries were done. Oth. Prp. No. 21 (1897) page 28. The use of pro forma arrangements to circumvent participation rules have also been occurring in different ways in a modern context, see for example the practice of buying and selling vessels to transfer quotas that led to amendments of legislation 2015 in chapter 8.4.2.

man vessel) had to be Norwegian citizens. It was lastly set out in section 46 that the right of Norwegian citizens under sections 1 and 45 would also apply to a foreigner that had resided in Norway the last 12 months. As seen in chapter 3.6.2, these rules are similarly predecessors to the rights of foreigners residing in Norway to own vessels under 15 meters under section 5(1) and resident requirement for crew members and the captain under section 5a of the Participation Act. Foreign involvement would also come under continued attention entering the next century with a burgeoning of motorized vessels and trawlers appearing on Norwegian coast.[767] This will be further addressed after an introduction of important institutional and organizational developments at the eve of the century.

5.9 Establishment of fisheries administration and industry organizations

As outlined, several administrative functions in the form of appointing public supervision to oversee fisheries and sporadic use of marine research as input to various legislative processes had evolved in the 1800s. Due to the importance of fisheries not only for the coastal population, but for the national economy, the government also had increased efforts to gain knowledge of what was being fished, produced and exported in a more systemized way, to gain insights into how to make the business more profitable. The collection of annual statistics especially intensified in the second half of the 1800s.[768] From 1860 the marine research was also further formalized and strengthened through annual funding over the state budget.[769]

Private initiatives with the aim of further developing and promoting the fisheries were also taken. In 1879 a company named *Selskabet for de norske Fiskeriers Fremme* was established in the city of Bergen, with subsequent establishment of subdivisions in other cities along the coast.[770] These organizations would also provide important input to legislative processes

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767 In the 1890s the first vessels with motorized engines were tested. See more on the transition from early pioneering to implementation in fisheries in Johansen (2014b). The innovation of new and more effective gear types also continued.

768 Solhaug (1983) 145; Schwach (2000) page 47.

769 See more on the early efforts in Schwach (2000).

770 See more in Anonymous (1929) page 26–27. An overview of the history of fishery organizations and cooperatives in Norwegian fisheries is found in Hallenstvedt (1982).

and were predecessors to the fishermen associations that would become strong political influences on the evolution of fisheries legislation in the next century.[771] In the first years of the organizations, several of the divisions pursued the establishment of a fisheries administration with a fisheries director.[772] The efforts proved fruitful. A more formalized fisheries administration came in the form of two permanent public inspectors with different geographical scope (one in the south and one in the north) in 1887, and in 1898 a unit for fisheries matters was established in the Ministry of Interior Affairs, which was the responsible for fisheries matters at that time.[773]

In 1899 the Parliament granted money to a government appointed committee that investigated and came up with recommendations to how the administration of fisheries should be organized for the future.[774] This process led to the establishment of *den Norske Fiskeristyrelsen*, a subordinate to the Ministry, in the city of Bergen in 1900, which a few years later would become the Fisheries Directorate headed by a Fisheries Director.[775] Both enforcement and marine research were responsibilities of the Directorate at this point, and activities within the latter area would be substantially expanded in the following years.[776] By this, an advisory and executive body was established which would further create *a specialized expertise* and *a niche of fisheries management*, and which would play an important role in the evolution of fisheries legislation in the next century. The establishment

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771 An example of legislative input to the legislative process of the Lofoten Act 1897 was a report made by *Nordland Fiskeriforening* in 1886 which proposed law amendments of the Lofoten 1857 Act, see more on this in Lofoten Commission 1893 page 13.

772 See for example Hallenstvedt (1982) page 20–21.

773 See more on this in Johansen (2014b) page 24–25; Hallenstvedt (1982) page 21.

774 This is referred to in Indst. S. XVII (1899/1900) Indstilling fra næringskomiteen nr. 1 angaaende bevilgning til foranstaltninger vedkommende saltvandsfiskeriene, which also further outlined the recommendations of the committee.

775 There is a lot to say about this process and involved persons, which involved strong opinions on where to localize the administration and how it should be organized. See more in Schwach (2000) 91-99; Johansen (2014a) page 24–30.

776 To have an administration with practical and scientific expertise was an element of a governmental strategy to reform the fisheries industry. Schwach (2000) page 91. The Norwegian Institute of Marine Research (IMR) became a separate unit from the Fisheries Directorate in 1989. In Norwegian it is referred to as "Havforskningsinstituttet."

of ICES in 1902 was also an event that, as will be shown in the next chapter, would become an important influence in the evolution of domestic legislation post-World War II (WWII).[777] As seen in this chapter, many key components of the current regulatory system in the form of rules of conduct, the use of conferred authorities to establish more specific curtailments in a fishery based on local conditions (and biological knowledge) and mix of enforcement strategies between with shared responsibilities between the public and the industry had been established after a gradual evolution over the centuries. Especially the period between the mid 1700s up to the late 1800s was eventful. It could also be seen as the establishment of the main structures of the current fisheries legislation.

6 Fisheries legislation into the age of engines, automatization and electrification (1900 – 1960s)

6.1 Market crisis, instability and social considerations

6.1.1 Emergence of a trawling industry

The arrival of a new century therefore marked the advent of a new fisheries governance era in many aspects. The Lofoten fisheries had at that point found a structure that would sustain in the years to come. There had also been some developments in the herring fisheries, with the emergence of a new fishery in the north.[778] This had catalyzed adoption of new herring legislation, which was based on much of the same principles as the Spring Herring Act.[779]

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777 See more on the evolution of ICES in Griffith (1999).

778 This was fishing on a type of herring referred to as big herring, and later fat herring, in contrast to the fishing on the spring herring on the southwest coast. See an explanation of different stocks of herring in footnote 562 above.

779 This was the lov 26. juni 1893 om Sildefiskerierne (Herring Act 1893), building on a previous statute, but now also with provisions of supervision and administration of justice that the Spring Herring Act 1851 had, see more in Indst. O. IX. (1892) Indstilling fra Næringskomiteen No 1 angaaende Udfærdigelse af en Lov om Sildefiskerierne. As an intriguing side observation on pelagic species in that time period, it can be mentioned that it was proposed in a Private Member proposal to the Parliament to prohibit harvest on *bluefin tuna* in 1893. This was not due to biological considerations, or that the harvest methods were far from the animal welfare standards of today (with a harpoon from land so that the tuna would often get away wounded), but that the killing hindered the tuna chasing sprat into fjords, so that the emerging sprat fisheries would be most beneficial. At this point bluefin tuna was only used to feed pig, and was therefore a resource of low value, which is fascinating in light of the sky-high prices paid for these scarce resources today. The proposal was not pursued. See more in Dokument Nr. 65 (1893) Forslag til Lov om Fredning af Sildestørje.

In context to the scope of this inquiry, however, it was the emergence of *trawling technology* at the turn of the century that foreshadowed *new regulatory innovations* that would come a few decades later. The first efforts of Norwegian trawling in this time period were not successful, but the British had come further in the development and had started appearing with steam trawlers on the Norwegian coast outside the areas of Finnmark.[780] As noted in chapter 5.8.2, only Norwegian vessels could fish in the territorial seas, but several British vessels were registered under the Norwegian flag and it was feared that these would fish closer to shore.[781]

This, in combination with fishermen's complaints towards trawling, the desire to prevent gear conflicts and some biological concern for especially stationary fish stocks, led to a prohibition of the use of trawlers in territorial waters in 1908.[782] The adoption of the statute did not in itself represent a legal innovation as gear curtailments had been widely used for various reasons for many years, but it was a precursor of the first *access regulations* that would evolve after a few decades of market developments and volatile times that would bring the *social dimension* even more explicitly at the fore of the regulatory developments.

The Trawler Act 1908 built on Icelandic trawling legislation from 1898 (with additions of 1902), and by that marked the first explicit reference to use of a *legal transplant* from another jurisdiction identified in the studied material.[783] It also set out a rule that the vessel master could be liable for violations by crew members, which is also the first liability rule of

780 See for example Johansen (2014b) page 128–129; Strøm Bull (2011) page 92.

781 Johansen (2014b) page 129; Ot. prp. nr. 18 (1908) Angaaende utfærdigelse av en lov om forbud mot fiskeri med bundslæpenot (Trawler Act 1908) page 3. In addition to a codification of the prohibition in territorial waters outside of the Finnmark coast in Finnmark 1897 Act, a general prohibition for non-Norwegian vessels to fish in territorial waters was laid down in Lov 2. juni 1906 om forbud mod utlændingers fiskeri paa norsk sjøterritorium m. v. (Fisheries Prohibition Act 1906) in 1906.

782 Lov 13. mai 1908 om forbud mot fiskeri med bundslæpenot (Trawler Act 1908). See more on the process leading to the adoption of the statute in Strøm Bull (2011) page 92–98.

783 Ot. prp. nr. 18 (1908) page 4; Ot. prp. nr. 39 (1925) Om lov om forbud mot fiske med bunnslepenot (trål) page 3

this content identified in the material.[784]The adoption also marked the precursor of the first provision identified in fisheries legislation authorizing *sentencing to imprisonment* for law infringements when the statute was revised in 1925.[785] Prior to these there had been reports of illegal trawling outside the coast of Finnmark with requests for stricter punishment for these violations as the trawling was reported to impact the population highly negatively.[786] Also in this respect inspired by the Icelandic trawling legislation, the Ministry proposed to authorize sentencing to imprisonment up to six months in cases of repeated offences and severe infringements.[787]

6.1.2 Market crisis and state intervention in first-hand sales

As seen above, trade had been liberalized towards the end of the 1800s. New technology for production and offshore fisheries (bank fisheries) had also emerged and opened for new fishing opportunities and markets.[788] New *canning technology* opened up for sprat fisheries and export of canned sprat to new markets in US, Canada, UK, Australia and South Africa. Low quality herring would find new use with the development of *fish oil and flour production* and a growth of plants along the coast. Also, sales of *fresh* herring, halibut and cod had emerged with UK as the main market, although traditional dried and salted fish products remained important products to Spain, Portugal, Germany and Italy.

Prior to World War I (WWI), sales and trade were favourable as prices were good and there were few trade restrictions. WWI would, however, reverse the situation and impact the open Norwegian economy with about 80–90 % of the quantities of harvested fish going to export.[789] Sales of fish became an element of war policies as the UK wanted to restrict the crucial supplies to Germany, which was a market for Norwegian fish products. I will not go into details of a long chain of informal and formal events in the period 1915–1917, but Norway, through an industry organisation, made an agreement with the British cabinet in

784 Trawler Act1908 section 4.

785 Lov om forbud mot fiske med bunnslepenot (trål) (Trawler Act 1925) section 4(2).

786 Ot. prp. nr. 39 (1925) page 1.

787 Ot. prp. nr. 39 (1925) page 2.

788 See more on these developments in Johansen, Hovland and Haaland (2014).

789 Hovland and Haaland (2014) page 191.

1916 to facilitate exports that would prove consequential.[790] Only 15 % of the fish could be sold to Germany and allies, and the remaining sales to the British were based on a fixed price. During the circumstances, however, the British at one point stopped buying the fish, which resulted in an accumulation of large stocks of herring that couldn't be sold. This was hard for the fishermen and buyers, who also had not been able to adjust the fixed price that was lower than the market. To try remedy the situation the Norwegian state came in as buyer and guaranteed to pay a *minimum price* to the fishermen that would match the fixed prices in the agreement with the British.[791] The use of guaranteed prices and state purchase of fish would only last for a few years, but it was an indication of what would come few years later when the arrangement of *minimum prices* to ordinary buyers soon became an element of all sales.

The 1920s would continue to be volatile years due to general unease in the world, currency chaos, competition from other countries with resources and other circumstances which affected the market situation and prices to fishermen (which amounted to almost 100 000 persons) negatively.[792] There was also an organizational wave in the fisheries sector during these times. In 1926 the largest association of today, the Norwegian fisherman Association, was established. It would be an important influence in developing fisheries policies more generally in the years to come.[793] There was, however, also a growing acknowledgement of the need to further regulate sales through coordinated measures within the different parts of the industry in an attempt to stabilize the supply, and thereby also prices, but there was

[790] Hovland and Haaland (2014) has outlined the events, which the following builds on. The Norwegian cabinet tacitly approved the agreement as it did not want to be a formal party to the agreement with the British government.

[791] The situation and proposal were presented to the Parliament in St. prp. nr. 214 (1917) Om ekstraordinære foranstaltninger til fiskerienenes fremme.

[792] See an overview of the market developments for various products in Hovland (2014a). See also Christensen and Hallenstvedt (1990) page 13–19 for a description of the various factors that led to challenges for the fishing industries and Finstad (2005) page 30–31on the social circumstances in the northernmost areas.

[793] Hallenstvedt (1982) addresses the evolution of a diversity of associations in Norwegian fisheries. The history of the Norwegian Fisherman Association is described in more detail in Christensen and Hallenstvedt (2005).

no consensus as to where in the value chain regulations should be implemented.[794] The first efforts in this direction came from the harvester side of the herring fisheries, with the establishment of the herring fish sales organization *Storsildlaget* in Ålesund in December 1927, with the aim of regulating all sales of big herring. The first set of regulations were tested in January 1928.[795] To become successful the regulations needed both to be respected among members of the sales organization, and to be accepted by buyers, producers and exporters. As the first catches were taken January 13, no buyers showed interest for the price the cooperative required (16 NOK per unit). The cooperative then assigned vessels to deliver the fish at plants for oil and meal production at a much lower price (5, 5 NOK per unit). The members loyally followed the instructions, and no members were tempted to accept offers from other buyers of 14 NOK per unit (which was close to the required price). The buyers finally accepted the prices set out by the cooperative, and sales were conducted. Through these arrangements we can see the first sign of the upcoming *new epoch* of the *fishermen dictating the terms of sales*.

As the herring fisheries were diverse, soon other sales organizations were created. This caused friction, collaborative challenges and risk of member losses that would disturb the foundations of the system. The idea of formalization through a *legal requirement of sales* through government-approved sales organizations therefore arose and gained support. After provisional regulations first were approved by the King in December 1929, a temporary Act on the export of big herring and small herring was adopted in 1930.[796] The main rule set out that the King could lay down a prohibition to export the herring unless it was sold through a Ministry approved-organization.[797] In the Bill proposition it was highlighted that the voluntary measures were not enough to secure regulation.[798] Another statement from the Bill proposition clearly articulated the actual challenge and main

794 Hovland (2014a) page 225–226.

795 These establishments, the first regulations and early events are thoroughly described in Fjørtoft (1947), which is referred to in Hovland (2014a) page 226–227. The following is based on these accounts.

796 Lov 5. mars 1930 Midlertidig lov om utførsel av storsild og vårsild (Herring Export Act 1930).

797 Herring Export Act secction 1.

798 Ot.prp. nr. 7 (1930) Om utferdigelse av en midlertidig lov om utførsel av storsild og vårsild page 1.

motivation for regulating the sales with "[s]uch an overfilling of the markets, with subsequent price fall – it is in the nature of the case – with the uneven fishery and the need for immediate sales that is inevitable, unless the overall sales are organized."[799]

This quote demonstrates how the nature of harvest can be unpredictable, but that the fishermen still have a rather immediate need to sell the fish once it is harvested. There were members of the Parliament who were not in favour of forcing actors to organize, lamenting ideological opposition to a "state monopoly" and highlighting the importance of free markets. One of the opponents was not principally rejecting any regulation, however, and stated during the Parliament discussions:

[799] Ot.prp. nr. 7 (1930) page 1. Norwegian wording: "En sådan overfylling av markedene med påfølgende prisfall kan – det ligger i sakens natur – med det ujevne fiske og varens krav på øieblikkelig omsetning ikke undgåes, medmindre den samlede omsetning organiseres."

> I am on the other hand not that adamant that I cannot admit that there occasionally can be circumstances that call for a state regulator. In this case, however, I see no need or desire for it, on the contrary. The Ministry itself has highlighted in the proposal, that there is no doubt that the more stable and better prices achieved last year was a result of the then existing voluntary fisheries organizations under collaboration with associations of businesses, and that both these organizations conducted a significant work both by regulating supply and distribute the catches in the most beneficial way.[800]

6.1.3 Permanent institutionalization of first-hand sales of fish

Towards the end of the interwar period action was taken at different levels to deal with the critical situation for the overall fisheries, and the state of affairs were complex.[801] The temporary regulations of herring sales laid down in 1930 were continued temporarily up through the 1930s, but there was no resolution to the challenging conditions in the cod fisheries.[802] In 1932, a temporarily statute was laid down that authorized the King to prohibit export of salted and dried fish unless conducted through and approved by an organization of exporters.[803] By this, the exporters were given the tools to collaborate and regulate the trade, in contrast to the herring fisheries where the harvesters were the regulators. To assess the state of the fisheries more broadly the Parliament in 1934 appointed a commission to examine how to increase the profitability in the fisheries sector through eight reports in the

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800 Forhandlinger Odelstinget (1930) page 328. Norwegian wording: "Jeg er naturligvis på den annen side ikke så stivbent, at jeg ikke kan innrømme at forholdene kan ligge således an, at en regulator må settes inn også fra statens side. Men i nærværende sak ser jeg ingen nødvendighet og ingen ønskelighet derfor, tvertom. Departementet sier således selv i sitt forelegg, at der ingen tvil er om at de jevnere og bedre priser som blev oppnådd i fjor skyldes de da eksisterende frivillige fiskerorganisasjoner under samarbeide med sammenslutninger av forretningsstanden, og at begge disse organisasjoner utførte et betydelig arbeide både ved å regulere tilførslene og fordele fangsten på den fordelaktigste måte."

801 For a through overview of the chain of events, see Christensen and Hallenstvedt (1990) page 29–76.

802 See an overview of the herring measures in the period 1933–1936 in Ot.prp. nr. 1 (1936) Midlertidig lov om utførsel av vintersild

803 Lov 30. juni 1932 om adgang for Kongen til å treffe foranstaltninger til ordning for utførsel av klippfisk

period 1934–1937.[804] Report IV of 1935 addressed the question of organizing first-hand sales.[805] The majority of the commission, that I in the following will refer to as the Raw fish Commission 1935 (report IV), proposed to set out a statutory duty for fishermen participating in the seasonal fisheries to be organized through an organization that would regulate sales. The Minority could not support the coercive element of forcing the fishermen to organize.[806]

During the period of follow-up of the report, the Ministry adopted temporary measures in the form of guaranteed export in combination with fixed minimum prices on firsthand sales to the fishermen in 1936 to support the cod fisheries.[807] There was also appointed another commission in 1937 that were to further investigate how sales in firsthand could be conducted.[808] This Raw Fish Commission 1938 proposed a statute that authorized the King to prohibit production, sales and export of fish or product of all types of fish that was not bought through a Ministry-approved fish sales organization (representing the harvesters). Included in this was also the authorization of the sales organization to unilaterally adopt a minimum prize for the fish.[809] It should, however, be noted that there were only fishermen in the Raw Fish Commission 1938, except for the chair. At the same time the commission saw that support from both buyers and the fishermen to the establishment of a sales organization was a precondition for pursuing the proposal.[810] The commission highlighted

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804 In Norwegian it was named: "Komité til Behandling av Forskjellige Spørsmål vedkommende Fiskeribedriften". The commission was popularly referred to the "Profitability Commission." I will in the following refer to the different inquiries by the different topics that were addressed.

805 Raw Fish Commission 1935: Komité til Behandling av Forskjellige Spørsmål vedkommende Fiskeribedriften: Innstilling IV angående spørsmålet om å organisere omsetningen av råfisk.

806 Raw Fish Commission 1935 page 5–6. The profitability issues were to be submitted in the final and main report in 1937, see more in Profitability Commission 1937: Komité til Behandling av Forskjellige Spørsmål vedkommende Fiskeribedriften: Innstilling VIII om fiskerienes lønnsomhet.

807 See more on the measures in St. prp. nr. 21 (1936) Om foranstaltninger til støtte av torskefiskeriene and Christensen and Hallenstvedt (1990) page 54–55.

808 Raw Fish Commission 1938: Innstilling fra en av Handelsdepartementet nedsatte komité: Innstilling om organisasjon av RÅFISK-OMSETNINGEN.

809 Raw Fish Commission 1938 page 5.

810 Raw Fish Commission 1938 page 5–6.

that the cod fisheries had been characterised by chaos and arbitrariness for years, that the fishermen had no influence on the pricing, which was unilaterally controlled by buyers, and all that parties would benefit from a stable price over a longer period.[811] As to the risk of abuse of power, the commission highlighted that irresponsible behaviour would inevitably afflict the fishermen themselves and that the authorities could intervene if necessary.[812] From a contemporary point of view it is relevant to highlight that the commission discussed the alternative of using a price council with equal representation of fishermen and buyers, and with an independent arbiter appointed by the government. The commission did not, however, support this idea and feared that it would be the more or less indifferent, and perhaps less knowledgeable arbiter, which in effect would fix the price, and that it would necessitate a large control apparatus to enforce prices.[813]

After a hearing, the Ministry submitted a Bill proposition to the Parliament in line with some modifications on the commission proposal.[814] There were many factors and interests playing a part in these developments. As noted, there was an organizational spirit in industrial Norway more generally.[815] The Ministry justified in the Bill proposition that this was just a new step on a path that had started, and that the *nature of the fisheries operations* necessitated quick sales of fish, and that the individual fishermen were practically prevented from spending time on these affairs.[816] The majority of the Parliament supported the Bill, but the one faction (mostly conservatives) opposed both forcing this form of a cooperative system on the industry, and giving the executive branch wide authorities ("carte blanche") to regulate the sales of fish.[817] It is interesting to see how different the opposing positions in the Parliament viewed these questions. The conservative questioned the delegation of authority to the executive *before* the fishermen had addressed the issues themselves, and was

811 Raw Fish Commission 1938 page 4–5.

812 Raw Fish Commission 1938 page 8.

813 Raw Fish Commission 1938 page 5.

814 Ot.prp. nr. 59 (1938) Midlertidig lov om omsetningen av råfisk.

815 Raw Fish Commission 1938 page 3.

816 Ot.prp. nr. 59 (1938) page 4.

817 Forhandlinger Odelstinget (1938) page 584.

not principally opposing a statute on the matter per se.[818] There were also expressed objections to the strong unilateral power for the fishermen and if the whole system would be applicable for whitefish fisheries.[819] A member of the position, on the other hand, expressed the following to the conferring of power and whether approvals of organizations and terms of the sales had to go through the Parliament after fishermen voting:

> It is a carte blanche statute as other carte blanche statutes we have had and have, and with results that have proven satisfactory in many areas. … I think it is less possible that the Parliament at any point, every year if necessary, when the fishermen has voted, should address this question. This is simply an administrative case and with guidelines that are analogue to other statutes and decisions laid down the last few years, and that the administration have dealt with."[820]

This friction of a more constitutional character has a line up to today. At which level should the Parliament be involved politically in the more frequent regulation of the fisheries? In which areas should the Parliament through legislation lay down more precise and detailed rules? What is an "administrative case"? These are questions that at different degrees run through the thesis and will be further reflected on in part IV.

Following the adoption of the new, but still temporary, statute, the Norwegian Raw Fish Sales Organization was established on November 9, 1938. Although not explicitly articulated in Bill documents, it is apparent that the new state of law had been reversed from

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818 See e.g. Forhandlinger Odelstinget (1938) page 584–587.

819 See e.g. statements in Forhandlinger Odelstinget (1938) page 585. The sales in the herring segment had the meal and oil industry as an alternative if it was challenging to sell the fish in other markets. There was not such alternative in the whitefish industry and the products were also of another character.

820 Forhandlinger Odelstinget (1938) page 590. Norwegian wording: "Det er en blancolov som andre blancolover vi har hatt og har, og hvis resultater har vist seg tilfredsstillende på mange områder … Jeg synes nok at det går enda mindre an at Stortinget til enhver tid, for hvert år om så skulde være, når det har vært holdt en avstemning blandt fiskere, skal ta stilling til dette spørsmål. Dette blir rett og slett en administrasjonssak og med retningslinjer analoge med andre lover og vedtak som er gjort de siste år, og som administrasjonen har måttet greie med."

the strong position of the merchants up throughout the centuries.[821] By the new statute it was the harvesting sector that had the unilateral regulating power and it can be viewed as a strengthening of *social considerations* from the fishermen's perspective at that time. It has throughout the years been supported broadly politically, but has, and still raises, controversy. The shift did not, however, stop the state support element of the sales through various measures over the state budget in the crisis years.[822] Post WWII this would, however, transform into new formal channels that will be addressed briefly after the introduction of important legal developments in trawler legislation.

6.2 The first limited entry regulations and ownership of vessels

6.2.1 Introduction of a licencing regime in trawl fisheries

Simultaneously to the developments in the sales of fish, there were other areas of fisheries legislation that underwent scrutiny in the other seven reports by the 1934 appointed commission mentioned above. In report VI the question of Norwegian trawl fishery was addressed, which I will refer to as the Trawler Commission 1935.[823] Similar to the development in the sales of fish the trawling issue was complex, eventful and with many involved interest groups, not to mention the international law impacts on jurisdictional matters, which only will be dealt with briefly here to identify domestic legislative trends.[824] As with the sales of fish and other area of legislation, the sub-reports also had to be seen in relation to the main report submitted in 1937 that broadly assessed how the Norwegian fisheries could become more profitable. As noted, there were from 1908 a general prohibition on trawling within territorial waters for all vessels. The trawling activities

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821 At the same time the Raw fish Commission 1938 pointed out that the old relations and interdependency with a strong village owner were no longer present. This was due to technological developments of vessels and motorization that made the fleet more mobile, less dependent on specific buyers, less depending on weather and with a larger radius to operate within. Raw Fish Commission 1938 page 6.

822 Raw Fish Commission 1938 page 8.

823 Trawler Commission 1935: Komité til Behandling av forskjellige Spørsmål vedkommende Fiskeribedriften: Innstilling VI angående spørsmålet om norsk trålfiske.

824 See Strøm Bull (2011) page 92–110 for a thorough overview of the evens from a legal historical point of view with emphasis on the county of Finnmark. The events are also described more generally in Hovland, Haaland and Svihus (2014).

outside the coast of the county of Troms and Finnmark continued, especially by foreign trawlers, and there were disputes on the jurisdictional borders (of the baseline) and complaints on illegal trawling.[825] To provide for a more effective enforcement, the military supervision was therefore authorized to issue fines for illegal fishing in a law amendment in 1925.[826]

The trawler fishery, however, continued to raise controversy and the situation escalated in conjunction with the difficult market situation in the inter-war years.[827] Especially the sales and export of *fresh fish* was challenging as UK and Germany had trade restrictions. The export of fresh fish to the UK was e.g. restricted by quantities over a period of time.[828] There were some fishermen and buyers in Finnmark that expressed to the Trawling Commission1935 that they did not want fish from the trawlers to be included in export quotas and that the fishery should be prohibited, or at least prohibited to access the fresh fish market.[829] Also the county authorities acknowledged the challenge and referred to experiences of the local population losing opportunities of income because of trawling.[830] The majority of the Trawling Commission 1935 did not principally decide on the way forward for the trawling industry, but supported restricting sales of fish from trawlers to the fresh fish market. The minority, on the other hand, proposed an absolute prohibition on trawling. The main justification of a prohibition would be to protect the traditional fisheries from extinction, as trawling was a form of "exhaustion" that could empty the resources in the sea.[831] In other words, the biological harm a trawl fishery could cause was recognised, but it was first and foremost the *social consideration* of a large fishing population losing income opportunities that was the driving force for a prohibition.

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825 Hovland, Haaland and Svihus (2014) 338; Strøm Bull (2011) page 99.

826 See more in Ot. prp. nr. 39 (1925).

827 See chapter 6.1.2.

828 Finstad (2005) page 34 and 43.

829 Trawler Commission 1935 page 1.

830 Trawler Commission 1935 page 2.

831 Trawler Commission 1935 page 3.

The Ministry landed on proposing a solution where a general prohibition on trawl fishing was introduced, but the King in Council could exempt actors from the prohibition by issuing a licence to harvest.[832]. The Bill proposal was mainly based on input from the Directorate. The Directorate admitted, and expressed regrets, that these types of restrictions were not aligned with the previous liberal line of the administration, but underscored that "It can hardly be contested that there absolutely is a limit to which extent the industry would endure the increase in production that could arise as a consequence of unrestricted access to harvest fish with such a large harvest capacity as the modern trawlers."[833] The Directorate furthermore highlighted the constant increasing market challenges in each market segment and raised awareness of the negative impact the trawling industry could have in attempts to reduce the government transfers to the cod fisheries. Lastly, the Directorate underlined that the suggested licencing regime would ensure that:

> [O]ne would thereby through a more gentle way be able to intervene with already established trawling business. One would also by making the trawling subject to the approval of the King in Council to ensure control over the development of the business, so that if the circumstances could change that there again would be room for trawl fishery in our fishery business.[834]

Through these two quotes there are especially two aspects that are important to this thesis. First, the administration expressed an acknowledgment of the issue of *harvest capacity* of fishing vessels, which has become a crucial concept in modern fisheries management and motivated various legal actions through the years. Second, the administration expressed an

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832 The proposal was submitted in Ot. prp. nr. 57 (1936) Lov om fiske med bunnslepenot (trål).

833 Ot. prp. nr. 57 (1936) page 6. Norwegian wording: "Det er absolutt en grense for i hvilken grad bedriften vil kunne tåle den økning i produksjonen som vil kunne opstå ved en uhindret adgang til optagelsen av fiske med et redskap av så stor fangstkapasitet som moderne trål."

834 Ot. prp. nr. 57 (1936) page 6. Norwegian wording: "man derved vil ha adgang til på lempelig måte å gripe inn overfor de allerede iverksatte trålforetagender. Man vil da også ved å gjøre trålfisket betinget av Kongens tillatelse, ha hele utviklingen av denne bedrift i sin hånd, om forholdene atter måtte bli slik at der blir plass for et trålfiske som et ledd i vår fiskebedrift."

acknowledgement of the issuing of licences to conduct an activity that is generally prohibited as a *regulating tool* in shaping the development of the fisheries.

The Parliament did not find the case informed enough at that point and did not discuss the realities.[835] As a compromise a temporary Trawler Act 1936, in force until July 1 1937, was laid down with a much more restrictive line than what the Ministry had proposed.[836] A general prohibition on trawl fishing within territorial waters, except for shrimp trawlers and Danish seine, was laid down.[837] Also landings of fish harvested with trawlers *outside* the territorial waters in Norwegian ports were prohibited, and these catches were not be included in the Norwegian export quotas to other countries.[838] Trawlers that were operative when the statute entered into force could, however, be issued exemption from these prohibitions by the King in Council.[839] The King in Council was also authorized to adopt licence conditions for these trawlers on deliveries of catches, sales, production and export, including if the fish was to be produced as saltfish or salted and dried fish.[840] The Parliament furthermore called for the appointment of a new commission that was to investigate the trawling issue broadly from an economic and social perspective and submit a report in the first months of 1937.[841] This temporary statute was seminal in many aspects. First of all, it represented the first implementation of regulating access to harvest through a *licencing scheme*. Second, it prescribed a use of licence conditions as a tool to achieve social purposes, which is found in the current system of delivery duties.[842]

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835 Innst. O. XXXIII (1936) Innstilling fra sjøfarts- og fiskerikomitéen om midlertidig lov om fiske med bunnslepenot (trål) page 4.

836 Lov 16. juli 1936 Midlertidig lov om fiske med bunnslepenot (trål) (Trawler Act 1936).

837 Trawler Act 1936 section 1(1)

838 Trawler Act 1936 sction 1(2)

839 Trawler Act 1936 section 1(3)

840 Trawler Act 1936 secion 1(3)

841 Innst. O. XXXIII (1936) page 4. The Ministry shortly thereafter appointed the Trawler Commission 1937.

842 See more in chapter 3.2.6 and later chapters of the legal historical inquiry.

The Trawler Commission 1937 submitted its report in March 1937, followed by a Bill proposition from the Ministry in 1938 that led to the Trawler Act 1939.[843] The issue was politically difficult and heavily debated before the Act was adopted by the Parliament, but these discussions represented nothing principally new as strong and broad opposition to new technology had appeared far back in time and was already present in 1936.[844] At the same time the trawling question had at that point been broadly assessed in three commissions (including the Profitability Commission 1937), which had made it more clear that the trawling industry represented a realistic threat to traditional fisheries.[845] There was therefore a somewhat justifiable fear that fishermen could loose work opportunities, or become a "proletariat" of employees on large vessels owned by capitalist interests with no connection to the coastal communities.[846]

The trawling issue would in the years to come continue to cause trouble in the northernmost areas of Norway, but as we will see in somewhat different ways. One new element was that licences to trawl were only to be issued for trawling *outside* territorial waters.[847] Another new element in the Trawler Act 1939 was that the number of trawlers explicitly was limited to 11, but the King in Council had the authority to exempt this number if market conditions opened for it.[848] One faction in the Trawler commission1937 had proposed that trawler licences could only be issued to active fishermen.[849] This was not pursued by the Ministry, but in the compromise by the majority of the Maritime and fishery Committee in the Parliament it was laid down that new licences could only be issued to a vessel that

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843 Ot. prp. nr. 51 (1938) Om lov om fiske med bunnslepenot (trål) ; Lov 17. mars 1939 om fiske med bunnslepenot (trål) (Trawler Act 1939).

844 See Strøm Bull (2011) page 105–110; Hovland, Haaland and Svihus (2014) page 341–343 for some highlights.

845 In the report from the Profitability Commission 1937 it was for example estimated that 200 trawlers with about 6000–8000 people could catch more than 70 000 fishermen in traditional fisheries could catch. Trawler Commission 1937: Innstilling fra en av Handelsdepartementet nedsatte komité: Innstilling om fiske med trål page 47 and 60

846 See for example Profitability Commission 1937 page 2.

847 Trawler Act 1939 section 1(2).

848 Trawler Act 1939 sections 1(2) and 1(4).

849 See more on this in Trawler Commission 1937 page 109 and 112.

"substantially were owned and operated by active fishermen."[850] This was to be adopted by the Parliament, but must be seen in relation to the upper limit of 11 trawlers as the politicians generally were promoting caution when it came to expansion of the trawler fleet. These are the first traces of the later *activity requirement*, which is a fundamental principle in today's participation regulations, identified in the thesis investigations, see overview of today's rules in chapter 3.6.2. This principle would, as the next chapters demonstrate, find a more general form in legislation in the next two decades.

6.2.2 Vessel ownership and the question of who can fish

Prior to WWII the situation for Norwegian fisheries was difficult with over 100 000 fishermen and low economic outcomes.[851] The state had in various ways supported the industry through loans and more direct economic support in the 1930s, and there had evolved a closer collaboration between state and industry.[852] The Profitability commission 1937 was to address these challenges and propose measures to better the situation for better fishermen. The commission was divided in different factions, both as to *articulating the problems*, and to the *remedies prescribed*. The majority concluded that the low profitability was due to the difficult market situation, costs that were too high compared to prices and that there were too many fishermen.[853] This was an important acknowledgement, but it would still take many years until problems of overcapacity in the fishing fleet would be addressed more specifically. The commission also acknowledged the *fisherman profession* in the harvesting activities, and there had already been made formal efforts to keep control of the number of fishing vessels and fishermen that would become central data in the shaping of future legislation. As far back as 1917 a general statute on a *registry of fishing*

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850 See more in Innst. O. II (1939) Innstilling fra den forsterkede sjøfarts- og fiskerikomité til lov om fiske med bunnslepenot (trål) page 13–14, 18, 25. The Norwegian wording in the later adopted section 1(2) of the Trawler Act 1939 was "i det vesentlige eies og drives av aktive fiskere." The questions of whether only active fishermen exclusively should own fishing vessels and gear more generally was up for discussions in the fishermen's organizations prior to WW2. Ot.prp. nr. 24 (1956) Om lov om eindomsrett til fiskefartøyer m. v. page 1.

851 Hovland (2014b) page 265.

852 See more on this in Hovland, Haaland and Svihus (2014) page 335–338.

853 Profitability Commission 1937 page 61.

vessels had been adopted.[854] A record of persons with fishing as a profession (fishermen registry) was established in relation to social security schemes back in 1920.[855] These are schemes that are not so relevant to the issues addressed in the thesis directly, but the *fishermen registry* is relevant as there are conditions to participate in fisheries today that are connected to it.

The above-mentioned discussions on vessel ownership were addressed during WWII. One reason for this was that increased profitability (increased prices) in fisheries after the breakout of the war attracted capital interest in industries other than fisheries.[856] This caused fear of a shift in the social and production stability the fisherman ownership had established.[857] To prevent such a development, regulations on the purchase of ownership of vessels were laid down in 1941.[858] The regulations laid down that ownership of vessels, or shares of a vessel, that were registered in the Vessel Registry on or after January 1, 1939 until further notice could not be purchased without *permission* from the Fisheries Director.[859] The Directorate could furthermore, with approval from the Ministry, lay down conditions for permits, including that the new owner had to be an active fisherman and that the vessels

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854 Lov 12. mai 1917 om registrering og merking av fiskefartøyer (Fishing Vessel Registry Act 1917).

855 The authority for municipalities to keep a register of fishermen was laid down in Lov 10. desember 1920 um ulukketrygding for fiskarar, and municipalities carried out administrative functions. After different types of organizational structures at local level over the years, all functions were from 1980 organized under the state and became a subordinate of the Directorate. The authority to keep a Fishermen Registry was in 1998 transferred from social security legislation to the Participation Act 1972. See more on these amendments in Ot.prp. nr. 33 (1996–97) Om lov om oppheving av lov 11. juni 1982 om rettledningstjenesten i fiskerinæringen og endringer i visse andre lover mm, and lov 27. mars 1998 om opphevelse av lov 11. juni 1982 nr. 42 om rettledningstjenesten i fiskerinæringen og endringer i visse andre lover m.m.

856 Ot.prp. nr. 67 (1947) Midlertidig lov om konsesjon for ervervelse av eiendomsrett til fiskefartøyer page 1.

857 Ot.prp. nr. 67 (1947) page 1.

858 Forordning 19. desember 1941 om konsesjon for ervervelse av eiendomsrett til fiskefartøy (Vessel Ownership Regulations 1941). The version I have studied is rendered in Ot.prp. nr. 67 (1947) page 1. See also Hovland Haaland and Svihus (2014) page 344; Delivery Duties Expert Group 2016: Rapport fra ekspertgruppe nedsatt av Nærings- og fiskeridepartementet: Vurdering av leveringsplikten, bearbeidingsplikten og aktivitetsplikten page 9.

859 Vessel Ownership Regulations 1941 section 1.

had to participate in one or more fisheries.[860] Some of the rationale expressed by the Ministry was that "[o]ne at all times have found it desirable for society that the fishermen are owners of the vessels they use."[861] In 1942 it was opened up for an exemption for vessels under 30 feet, as that was considered less questionable.[862] The regulations were continued after the war until they were replaced by a temporary Act with much of the same content as the 1941 regulations.[863] Although upon the discretion of the fisheries administration at that point, these enactments applying to all vessels laid down the foundations of the *commercial licence* and the *activity requirement* in today's legislation.

6.3 Post-war developments: A planned economy and ownership rules

6.3.1 Liberalization of trawler legislation

The German occupancy of Norway between 1940 and 1945 had a long-lasting impact on Norwegian fisheries.[864] The emergence of new freezing technology that made a fish filet industry on land possible was particularly significant. These are developments that generally are not directly relevant to the licence and enforcement system for commercial fisheries, but have a close connection to the trawling fleet policies and participation rules post WWII. The question of employment in the fishing industry on land also represents social considerations that need to be placed and discussed more generally in relation to the regulatory system for the fleet. The complexities of these policies in the rebuilding of Northern Norway after WWII, and the planned economy that would permeate overall Norwegian policies for decades, can at the same time not be overstated.[865]

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860 Vessel Ownership Regulations 1941 section 2. See more in Ot.prp. nr. 67 (1947) page 2 on the conditions, the guidelines for the processing of licence applications and the application process.

861 Ot.prp. nr. 67 (1947) page 2. Norwegian wording: "[e]n har alltid funnet det ønskelig samfundsmessig sett, at fiskerne er eiere av de fartøy de bruker."

862 See more on this development in Ot.prp. nr. 67 (1947) page 3.

863 Lov 27. juni 1947 Midlertidig lov om konsesjon for ervervelse av eindomsrett til fiskefartøyer (Vessel Ownership Act 1947).

864 See Finstad (2014) for an overview of the major fishery related events during the war years.

865 See Finstad (2005); Holm (1996); Hersoug (1982) for more through analysis of some of the developments.

The breakthrough of frozen filet processing came during the war years, and the Germans established several freezer plants for fish production along the coast.[866] The idea of developing new processing industries on land for refrigerated and frozen fish was something Norwegian authorities had pursued and supported in the 1930s, but with limited success.[867] During the war years the Norwegian government in exile started planning for the rebuilding and industrialization of northern Norway, and the development of a state-owned frozen fish industry would play a central role in the plans.[868] The planning continued over several years while the settlements along the coast were rebuilt after the war.[869] Trawlers were also to play a key role in providing the industry with raw material in the plans of the authorities. The strict trawler legislation therefore had to be revisited. A commission was appointed in 1947 to examine the issue and how the fisheries could be rationalized and become more efficient. The report was submitted in 1949.[870] The expansion of the trawler fleet had, however, begun independently of this process, under the authority to exempt from the general prohibition in the Trawler Act 1939.[871] There had been issued 149 licences to trawl for herring and sprat, and 11 permanent and 7 temporary licences to cod trawlers above 50 gross tonnes by 1949.[872]

Many things had changed since the interim war period. The market situation was favourable and there was low unemployment and competition for workers.[873] The Norwegian Fisherman Association was therefore not as skeptical of trawl fisheries as previously, as long as it was active fishermen that participated and that it was a supplement to coastal

866 Finstad (2005) page 51–54.

867 See more on this in Finstad (2005) page 32–47.

868 Kolle (2014a) page 406.

869 All of the county of Finnmark and northern areas of Troms had been burnt down after scorched-earth policies by the Germans in the wake of the war.

870 Trawler Commission 1949: Komitéen til utredning av spørsmålet om rasjonalisering av fisket og fisketilvirkningen: Innstilling om endring av lov av 17. mars 1939 om fiske med bunnslepenot (trål), og en redegjørelse om den norske fiskeflåtes stilling og fremtidige utviling.

871 The authority to issue licences was conferred from the King to the Ministry in 1949 to make renewal of temporary licences more dynamic. Ot.prp. nr. 25 (1950) Om lov om fiske med trål page 4.

872 Ot.prp. nr. 25 (1950) page 10.

873 See for example Trawler Commission 1949 page 11–12.

fisheries.[874] Although the Trawler Commission1949 didn't have sufficient information on whether trawl fisheries would be profitable, both factions supported a continuation of the *general prohibition* and an *expansion* of the trawler fleet as the macroeconomic circumstances were positive. It was also recognized that the international fishing rights outside territorial waters could influence the Norwegian coastal fisheries negatively, and that the trawler industry could provide alternative work opportunities in years when there were low quantities of cod in coastal areas.[875] It was also found important to improve harvest technology so that the industry would not be so labour dependent, and to provide more food for a growing world population. The commission highlighted several times in its report that there had not been proved any *negative impact* on the size of the cod stock from trawling activities.[876]

The Ministry proposed a new trawler statute with some modifications of a proposal by a majority of the Trawler commission 1949 that in essence was adopted by the Parliament after much discussion.[877] It categorized trawlers under and over 300 gross tonnes in two groups. For trawlers under 300 gross tonnes the Ministry was authorized to issue licences with no ownership requirements.[878] The ownership question was left to be considered in relation to the general ownership legislation that was under revision at that time.[879] Trawlers above 300 gross could be issued licences upon the discretion of the King in Council, and fishermen, cooperatives of fishermen and those issued licences pursuant to the Trawler Act 1939 were to be prioritized.[880] The issuing of licences to trawlers above 300 gross tonnes had to be addressed by an advisory board with different industry representatives appointed by

874 Trawler Commission 1949 page 30.

875 Trawler Commission 1949 page 26. It was also seen as strategically important to develop a Norwegian trawler fleet with all the foreign trawlers along the coast geopolitically and with respect to international law.

876 Trawler Commission 1949 page 17 and 26.

877 Lov 20. april 1951 om fiske med trål (Trawler Act 1951); Innst. O. I. (1951) Innstilling fra sjøfarts- og fiskerikomiteen om lov om fiske med trål. See more on the political involvement in Kolle (2014a) page 409, which is also referred to in Delivery Duties Expert Group 2016 page 11.

878 Trawler Act 1951 section 1(2).

879 Ot.prp. nr. 25 (1950) page 16–17.

880 Trawler Act 1951 section 1(3).

the King in Council. A minority faction with strong fishermen connections did not support any issuing of new licences to anyone others than active fishermen or fishermen cooperatives.[881]

With the new Act in place the expansion of the trawler fleet could carry on with further intensity and with an opening for ownership outside the harvester segment. Of other legislative highlights, section 3 was particularly interesting indicating a new era of licencing policies. The first subsection set out that:

> Those who are granted licence to harvest with trawl are obliged to be subject to any regulation with regard to harvest quantities, use of harvest and harvest area that at all times are laid down by the King in Council.[882]

The provision therefore set out a state of law where licence holders could be restricted with regard to *harvest quantities*, which were new developments more generally at this time period, see more in chapter 6.4. The Trawler Commission 1949 expressed that harvest and area restrictions could be imposed under international agreements and other unforeseeable circumstances that were not specified.[883] Several other rules have a line up to today, including expressing the connection between a licence, person and vessel; the use of a replacement vessel in relation to shipwreck situations; and that no new owner of a vessel had any claim of being transferred a licence.[884]

6.3.2 Ownership requirements and exemptions

As noted, there was at the same time a revision of the general ownership rules, and thereby also participation policies more generally. A more permanent clarification came with the Vessel Ownership Act 1956.[885] The Act was only to last until 1961, but it was continued until

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881 Trawler Commission 1949 page 31.

882 Norwegian wording: "De som får tillatelse til å drive fiske med rål er forpliktet til å innfinne seg i slik regulering med hensyn til fangstkvantum, fangstens anvendelse og fangstområde som til enhver tid fastsettes av Kongen."

883 Trawler Commission 1949 page 29.

884 Trawler Act 1951 sections 1(5) –1(6). See more on the current rules in chapter 3.6.2.

885 Lov 29. juni 1956 Mellombels lov om eigedomsretten til fiske- og fangstfarkostar (Vessel Ownership Act 1956).

it, as will be demonstrated below, was replaced by new legislation in 1972. It was in the Act laid down that all ownership of fishing vessels registered in the Fishing Vessel Registry required a permit by the Ministry, or whoever the Ministry authorized to issue permits.[886] Section 2(1) stated that a permit could be issued to:

> 1) Fishermen that have participated in fisheries for at least 3 years and still will be active with fisheries as main occupation.
> 2) Companies where fishermen that have participated in fisheries for at least 3 years and still will be active with fisheries as main occupation, have the majority of the interests.
> 3) Persons or companies that have been participating in fisheries for at least 3 years, and still are connected to the fisherman professions in a natural way.
> 4) Persons or companies that want to replace vessels with others, as long as the former vessels were registered in the Fishing Vessel Registry.[887]

The essence of these requirements, which in this thesis is referred to as the *activity requirement*, has lasted up until our days, but in somewhat modified forms. The requirements have raised debate through the years, but at the core represents what has been considered one of the foundational fishery policy principles of a *fisherman owned fleet*. The justifications were social considerations, to protect fishermen, prevent damaging speculations and capital interest to enter the industry, production and market stability and for the authorities to keep control of the total number of fishing vessels.[888] The issue for debate and controversy at that time, and even today, is the exemption from the main rule of fishermen ownership of fishing vessels. It was set out in section 2(2) in the 1956 Act that:

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886 Vessel Ownership Act 1956 section 1 (1).

887 Norwegian wording: "1) Fiskarar som har drive fiske i minst 3 år og framleis skal drive fiske som hovudyrke. 2) Selskap der fiskarar som har drive fiske i minst 3 år og framleis skal drive fiske som hovudyrke, har storparten av interessene. 3) Personar og selskap som har drive fiske i minst 3 år, og som framleis er knytt til fiskaryrket på ein naturleg måte. 4) Personar og andre selskap som vil skifte ut farkostar med andre, så framt dei gamle farkostane står i registeret over merkepliktige norske fiskefarkostar."

888 Ot.prp. nr. 24 (1956) page 5 and 7.

> Other companies where fishermen together with municipalities and/or fish producers have the majority of the interest, can in individual cases be issued permit to buy and operate fishing vessels that is 110 feet or longer, as long as economic or other important considerations call for it.[889]

A commission of 1953 that had examined the issue had originally proposed no size limit for exemption, and no specifications of a required industry connection, or inclusion of municipalities. The Ministry found the proposal questionable as it was a breach of the main principle of fishermen ownership. It stated that:

> By opening access for other persons to purchase fishing vessels, the Ministry is afraid that this could lead to capital strong interests penetrate the industry at the expense of active fishermen … One can therefore risk to get a greater or less backsliding or undermining of the provisions of the Act that no one neither desired, nor intended.[890]

The Ministry also highlighted that the proposal could cause practical administrative challenges as decisions would be based on discretionary judgements.[891] It did, however, see things differently for larger vessels over a certain size due to capital needs. This is why the Ministry proposed that vessels above 200 gross tonnage was to be exempted for the ownership requirement, but the limit was amended by the Parliament to over 110 feet for practical reasons.[892] As seen in the final provision above, however, application would still be based on discretion on e.g. what would constitute "economic or other important

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889 Norwegian wording: "Andre selskap der fiskarar saman med kommunar og/eller fisketilvirkarar har storparten av interessene, kan i einskilde høve få løyve til å kjøpe og drive fiskefarkostar som er 110 fot lengste lengd eller meir, så framt økonomiske eller andre viktige omsyn tilseier det."

890 Ot.prp. nr. 24 (1956) page 7. Norwegian wording: "Ved å åpne adgang også for andre personer til å anskaffe seg fiskefartøyer er departementet redd for at dette kan føre til at kapitalsterke interesser trenger seg inn i næringen til fortrengsel for andre fiskere … Man kan således risikere å få en større eller mindre utglidning eller uthuling av lovens bestemmelser som ingen hverken har ønsket eller tilsiktet."

891 Ot.prp. nr. 24 (1956) page 7.

892 Innst. O. nr. 120 (1956) Tilråding frå sjøfarts- og fiskerinemnda om mellombels lov om eigedomsretten til fiske- og fangstfarkostar page 198. This was also in line with what the Directorate had proposed.

considerations." The Ministry could at the same time lay down more specific rules for the application of the Act, including a general exemption for vessels under a certain size.[893] Permits issued under the Vessel Ownership Act 1956 are, as will be further elaborated in later chapters, another predecessor to the current regime of commercial permits.

6.3.3 A state supported industry and the shaping of sales organizations

The exemption provision in the 1956 ownership statute would, however, soon be liberalized. This development must be seen in relation to the general policies of a state-owned fish processing industry and overall profitability challenges. As noted, the postwar years were characterized by complex policies within in a *planned economy framework*. This would also include further development of state support arrangements to the fishing sectors and shaping the role of the sales organizations. Governmental transfers are a bit on the side of the topics addressed in the thesis, but still have an important contextual role, and as a governing tool up until the important shift and phasing out of subsidies in the early 1990s.[894] In the following only the major tendencies most relevant to the thesis context are introduced.[895]

In 1957 a commission was appointed to examine challenges in the cod fisheries in the short and long term, often referred to as the Cod Fishery Commission 1957.[896] The commission and the Ministry were of the opinion the problems in the fisheries policies required the development of guidelines on the future *structure of the fishing fleet*.[897] The commission furthermore highlighted that the filet industry was of importance for the employment on the coastal areas of the county of Finnmark. The commission therefore proposed to

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893 Vessel Ownership Act 1956 section 4. It was laid down in regulations that that vessels under 50 feet (16,68 meter) were exempted from the activity requirement in 1956.

894 See more in chapter 7.

895 For more details, see Kolle (2014b); Holm (1996); Handegård (1982); Hersoug (1982); Sandbæk (1995) page 115–121.

896 See more on this process and the report in St. meld. nr. 71 (1959) Innstillingen fra Torskefiskeutvalget 1957 (Cod Fishery Commission 1957).

897 Cod Fishery Commission 1957 page 12 and 18. This could be seen what the fleet should look like in terms of overall size and its composition of different vessels with regards to vessel length, gear types and similar.

liberalize the ownership rules in the fleet to give the land industry an opportunity to own fishing vessels to secure a more stable input of fish to the production.[898] The Ministry and Parliament generally supported the proposal, and a liberalization of the Vessel Ownership Act 1956 went into force in 1961.[899] There was in the new provision no requirement of fishermen involvement, or fishing industry connection, to be given exemptions from the general rules, but the advisory board pursuant to the Trawler Act 1951 was to give a statement in specific cases.[900] In the Bill proposition it was expressed that exemptions were only for particular cases, and especially when it was desirable to provide raw material to the processing industry in the concerned district.[901] The authority to exempt, and set out further conditions, was laid to the King in Council. This was followed by a further expansion of the Norwegian trawler industry.[902]

The Cod Fishery Commission broadly assessed the profitability of the fishing fleet. The conclusions were rather discouraging, and several remedies other than the ownership liberalization in the fishing fleet were proposed. This included support to scrapping vessels, loans to invest in new and more efficient vessels, expansion of minimum wage support schemes, research and development funding for innovation of new harvest technologies and various export measures, to mention a few. Similar measures were proposed by a committee that examined challenges in the herring fisheries due to a reduction of herring stocks along the coast.[903] The postwar state support policies were also closely connected to the further

898 Cod Fishery Commission 1957 page 13–14. This type of control of the raw material and production is often referred to as "vertical integration."

899 See more on the proposal in Ot.prp. nr. 47 (1960-61) Lov om brigde i mellombels lov av 29. juni 1956 om eigedomsretten til fiske- og fangstfarkostar. A short overview of the main events and influences is also provided in Delivery Duties Expert Group 2016 page 11–12.

900 See new section 2(2) in Lov 16. juni 1961 om brigde i mellombels lov av 29. juni 1956 om eigedomsretten til fiske- og fangstfarkostar.

901 Ot.prp. nr. 47 (1960–61) page 2.

902 Delivery Duties Expert Group 2016 page 12.

903 See more on this committee work in Kolle (2014b) 519–521.

development of the institutions for first-hand sales of fish.[904] The temporary Raw Fish Act 1938 found its permanent form in the Raw Fish Act 1951.[905] The law revision mostly represented a few clarifications of the scope of the authority to regulate the sales and codifications of established practices and organizational matters, and no introduction of any new principles as such.[906]

The question of price in relation to sales of fish was a complex issue in the early postwar period and the state was highly involved in price regulation in society more generally. The negotiations on first hand sales prices of fish were conducted between the sales organizations and the state, with the state basically setting the price.[907] Exporters were not subject to the fixed prices, or any maximum prices, and 80 % of excess profit exporters would gain from high market prices had to be transferred into a price regulation fund.[908] These were during the 1950s used for various support to an increasingly unprofitable fishing

[904] There were efforts in the interim war period to establish export regulations and cooperatives. This was continued post-WW2, and resulted in a statute that from 1955 that was lov 30. juni 1955 Midlertidig lov om regulering av og kontroll med produksjon, omsetning og utførsel av fisk og fiskevarer (Fish Export Act 1955). There was therefore also public regulation of export, and establishment of several export councils representing groups of exporters. An overview of market and export events in this time period is provided in Kolle (2014b) page 504-513. The producers represented a highly heterogeneous group of interests, and it was challenging to find a unified model of organizing all these interests. Kolle (2014b) 501–503. A thorough overview of all the different elements in the jungle of fisheries organization up through the 20th century is found in Hallenstvedt (1982); Holm (1996).

[905] Raw Fish Act 1951.

[906] It was acknowledged that the former statute was wide in scope and that interpretation would not clarify those matters. Ot.prp. nr. 63 (1951) Om lov om omsetning av råfisk page 6. The clarifications and specifications included rules for approval of buyers, revoking of buyer approvals, an appeal mechanism for buyers who in different ways were prevented from buying, scope of regulating the fishery through various curtailments when necessary for sales matters, expressing the authority to direct catches to buyers, and to the extent buyers could participate in production, import and export of fish. It was also acknowledged that although more rules were articulated explicitly in the statute, the Act would still remain delegated legislation. Ot.prp. nr. 63 (1951) page 19.

[907] Christensen and Hallenstvedt (1990) page 143.

[908] See more on the fund arrangement in Christensen and Hallenstvedt (1990) page 150-151.

industry, including price support, and support to buy fishing gear and bait.[909] These transfers did, however, empty the funds by 1958 and the state continued to support the industry over the state budget after pressure from the industry. In conjunction to the above measures, a Subsidy Commission was appointed in 1963 to analyse the situation, provide relevant profitability statistics and propose measure that could steer the fishing fleet in in a profitable direction. The result of this was the establishment of an agreement between the industry, represented by the Norwegian Fishermen Association, and the state in 1964.[910] The purpose of the agreement was to increase the profitability so that the fishermen would achieve revenues similar to those in other industries, and to transform the industry into a subsidy independent one.

The various support was transferred to, and administered by, the sales organizations.[911] The state was at the same time no longer involved in fixing fish prices. From 1958 onwards, minimum prices were laid down by the sales organizations after negotiations between the sales organizations and buyers/producer organizations, but the market and cost situation still made the industry dependent on price support for many more years.[912] This chapter has only briefly summarized some of the postwar events to give important context to the role of sales regulations and the profitability challenge in the fishing fleet that would influence the

[909] Se more on these developments in the report from the Subsidy Committee, which is an attachment to St. prp. nr. 143 (1963–64) Forhøyelse av bevilgningen på statsbudsjettet for 1964 under kap. 1531, Pristilskott, post 72, Til støtte av torske- og sildefisket og bevilgning på statsbusjettet for 1964 under kap. 1076, Pristilskott m.m., ny post 72, Til støtte av effektiviseringstiltak i fiskerinæringen.

[910] The agreement is often referred to as the General Agreement (In Norwegian "hovedavtalen"), the Fisheries agreement (In Norwegian "fiskeriavtalen") or more generally as fisheries subsidies. See more on the background and main elements in St. meld. nr. 7 (1964–65) Om hovedavtale for fiskerinæringen, which is also referred to in Sandbæk (1995) page 117.

[911] They were, however, not a party in the agreement.

[912] See a brief overview in Kolle (2014b) page 486; Kolle (2014b) page 524–527.

regulatory developments in the years to come.[913] Concurrent to all these more social and economic policy related developments in the industry, there were ongoing processes addressing the design of future rules for regulating the actual harvest operations, and what considerations it should promote. Included in this process was also a reorganizations of the various sets of fragmented statutes that had evolved during the previous century.

6.4 Consolidation of fisheries legislation

There was generally a growing awareness of the threats of overfishing in the first half of the 1900s, with international initiatives and several conferences to address the problems where Norway participated.[914] There had been introduced protection of juvenile and small herring and sprat in a statute from 1931, but as seen this was not the first time these types of biologically justified measures were used in fisheries legislation.[915] It was still therefore

[913] There is a lot of analysis of these postwar policies generally, and fishery specifically. Smith and Boe placed these types of state support in a general administrative law context in Smith (1979b) page 112–115; Boe (1979). The sociologist Ottar Brox criticized what he referred to as the technocrats entering the fisheries policies in his famous book *What happens in Northern-Norway? A study of Norwegian rural policies* (my translation), Brox (1966). He argued against the top-town approaches, especially by the Cod Fishery Committee 1957, and explained why larger vessels and filet industry on land were not the solutions to the challenges. See also Hersoug (1982); Holm (1996) for more fishery specific analysis. Holm conceptualized two models for the modernisation that took place in this time period. One is the so-called "Bygdenæringsmodellen" (the rural model), the other the "Industrimodellen" (the industrial model). The former addressed the institutional changes starting with the introduction of the legal protection of sales monopoly for fishermen cooperatives, and how the fishermen profession was made *distinct* from the *household economy*. The latter was the introduction of the filet and freezing land processing industry. A third model that was also introduced, but that concerned later developments that is addressed in chapter 7. Holm (1996) asserts that the industrial model was driven through top-down policies in opposition to the fishermen and coastal population, and that there were frictions between the models although they didn't mutually exclude each other. The historian Bjørn-Petter Finstad wanted to nuance both the analysis of Holm and Brox on basis of the findings in his doctoral thesis, which demonstrated that the fishermen were much more positive to the industrialization than expressed in those works as long as their economic interests were not challenged. Finstad (2005) page 12. This is also supported in Johansen (2014b) page 133.

[914] See more on these developments in Engesæter (2002); Gezelius (2008a).

[915] Lov 24. juni 1931 om fredning av brisling og småsild og merking av hermetisk nedlagte fiskevarer m.v. (Protection of Sprat and Small Herring Act 1931). This Act replaced a previous statute from 1927. According Johansen (2014b) page 127 there had been claims from the land seine fishermen to stop the fishery on small herring that threatened the herring stock as far back as 1912. At that point the small herring was too important for the oil and flour producers and a growing purse seine fishery, so no action was taken. Johansen, Hovland and Haaland (2014) page 179.

regulation to prevent conflict between diverse gear types that was prominent. The purse seine fishery and motorized vessels had emerged in the first decades of the 1900s, and fisheries were more spread out geographically and with less seasonal distinctions between the different herring types.[916] This was one of the justifications for consolidating and modernizing the different statutes regulating herring fisheries.[917] As this process mostly was aimed at merging different sets of rules into one statute with no major principally motivated amendments, the thesis will not go any further into the details of the process leading to a unified Herring Act 1937, or the content of the Act.[918]

A consolidation of other saltwater fisheries legislation initiated by a process not long after had, on the other hand, some legal developments that merit closer inspection. This was also a process of a more general and transformative character which equipped the legislation for an upcoming era with more attention to environmental considerations.[919] As in the herring fisheries, technology developments made vessels more mobile to operate in larger areas, calling for more uniform legislation all along the coast.[920] Important in this process was the report by the appointed Fisheries Commission 1949, which started its work as far back as 1939, resulting in the Saltwater Fishery Act 1955.[921] It was a complex mix of legislation addressing different regions, species and concerns that were to be consolidated. Some consolidation had already started when a Fishery Protection Act was adopted in 1938.[922] It was, however, made temporary as the Parliament saw it necessary to consider it in

916 See more on the complexities and changes in Ot. prp. nr. 11 (1937) Om lov om sild- og brislingfiskeriene page 8–10.

917 Ot. prp. nr. 11 (1937) page 9; Herring Commission 1934 page 5–7.

918 See more in Ot. prp. nr. 11 (1937), which also has attached the report by the Herring Commission 1934.

919 I am by this not disregarding that the evolution of herring legislation has played a role in the overall evolution of fisheries legislation. That herring legislation was an influence, and that it was sought to develop uniform legislation, is highlighted by the Fisheries Committee. Fisheries Commission 1949 page 28.

920 Fisheries Commission 1949 page 27.

921 Lov 17. juni 1955 om saltvannsfiskeriene (Saltwater Fishery Act 1955). See more on the mandate and work of the committee in Ot.prp. nr. 51 (1954) Om lov om saltvannsfiskeriene page 2-3.

922 Lov 6. mai 1938 Midlertidig lov om fredning av saltvannsfisk (Fishery Protection Act 1938). See Gezelius (2008b) page 48–49 for an overview of some of the main events in this time period.

conjunction with the overall revision.[923] The Act set out provisions for authorizing *gear curtailments*, *minimum sizes* (of harvested fish) and time periods of *harvest prohibitions* on flounder and halibut. This was partly a codification of rules agreed on in an international agreement from 1937, but in the Bill proposition the Ministry expressed that the legislation for a long time had been unsatisfactory.[924]

One seminal legal development in the Saltwater Fishery Act 1955 was the introduction of a *general authority* of the King in Council in section 4 (1)(7) to limit harvest quantities, in other words, to introduce *harvest quotas*, for specific fish species. As noted, this had been laid down already in trawler legislation, but this authority must still be regarded as fairly paramount in the regulation of fisheries more generally. The justifications were clearly biological and aimed at protection of fish stocks.[925] It was prompted by the Norwegian signing of an agreement in Washington in 1949 that was to become the International Convention for the Northwest Atlantic Fisheries (ICNA), the predecessor of the Northwest Atlantic Fisheries Organisation (NAFO).[926] It was expressed in the Bill proposition that the rule concerning harvest limitations was new and that:

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923 Innst. O. nr. 30 (1938) Innstilling fra sjøfarts- og fiskerikomiteen til midlertidig lov om fredning av saltvannsfisk page 85.

924 Ot. prp. nr. 16 (1938) Om lov om fredning av saltvannsfisk page 1.

925 The preparatory works explicitly highlighted that regulation of sales or social considerations were outside the scope of the provision. Ot.prp. nr. 51 (1954) page 16.

926 Fisheries Commission 1949 page 29. This is also highlighted by Gezelius (2008b) page 49. Gezelius expressed that both ICNAF and the Saltwater Fishery Act 1955 "were ahead of political processes that led to their implementation." By this he referred to actually laying down catch restrictions in practice. Nevertheless, the authority that was laid down reflected the legislative intentions at that time.

> It must be assumed that the technological development will lead to a continuous stronger exploitation of the stock of fish as well as shellfish. One therefore must presume that on basis of biological reasons it can be necessary to lay down measures, inter alia through international collaboration to protect the stock.[927]

The overall consolidation was a modernization of the statute in line with the use of chapters used in the Spring Herring Act 1851. There was laid down substantive, territorial and personal scope of the Act, which was extended to fisheries by Norwegian citizens in more distant waters.[928] The use of conferred authorities and need for flexibility was again acknowledged as an important instrument in fisheries regulations and further expanded.[929] The Fisheries Commission 1949 acknowledged that delegation of rule-making authority to a body other than the Parliament was controversial, but that the regulatory nature sometimes made it necessary and expedient.[930] It was highlighted that decisions laid down within the scope of the authority had to be based on a "versatile expert assessment adjusted to the special conditions in the relevant district and fishery."[931] As a response to arguments that not prescribing provisions in the statute, but allowing the executive to easily change regulations, could lead to a strong industry pressure the administration might not resist, the commission underscored that:

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927 Ot.prp. nr. 51 (1954) page 16. Norwegian wording: "Det må antas at den tekniske utvikling vil medføre en stadig sterkere beskatning av bestanden av så vel fisk som skalldyr. En må derfor regne med at det av biologiske grunner kan bli nødvendig å treffe ytterligere tiltak, bl.a. gjennom internasjonalt samarbeid til beskyttelse av bestanden."

928 Saltwater Fishery Act 1955 section 1.

929 See some general quotes in Ot.prp. nr. 51 (1954) page 13–14. The Ministry agreed with the argumentation by the Fisheries Committee 1949 in favour of the proposed provisions.

930 Fisheries Commission 1949 page 27.

931 Fisheries Commission 1949 page 27. Norwegian wording: "allsidig fagkyndig vurdering avpasset etter de spesielle forhold i vedkommende distrikt og under vedkommende fiske."

> [O]bjections of that character cannot be decisive. Whether provisions are statutory, or laid down with authority provided by statute, they equally must be based on purely professional judgements … Additionally, this type of argument can be countered with that it exactly is necessary that the legislation concerning the conduct of the fishery is provided with a certain elasticity. The committee has therefore placed considerable weight on finding a solution that allows for a natural development, and that not by provisions of a more time-focused character stops or impedes a rationalisation."[932]

By this, one could say that principle of *adaptive governance* was fairly explicit further acknowledged in the fisheries legislation. Another important development was the enacting of the provision on illegal fishery catches in section 64 that marked the first traces of two important mechanisms in today's legislation: the *duty to land catches* and the *administrative confiscation* in cases of illegal catches. With its origin in the Flounder Protection Act 1932, Halibut protection Act 1937 and the Fisheries Protection Act 1938, section 64(1), set out that:

> Fish and shellfish harvested in violation with provisions in chapter 2 in this Act or protection regulations pursuant to the Act, shall immediately be discarded at sea.[933]

In other words, there was a *duty to discard* fish when various rules had been violated. This would be violations of basically all biologically justified rules of conduct within the authorities of the statute (under chapter 2 of the Act). It was underscored in the Bill proposition that it could seem inconvenient to discard dead fish, or fish not regarded viable,

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[932] Fisheries Commission 1949 page 27. Norwegian wording: "… innvending av denne art ikke tillegges avgjørende vekt. Enten bestemmelsene gis i lovs form eller de gis med hjemmel i loven, må de i like høy grad bygge på en rent faglig vurdering. … Det kan også bemerkes til et slikt argument at det nettopp er nødvendig at lovgivningen om utøvelsen av fisket gis en viss elastisitet. Komitéen har således lagt atskillig vekt på å søke å komme fram til en lov som gir rom for en naturlig utvikling, og som ikke ved bestemmelser av mer tidsbetont karakter stanser eller hemmer en rasjonalisering."

[933] Norwegian wording: "Fisk og skalldyr som er fanget i strid med bestemmelsene I denne lovs kap. 2 eller med fredningsbestemmelser gitt i medhold av loven, skal straks kastes på sjøen."

but it was still considered important to discard this fish due to control reasons.[934] The various provisions of participatory governance in several former statutes, such as the Lofoten Act 1897, were also incorporated in the new Act.[935] The Fisheries Commission 1949 underscored that future process of adopting regulations pursuant to the Act had to be conducted in close collaboration with fishermen and their organizations.[936]

The adoption of the Fishery Act 1955 marked the end of volatile years with two world wars, macro-economic crises and a growing acknowledgement that also the larger migratory marine stocks were not inexhaustible. Additionally, it marked years in which the fleet had become motorized (and thereby more mobile) and new harvest and production technology had emerged. A framework to protect and provide stability for the harvesting sector had been laid down through the legal monopoly of sales of fish in the Raw Fish Act 1938, and the trawling fleet had gone from strict access regulation into a regime of liberalization and expansion in conjunction with an emerging fish processing (filet) industry in coastal communities in northern Norway. The profitability was at the same time low in the overall fisheries, and questions of overfishing and overcapacity of the fleet received increasingly political attention. With the adoption of the Herring Act 1937 and the Saltwater Fishery Act 1955 the regulatory system was equipped to limit catches and restrict fishing in other ways. Yet, there would be a few more years until overexploitation became the top priority on the policy agenda.

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934 Ot.prp. nr. 51 (1954) page 30. The control issue was further elaborated in relation to the Flounder Protection Act 1932 which had a similar rule in section 1 with regard to a prohibition to fish flounder under the minimum size. The preparatory work of that Act highlighted that the way the provision was designed also meant that dead fish were to be discarded, but that this was necessary to avoid that the prohibition was illusory because of proof questions. See more in Ot. prp. nr. 26 (1932) Om lov om fredning av gullflyndre page 4. In other words, it was easy to claim the fish was dead to be able to keep it, so that the prohibition would not be effective. As will be demonstrated later, this would change once the administrative confiscation evolved. It must also be underlined that there were no penalties at that point involved with fishing undersized fish, only that you were not to bring it to land, and that it could not be sold. In practice, it was therefore probably the prohibition to sell that was most effective to secure compliance.

935 See Saltwater Fishery Act 1955 chapter 7. In the Bill proposition it was highlighted that the institutions of fisherman supervisors and fisherman committee had been functioning satisfactorily for the about 50 years in action. See more in Ot.prp. nr. 51 (1954) page 26.

936 Fisheries Commission 1949 page 27.

7 Fisheries legislation into a quota regime (1968 – early 2000s)

7.1 Herring crisis: Introduction of licences in the purse seine fisheries

As seen in the previous chapters, biological considerations were to different extents addressed when designing fisheries regulations throughout the years. There was also growing awareness of the threats of overfishing up to the 1900s with introduction of catch limitations as regulatory tools at the international level, and in Norwegian legislation, in the first decade after WWII. It took, however, a crisis before overfishing measures were put into actual effect in the regulatory framework. In the 1950s and 1960s there was a substantial technological shift in the purse seine fisheries that made vessels extremely effective.[937] There were also large investments in modernisation of the pelagic fleet during this time period.[938] This led to expansion of winter herring fishing with a sharp decline in the catches in 1962–1965.[939] Consequently, the fleet shifted its fishing efforts over to other herring types, fishing in Icelandic areas, fishing on other pelagic stocks such as mackerel and capelin, but by the end of 1960s most of the herring stocks had collapsed and also other stocks had declined.[940]

In addition to the biological challenge, the huge investments in the herring fleet had not been followed by a corresponding development of production facilities at land, and no development of export markets.[941] The production and market challenges seemed to be the main motivation for a proposal by the Ministry in 1968 to lay down a temporary authority for the King in Council in the Vessel Ownership Act 1956 to stop the registering of *new* vessels in the Vessel Registry, or that vessels above a certain size limit could not be used for one or several specific fisheries.[942] The Bill proposition mentioned a proposal by the Directorate from 1967 to introduce a licencing regime in a new statute that would regulate

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937 See more on these developments in Kolle (2014b) page 467–479. The innovation that changed the purse seine fishery was in particular the power block on the basis of hydraulic technology, which made hauling of the nets much more effective.

938 See for example Hersoug (2005) page 90–91.

939 Kolle (2014b) page 452–453.

940 Kolle (2014b) page 454–476.

941 Ot.prp. nr. 39 (1967–68) Lov om brigde i mellombels lov av 29. juni 1956 om eigedomsretten til fiske- og fangstfarkostar page 1.

942 See more in Ot.prp. nr. 39 (1967–68).

participation in fisheries, among other things when necessary to protect the fish stocks, but the Ministry found the proposal premature as a licencing statute had to be prepared *thoroughly* and the *legal questions* that would arise would have to be "thoroughly investigated and considered."[943] The Bill proposal was passed in the Parliament, but it was controversial as it was seen as intrusive to the business and as a decision that was not well enough informed. The first use of the authority to restrict the registering of new vessels was used for purse seine vessels in August 1970.[944] The use of catch limitations followed, with an international agreement in 1971 on a Norwegian quota of 15 000 tonnes of herring.[945]

In 1972 a new statute with a general authority for the King to establish licencing regimes for specific vessel groups, fisheries, gear types, areas or times, was laid down.[946] The justification was first and foremost that licences could be:

> an element in national or international measures to prevent over-exploitation of the fish stocks or to secure a proper technical and economic development of the fishing fleet and a rational exploitation of the fish resources …[947]

A licencing scheme could not be adopted until a statement by an advisory board of fishermen representatives appointed under section 7 was submitted to the decision-maker.[948] Section 8 of the Act set out that the King in Council:

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943 Ot.prp. nr. 39 (1967–68) page 2. Norwegian wording: "etterrøkjast og vurderast nøye."

944 Ot.prp. nr. 22 (1971–72) Om lov om regulering av detagelsen i fisket page 1.

945 Ot.prp. nr. 22 (1971–72) page 2.

946 Lov 16. juni 1972 nr. 57 om regulering av deltagelsen i fisket (Participation Act 1972).

947 Participation Act 1972 section 6. Norwegian wording: "ledd i nasjonale eller internasjonale tiltak for å hindre overbeskatning av fiskebestandene eller for å sikre en forsvarlig teknisk og økonomisk utbygging av fiskeflåten og en rasjonell utnyttelse av fiskebestandene, …"

948 Participation Act 1972 section 7.

> gives regulations on the more specific guidelines for licences under section 6. In the regulations emphasis shall be given on previous participation in fisheries, professional and technical qualifications (vessel and equipment), the dependency of the owner and crew to conduct fishing and the importance of the fishery to secure raw material to certain districts or branches of production.[949]

A licence was given to a specific person or company, and to a specific vessel, and a new licence had to be issued if the vessel was replaced.[950] All these rules did not apply to the trawling fisheries, but the ownership rules from the Vessel Ownership Act 1956, which were consolidated into sections 2–5 of the new statute, applied to all commercial fisheries.[951] By that, the foundation for the *general commercial permit* in current legislation had found its form in one statute. Lastly, a general authority to lay down catch limitations and distribute it among participants of a fishery, after a statement from the committee pursuant to section 7 was submitted, was enacted in section 10.[952] This rule explicitly set out that quotas could be established and *allocated* in specific fisheries or time periods *amongst participants* in the relevant fishery, whereas the Saltwater Fishery Act 1955 section 4 authorized the ability to lay down catch limitations for specific fish species. The inclusion of this provision therefore marked a sweeping step into a *licence and quota based system*, in combination with a wide and general authority to establish limited entry fisheries through a licencing regime as far back as 1972, which has become a backbone of the current system.

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949 Participation Act 1972 section 8. Norwegian wording: "gir forskrifter om de nærmere retningslinjer for tillatelse i medhold av § 6. I forskriftene skal det særlig legges vekt på tidligere deltagelse i fiske, faglige og tekniske forutsetninger (herunder fartøy og utstyr), eiers og mannskaps avhengighet av å kunne drive fiske samt fiskets betydning for råstofftilførselen til bestemte distrikter eller bestemte produksjonsgrener."The Bill proposition sets out that the provision gives guidance as to which guidelines were to be used when issuing licences to participate in a particular fishery as the complexity and diversity of the fleet made it impossible "in advance on theoretical grounds to establish general rules on what criteria that were to be used when issuing licences." Ot.prp. nr. 22 (1971–72) page 6. Norwegian wording: "på forhånd på teoretisk grunnlag å fastlegge generelle regler om hvilke kriterier som skal legges til grunn for tildeling av konsesjoner."

950 Participation Act 1972 section 9.

951 Participation Act 1972 section 1(2).

952 Participation Act 1972 section 10.

In comparison to legislative processes of the previous century, with the extensive use of commissions and rather extensive Bill propositions, there was little thorough and broad examination prior to its adoption, and the Bill proposition itself amounted to 7 pages. An expert statement provided in an attachment to the Bill proposition by the Norwegian School of Economics (NHH) expressed that a temporary authority to lay down licencing regulations as a remedy to *immediate challenges* could be recommended, but that a new Act on the regulations of participation required further examination. [953] Additionally, the question of whether the proposed regulations could raise issues related to liability for damages for such as lost revenues for vessels pursuant to Articles 105 and 97 of the Constitution was put forward to the Ministry of Justice, which assumed that liability would only become relevant if certain vessel owners or groups where hit unreasonably hard compared to others when introducing a licencing regime. [954]

There had been appointed a policy advisory commission that considered the practical implications of a licencing regime that was not finished when the Bill proposition was discussed for adoption in the Parliament, but principal legal questions were not within the scope of the mandate. [955] The lack of examination was acknowledged in the Parliament committee recommendation, which underlined that guidelines and regulations should be considered thoroughly, and assumed that the industry had to be consulted on the commission report, before the statute was set into force, and called for annual reports on the practice and effects of the new statute. [956] There was therefore no broad and principal discussion of introducing a general authority to lay down licencing regimes or to establish and allocate quotas in the commercial fisheries in the legislative process. [957] Through a decision by the King in Council of January 11, 1973, a licencing regime was laid down for

953 Ot.prp. nr. 22 (1971–72) page 14.

954 See more in Ot.prp. nr. 22 (1971–72).

955 NOU 1972: 24 Konsesjonsordninger i fiske.

956 Innst. O. nr 54 (1971–72) Innstilling fra sjøfarts- og fiskerikomitéen om lov om regulering av deltagelsen i fisket page 81–82.

957 Some principal statements were at the same time given in the debate of the Parliament, see Forhandlinger Odelstinget 1971–72 page 567–575.

purse seine vessels through regulations.[958] It was to be modified and expanded in the following years, but this adoption marked the introduction of a new limited entry fishery after the trawling regime, which now was authorized in a general participation statute.

The Participation Act 1972 was not substantially revisited until it found its current form in 1999. Steps were taken, with several *White papers*[959] to the Parliament addressing different fisheries policy issues more generally, and a committee proposed new licence legislation in 1981 that was not pursued.[960] A White paper from 1977 on the long-term plan of the Norwegian fisheries started what this thesis identifies as a *new trend* of using these policy documents to set out and shape regulatory developments in the fisheries.[961] As demonstrated, many of the authorities laid down in legislation were (and still are) vague and called for broad discretion at different levels of the executive branch before decisions were made. The White papers would therefore become important *guidelines and instructions* for the exercise of the discretion in a more explicit and transparent form. Nevertheless, the Participation Act 1972 was followed by important legal developments as responses to new enforcement issues and the emerging of an international quota regime. The use of the Norwegian School of Economics (NHH) for expert statements in the

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958 Forskrift 26. januar 1973 om adgagen til å delta i fiske med ringnot (J. 376). See a critical analysis of the licencing practices in Ørebech (1982).

959 These are documents from the cabinet to the Parliament presenting policies or other relevant information the Parliament should be presented with by different Ministries. In Norway these are referred to as a "Stortingsmelding." An equivalent in EU and Commonwealth context is the use of a "green paper." I will throughout the thesis refer to it as White papers. In the first appearance I refer to the full title, for example, St.meld. nr. 21 (2007–2008) Strukturpolitikk for fiskeflåten. In the later appearances, only the number is cited. In this example it would be St.meld. nr. 21 (2007-20078).

960 This was NOU 1981: 3 Konsesjonsordninger i fisket. The commission acknowledged that open access to a fishery was not compatible with planning for profitable and rational employment. It also highlighted that protection of fish stocks was an important concern, but that licences alone could not solve the overcapacity challenges. It proposed a time limitation for licences and the introduction of a licence fee, in addition to simplifications of the legislation, see more in NOU 1981: 3 page 19–22. The Ministry was, however, doubtful of the proposal as it could bring in uncertainty among buyers of vessels and credit institutions, and hinder long term investments. Se more in St. meld. nr. 93 (1982–83) page 15. The Ministry aimed for a broad assessment of the licensing regime that would include some of the legal technical proposals by the commission, but this did not happen until the revision that led to the Participation Act 1999.

961 St. meld. nr. 18 (1977–78) Om langtidsplan for norsk fiskerinæring.

legislative process referred to above in other ways marked a new regulatory era, already to some extent foreshadowed by the Profitability Commission 1937 and liberal aspirations in the 1800s, where the growing field of economy and *economists* would gain an increased and fundamental role in the continuation of regulatory developments, and the *individual profitability* for actors came to the fore.

7.2 Confiscation, discard policies and shaping of a triadic enforcement system

7.2.1 Catch limitations and new control needs

The late 1960s and the 1970s were eventful years influenced by international fisheries law developments. Norway prohibited foreigners to fish within 12 nautical outside the base line in 1966, and the Norwegian exclusive economic zone (NEEZ) 200 nautical mile outside the base line was adopted with the Norwegian EEZ-Act in 1976.[962] With these new maritime borders and the increasing use of catch limits there was a need for efficient enforcement of the harvest.[963] Fishery supervision at sea was conducted by the Navy and a civil supervision under the Directorate during seasonal fisheries, until the Coast Guard was established in 1977.[964] The Directorate furthermore had the authority to inspect fishing vessels and processing plants at land, mostly with regards to quality and sales related issues, but also for controlling certain harvest related provisions.[965]

In conjunction with the use of catch limitations for vessels, the question of authorization of administrative confiscation of catches above the limits by the fisheries sales organizations became pertinent. This had already become a practice in the trawling fishery for cod. There was, for example, a decision by Norges Råfisklag,[966] to forfeiture harvest above quotas laid

962 Lov 17. juni 1966 nr. 19 om forbud mot at utlendinger driver fiske m.v. i Norges territorialfarvann (Fishing Prohibition Act).

963 There were for example quota regulations for each vessel in the capelin, herring and mackerel fisheries in 1973–1974. Ot.prp. nr. 39 (1975–76) Om lov om endring i lov av 16. juni 1972 nr. 57 om regulering av deltagelsen i fiskeriene page 1.

964 Se more on this in NOU 1975: 50 Oppsynet med fiskeri- og petroleumsvirksomheten page 21–28; Aaserød (2019) page 14–17.

965 See also more on this in Gezelius (2008b) page 54–55.

966 The largest sales organization for whitefish species, see footnote 273 above.

down by the sales organisation by several trawlers in 1969, which was challenged in the court system. A judgment by the Supreme Court of Norway from of 1975 clarified that there was no legal authority for the sales organizations to confiscate catches as practiced.[967] Confiscation practices had also been on the agenda in the Ministry prior to this, in 1974, when a proposal which included establishing a mechanism for administrative confiscation for harvest above quotas was consulted with stakeholders.[968] All this led to the adoption of a new section 10b in the Participation Act 1972 in 1976 that authorized mandatory administrative forfeiture of harvest above catch limits regardless of the fault element.[969] Preventive and practical reasons was listed as the main justifications for this type of forfeiture, but it can also be assumed to be building on principles of relinquishment of illegal gain and a restorative purpose.[970] It was furthermore laid down that this catch would go to the sales organization in question, and that sales organizations were to calculate what catch or share of the catch was violating the established quota.[971] The King in Council was authorized to lay down further rules on the procedures and how the sales organizations could spend the money the confiscated fish represented.[972] This form of confiscation will in the following be referred to as *excess forfeiture*.[973] Another important aspect in this process was that the Parliament articulated the state of law when assessing whether the forfeiture would violate the Constitution, which has a line to later discussions of ownership to the

967 See more in Rt. 1975 s. 931.

968 Ot.prp. nr. 39 (1975–76) page 2.

969 Participation Act 1972 section 10b(1). See also Smith (1979a) page 378–400 on the forfeiture authority at that time.

970 See for example Smith (1979a) page 389–390.

971 Participation Act 1972 section 10b(2). By "quota accounting" I refer to calculations of the harvested quantities measured up against the catch limitations.

972 Participation Act 1972 section 10b(3). This was for example done in forskrift 19. september 1978 om inndragning av fangst eller verdi av fangst etter paragraf 10 b i lov om regulering av deltagelsen i fisket, with a section 5 that set out that forfeited values were to be used for price balancing, price support or transportation support.

973 This term is inspired by Eriksen (2015) to distinguish this type of forfeiture from another type of forfeiture that was introduced a few years later, see more below in this chapter. See also Gezelius (2008b) page 51–52 for an overview of the events. There was also a law amendment of the Raw Fish Act 1951 that authorized administrative forfeiture of payment by the sales organizations in cases of violation of rules laid down under a new section 6a in the Raw Fish Act, see more in lov 2. april 1976 om endringer i lov av 14. desember nr. 3 om omsetning av råfisk.

marine resources (see more below in chapter 8.2). It concluded that it was not in violation as "it is not to be seen as criminal forfeiture, but a regulation of the property right of former ownerless things."[974] In other words, the marine resources in the sea were considered ownerless by the legislator.[975]

The inclusion of section 10b was accompanied with an important clarification of the authority to establish *vessel quotas* in new sections 10 and 10a.[976] Section 10 set out criteria established in administrative practices and some new ones to determine quotas for vessels, including storage capacity and number of fishermen onboard and a few other. Pursuant to section 10a the fish sales organizations could be authorized to take on practical tasks in the quota system, including calculating quotas for each vessel and registering catches. It was emphasized in the Bill proposition that this was a natural role of the sales organizations given the interconnectedness to their ordinary responsibilities in the sales of fish.[977] This addition was perhaps not of any significant legal impact at that time, but would in the years to come further manifest, and justify, an increased role of fish sales organizations in the overall resource control.[978]

7.2.2 Establishing responsibilities in the enforcement system, expansion of administrative confiscation and discard policies

The establishment of the NEEZ and technological developments also motivated a law revision of the Saltwater Fishery Act 1955, Herring Fishery Act 1937 and various provisions in the Trawler Act 1951.[979] After a long process, including a policy advisory commission

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974 Innst. O. nr. 53 (1975–76) Innstilling fra sjøfarts- og fiskerikomiteen om lov om endring i lov av 16. juni 1972 nr. 57 om regulering av deltagelse i fisket page 2. Norwegian wording: "ikke er tale om straffelignende inndragning, men en regulering av eierdomsretten til tidligere eierløse ting."

975 See also Rt. 1999 s. 14 page 20.

976 See more on this in Ot.prp. nr. 39 (1975–76) page 3.

977 Ot.prp. nr. 39 (1975–76) page 4. It was even pointed out that any other way to conduct these activities would be largely impractical.

978 See for example Smith (1979a) page 355.

979 Ot.prp. nr. 85 (1981–82) Om lov om saltvannsfiskeriene page 3.

report in 1975, the Saltwater Fishing Act was laid down in 1983.[980] The new statute first of all further made distinct a set of rules for regulating the harvest operations on one side, from the rules and conditions to participate in commercial fisheries on the other, by moving the authority to lay down vessel quotas, from the Participation Act 1972 to the Saltwater Fishing Act 1983 section 5. This transfer of the authority was justified by the idea that it systemically fell under the scope of the Saltwater Fishing Act 1983 as restrictions on the conduct of the fishery, and not the Participation Act 1972, as the latter was a "Licence Act."[981] This distinction has remained up until today and is important to acknowledge, although there are some aspects of it that are not intuitive for the understanding of the system. How the system works in practice is further demonstrated in part III.

Second, the new statute was an important first element in the formalization of the current *triadic enforcement system*, with shared responsibilities between the Coast Guard, the Directorate and the Sales organizations in the resource control and widening the scope of administrative forfeiture. Pursuant to sections 46–48 the Coast Guard had police authority[982] for the enforcement of provisions in the Act, which included a right to inspect, capture, seize and bring vessels at sea into land for further examinations.[983] The Directorate had no police authority, but was authorized to inspect and control vessels and production facilities within the scope of the power.[984] The role of sales organizations in the resource control was at first connected to excess forfeiture. The authority to confiscate catches above harvest limits was moved from the Participation Act 1972 to the Saltwater Fishing Act 1983 section 7.

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980 Saltwater Fishing Act 1983. The commission report was submitted in NOU 1975: 31 Kodifikasjon av fiskerinæringen.

981 Ot.prp. nr. 85 (1981–82) page 18. In Norwegian this was referred to as "konsesjonslov."

982 The Police authority was, however, of a lesser scope than the Police, see for example Ot.prp. nr. 41 (1996–97) Om lov om kystvakten page 19.

983 Saltwater Fishing Act 1983 sections 46, 47 and 48, see also section 53. It was in section 50 established that the Police would pursue cases of vessels brought to land as soon as possible. All these powers were moved to the Coast Guard Act when it went into force in 1999.

984 See more in Saltwater Fishing Act 1983 section 45. The Bill proposition set out that the control was a supplement to the Coast Guard and could take place at sea or land for the provisions it was authorized to control. Ot.prp. nr. 85 (1981–82) page 43.

As noted above in chapter 6.4, the Saltwater Fishery Act 1955 section 64 laid down a duty to discard catches harvested in violation of certain conservation rules. A few decades later, however, there was a growing concern that discards of fish and shellfish were a waste of resources if they could be used for human consumption, and it was seen as important to have control over catches and the actual fishing mortality from the fishing fleet within a quota management regime.[985] These were some of the justifications for the adoption of section 11 in the 1983 statute that set out that *viable fish* caught in violation to provisions pursuant to the Act had to be immediately released into the ocean (as previously), but the Ministry was now authorized to order *illegal harvest* of *dead or dying fish* landed. Furthermore, it was established that the value of these illegal landings would, similarly to the value of *excess forfeiture*, go to the relevant sales organization.[986] This was therefore the creation of another type of forfeiture, which will be referred to as *infringement forfeiture* in this thesis.[987] The main justification for this infringement forfeiture was consideration to the waste of resources (and pollution considerations).[988] The Ministry could through regulations authorize the sales organizations to pay for expenses to land the catches when it was obvious that the catch was not intentional.[989] For both types of forfeiture, the Ministry could lay down further regulations on calculations, and how to use the value of the forfeited resources.[990] Lastly, section 11(2) also authorised the Ministry to prohibit *discards* of catches and other fish waste products.

The system was revised a few years later in 1988 as the legislator found it necessary to clarify that also *legally* harvested catches could be ordered landed for environmental purposes. It was not clear enough from section 11(2) that legal catches of dying or dead fish that was still

985 See for example NOU 1975: 31 page 15. See also more on these developments in Gezelius (2008b) page 60–62.

986 Saltwater Fishing Act 1983 section 11(1). It was highlighted in the Bill proposition that the fishermen would have an incentive to land catches as the value of the forfeiture would go to the sales organization, and therefore indirectly benefit the industry. Ot.prp. nr. 85 (1981–82) page 23.

987 See footnote 973 above and terms used by Eriksen (2015).

988 Ot.prp. nr. 85 (1981–82) page 22–23.

989 Saltwater Fishing Act 1983 section 11(1). The remuneration in relation to excess forfeiture was to prevent the harvest being destroyed or dumped into the sea. Ot.prp. nr. 85 (1981–82) page 20.

990 Saltwater Fishing Act 1983 sections 7(4) and 11(1).

in the sea (typically kept within a seine in the ocean in pelagic fisheries) would fall within the wording of "discards," and therefore could be prohibited from being released back into the sea.[991] A new section 11(2) therefore set out that "the Ministry can order landings of dead or dying fish and prohibit discards of catches and fish waste."[992] By this the full and clear authority to what has been referred to as a *ban of discards* in Norwegian fisheries legislation was laid down, which is the predecessor of the duty to land catches that is addressed in chapter 8.2.[993] It was also clarified that it was the Directorate that had the authority to make decisions on *infringement forfeiture*. Another important clarification on the role of fish sales organizations in the triadic enforcement system were some amendments of the Saltwater Fishing Act 1983 and the Raw Fish Act 1951 in 1989 that expanded the authority of the Ministry to require catch reports, to establish more specific regulations for quota control and to further define the role and duties of the sales organizations in the resource control.[994] These amendments, and a later amendment in 2001 to also include illegal *delivery* of catches in the scope of administrative forfeiture, laid down a last important piece of the puzzle of the use of administrative confiscation in the regulatory system.[995] The essence of the system was that it created a mechanism of non-penal

991 See more on the justifications in Ot.prp. nr. 77 (1987–88) Om lov om endringer i lov 3. juni 1983 nr. 40 om saltvannsfiske m.v. og i visse andre lover page 24–25

992 Norwegian wording: "Departementet kan påby ilandføring av død eller døende fisk og forby utkast av fangst og fiskeavfall."

993 It is at the same time important to point out that the preparatory works emphasized that there were limitations to the extent of a prohibition due to commercial and practical considerations, see Ot.prp. nr. 85 (1981–82) page 23. Norwegian authorities typically refer to 1987 as the year a discard ban was introduced in Norway. This came in the form of a discard ban of dead and dying cod and haddock from purse seine and trawlers set out in forskrift 4. mai 1987 om forbud mot utkast av torsk og hyse i Norges økonomiske sone utenfor det norske fastland (J-45-87). See more on what is referred to as the "Discard Ban Package" in Norway in Gullestad, Blom, and Bogstad (2015). Gezelius (2008b) page 62 summarized the outcome as "the rationale for preventing discards had found its modern formulation."

994 See more on the amendments in Ot.prp. nr. 81 (1988–1989) Om lov om endring i lov 3. juni 1983 nr. 40 om saltvannsfiske m.v. og i lov 14. desember 1951 nr. 3 om omsetning av råfisk; Gezelius (2008b) page 67–68.

995 See more on the justifictaion of including deliveries in the scope in Ot.prp. nr. 92 (2000–2001) Om lov om endringer i lov 3. juni 1983 nr. 40 om saltvannsfiske m.v. og lov 14. desember om omsetning av råfisk (kontrolltiltak).

confiscation of all illegal catches, i.e. confiscation irrespective of criminal liability issued at an administrative level.[996]

7.2.3 Formalizing stakeholder consultations

The Saltwater Fishing Act 1983 laid down wide authorities for the Ministry to regulate the fisheries. The establishment of regulations under these and previous authorities included stakeholder consultations, which from 1973 were formalized through a council with representatives from the harvesters, the Ministry, the Directorate and the Marine Research Institute, and where the processing industry could attend as observers.[997] This was in the Saltwater Fishing Act 1983 formalized as a *Regulatory Council*[998] that was to provide statements before regulations and vessel quotas pursuant to sections 4–6 could be established.[999] The Council, and its successor in the form of *regulatory meetings*[1000] in a contemporary context, were to become the central participatory element in the regulatory system in the years to come.

7.3 Measures to address over-capacity in the offshore fleet

7.3.1 Developments in the purse seine fleet: Consolidation measures

Simultaneously to the establishment of a quota management system with catch limitations and other conservation instruments, there was a continuous evolution of other measures under the participation legislation to address low profitability and overcapacity in different

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996 See more on this in Ot.prp. nr. 85 (1981–82) page 23. Rt. 1999 s. 14 ; Rt. 2007 s. 1217 are two Supreme Court cases clarifying some of the scope of administrative forfeiture under the Saltwater Fishing Act 1983. The former ruled that that the evidentiary standard for forfeiture was "clear and convincing" evidence, and therefore not the normal standard of preponderance of evidence used in Norwegian civil cases. The latter ruled that forfeiture pursuant to section 11 did not have the character of a "criminal offence" pursuant to the ECHR. The use of criminal procedural forfeiture of catchers, gear or vessels in cases of criminal prosecution is not further reflected in the overview of regulatory developments post-WW2 as those are sanctions that go further back in time.

997 Ot.prp. nr. 85 (1981–82) page 21.

998 In Norwegian "Reguleringsråd."

999 Saltwater Fishing Act 1983 section 10. See more on role of the Council in Ot.prp. nr. 85 (1981–82) page 21–22.

1000 In Norwegian "Reguleringsmøter."

vessel groups. For the purse seiners there had been in place arrangements for merging licences since 1978.[1001] Put simply it allowed an owner of several vessels to withdraw one vessel from the fishery, whereas the remaining vessel was allowed to fish the *quota share* (of the TAC) of the other vessels in addition to its own share. The design of the system was, however, not effective in reducing capacity.[1002] Additionally, there were disincentives due to the design of the established allocation mechanisms (or key) for quota shares (which was established after negotiations within the industry). This requires a basic introduction to a rather technical element in how to calculate what a vessel can harvest each year through a quota allocation mechanism building on what generally, and in many sets of rules, are referred to as *quota factors*. These are important for understanding quota provisions annual regulations. A quota factor for purse seine vessels is also referred to as a *basis quota*[1003] and it was in this time period it originated. The allocation key was based on the following equation:

1500 hl + 40 % of storage capacity from 0–4000 hl
+ 30 % of storage capacity from 4000–6000 hl
+ 20 % of storage capacity from 6000–10000 hl
+ 10 % of storage capacity over 10 000 hl

This meant for example that a storage capacity of, for example, 10 000 hecoliters (hl) of one vessel under this equation was converted into 4500 hl.[1004] By converting a storage capacity of 10 000 hl into 4500 hl, what is referred to as a *basic quota* of 4500 hl was established for

[1001] Forskrift 13. februar 1978 midlertidige forskrifter om tildeling av tillatelse til å drive med fiske med ringnot (J-16-78) section 6.

[1002] The following builds on Structural Commission 1989: Innstilling fra kontaktutvalg for strukturspørsmål i fiskeflåten page 46–47. The design of the system was set up so that the quota share of each vessel was determined by storage capacity in hectoliters (hl), and there was an upper limit of 10 000 hl for each vessel. If the storage capacity of two merged vessels amounted to more than 10 000 hl, for example 12 000 hl, the excess capacity of 2000 hl could not be used by the remaining vessel. To use the excess capacity the vessel owner therefore had to invest in a new vessel with larger storage capacity.

[1003] In Norwegian "basiskvote."

[1004] Through the calculation: 1500 +1600 (40 % of first 4000 hl) + 600 (30 % of next 2000 hl) + 800 (20 % of last 4000 hl) = 4500.

that vessel. In other words, it was a term for the share of the total quota for an individual vessel with a certain storage capacity under the regulations in question, which was regressive for storage size.

The point of departure for calculating the actual quota the vessel could fish was adding up all basic quotas of the groups, and from that dividing the total allowable catch (TAC) of the group into vessel quotas (based on the share each vessel had of the group TAC). As a capacity reducing tool, however, the incentives to decrease capacity was therefore not strong at that point. On the other hand, the system would be beneficial for the group as a whole when vessels used the merging opportunity, in particular for vessels that didn't merge, as the total quota was to be allocated on fewer vessels. The situation for this fleet groups and others were some of the issues addressed in a report from The Structural Commission 1989, with a mandate to assess objectives and measures that could contribute to ensure adjustment of the harvest capacity to the resource base, to promote a fleet structure of economic sustainable units and a reasonable allocation of activities along the districts.[1005] These were, as will be seen below, to become prioritized policy areas in the following decades.

The commission saw an increase of the maximum storage capacity for purse seiners from 10 000 hl to 15 000 hl in 1988 as a step in the right direction (gave incentives to merge as more quantities could be fished by one vessel under the increased capacity), but furthermore proposed an extended access to merge licences, in which the gain to a larger degree should benefit the remaining vessel.[1006] In particular, the commission proposed to remove the connection between the physical size of the vessel (storage capacity), and the established right connected to the licence.[1007] In practice this would for example mean that keeping the vessel with the smallest storage capacity as the remaining vessel, would not lead to a lower basic quota according to the allocation key equation introduced above in this sub-chapter, but that it kept the basic quota from the larger vessel that left the fishery according to the

[1005] Strucutral Commission 1989 page 1.

[1006] Strucutral Commission 1989 page 47.

[1007] Strucutral Commission 1989 page 47.

calculus. As will be shown below, these were principles that had already emerged in the trawling fleet and that are essential for the understanding of later developments of capacity-reducing instruments that continued to evolve in the next decades.

7.3.2 Introduction of quota units in the trawler fleet

For the trawling fleet an important predecessor to the work of the Structural Commission 1989 was the introduction of a temporary *restructuring* or *structural measure*[1008] of capacity reduction through a three-year temporary amendment of the Saltwater Fishing Act 1983 in 1984 for certain trawler groups.[1009] This was motivated by the low profitability due to decreasing resources, increasing costs and strict quota regulations.[1010] With authority in a new section 5a of the Act *unit quotas*, *company quotas* and *regional quotas* for *fresh fish trawlers* and *round fish freezer trawlers* over a certain size were introduced in regulations from December 28, 1984, with a three year duration.[1011] The establishment of unit quotas was important as it allowed for more flexible use of the *fixed shares* of the group quota. Allocation of quotas to each vessel had up until that point been based on the size of the trawler, i.e. same type of vessels were allotted the same quota. In the new system the total trawler quota was divided into unit quotas that could be distributed *regardless of the vessel size* within a vessel company (company quotas) or in a region on the basis of agreements between vessel companies (regional quotas), but with a condition that one or more vessels were taken out of the Fishing Vessel Registry, i.e. leave the fishery, but not necessarily for good (more a lay-up situation as this was a temporary arrangement). The quota allocations and calculations of the unit quotas was conducted by the Directorate and were only made valid for one year at the time.

[1008] I will use the term "structural measure" for any measure introduced with the aim of capacity reduction in the fishing fleet. This is today well-established term in Norwegian fisheries policies. I will use this interchangeably with "structural arrangements."

[1009] The amendments are thoroughly outlined in Ot.prp. nr. 17 (1984–85) Om midlertidig lov om endring i lov av 3. juni 1983 nr. 40 om saltvannsfiske m.v.

[1010] Ot.prp. nr. 17 (1984–85) page 1.

[1011] Forskrift 28. desember 1984 om enhetskvoter for ferskfisk- og rundfrysetrålerflåten (Unit Quota Regulations 1984).

The essence of the system was therefore that the same amount of fish was fished by fewer vessels. It was at the same time only a temporary solution as the unit quotas from the vessels that were taken out were only to be allotted to another vessel until the three year period ended or the resource situation was considered strong enough to remove the measure.[1012] For the trawler fleet the resource situation did not, however, improve as expected, which led to the permanent adoption of section 5a in the Saltwater Fish Act 1983 in 1988 that could apply to *all trawler groups*.[1013] The capacity reducing effect of this measure, in combination with state support for decommission and similar measures, were not, however, effective in capacity reduction and capacity increased as a consequence of good fisheries in 1986–1988.[1014] The system would therefore further develop in the 1990s, but there were important events in the cod fisheries and coastal fleet in the late 1980s that first must be introduced.

7.4 Cod crisis: Introduction of limited entry in coastal fisheries

Despite the introduction of a quota regime in international and domestic law generally, it would take some years until catch limiting provisions were to be practiced in coastal fisheries. It was the chain of events in *cod fisheries* in the north in the late 1980s that activated executive authorities into practices (in the form of regulations) that in sum would constitute a *remarkable shift* in Norwegian fisheries policies. The cod fishery was in the mid 1970s subject to bilateral collaboration with the then-Soviet Union.[1015] The bilaterally agreed management measures included provisions to lay down TACs, but there was a clause in the agreement that set out that the coastal fishery with hand hook, longline and nets could continue after the national quota was harvested that lasted until 1983.[1016] There was a

[1012] Ot.prp. nr. 17 (1984–85) page 7.

[1013] This was addressed and proposed by the Maritime and Fisheries committee in the Parliament in Innst. O. nr. 20 (1988–89) Innstilling fra sjøfarts- og fiskerikomiteen om lov om endringer i lov av 3. juni 1983 nr. 40 om saltvannsfiske m.v. og i visse andre lover.

[1014] Strucutral Commission 1989 page 57. See also more on the expansion of the trawler fleet in this time period in Standal (2008).

[1015] I will from now on refer to it as Russia. The joint Norwegian-Russian collaboration was first formalised in 1975, after initial consultations in 1974, see more in Hønneland (2006).

[1016] Om retningslinjer for fiskeripolitikken page 78; Holm, Finstad and Christensen (2014) page 188. Apparently, there were continuous disagreements between Norway and Russia on these issues. Norway wanted to regulate the cod and haddock stock through stricter gear restrictions and minimum sizes, whereas Russia wanted lower quotas and harvest limitations. See more on this in Hønneland (2006) page 31–32.

Norwegian fishery above established quotas in the period 1977–1983, which also continued after 1984, but to a more limited extent due to lower harvest rates and a seal invasion from 1986.[1017] There had been laid down so-called *maximum quotas*[1018] for each individual coastal vessels in Norwegian regulations from 1983, but these were rather generous and did not in practice limit the fishing effort.[1019]

On several occasions in the same period there had been observed low levels of the cod stock and the marine researchers expressed concern over the status of the stock.[1020] In 1988–1989 there came an unexpected decline in the stock and the overall TAC was reduced from 630 000 tonnes in 1988, to 340 000 tonnes in 1989, leaving 113 000 tonnes for the coastal fleet to fish.[1021] The coastal fleet had reached the TAC by early April and the fishery was for the first time closed from April 18.[1022] There is a lot of literature on the chain of the events that followed this fishing stop, investigating what the main causes were and whether it actually was a biological crisis.[1023] What is most interesting for this inquiry is, however, is that the authorities now started practicing quota limitations for the coastal fleet. There was probably a complex rationale for the action that was taken, and it is also not for this inquiry to pursue this in detail, but as demonstrated, there were conservation and biological considerations underpinning the legislation which alone would call for action in cases of sharp resource declines.[1024] The situation also became an opportunity to reconsider the regulatory regime for the coastal fisheries and triggered, as will be shown, a process of

[1017] Holm, Finstad and Christensen (2014) page 188–189.

[1018] The use of maximum quotas are still regulatory instruments used. The basic idea is that this is not a guaranteed quota, but an upper limit for individual fishing within a group quota. As soon as a group quota is reached in one regulatory year, no vessel can continue fishing.

[1019] Hersoug (2005) page 111.

[1020] See for example Hønneland (2006) page 36–37; Hersoug (2005) page 110–113.

[1021] Holm, Finstad and Christensen (2014) page 186.

[1022] Forskrift 14. april 1989 om stopp i fiske etter torsk med konvensjonelle redskap nord for 62 grader N. br. i 1989 (J-57-89).

[1023] See for example Holm, Finstad and Christensen (2014) page 189, 194–195 for an overview.

[1024] Holm, Finstad and Christensen (2014) page 186 also highlight that with the prevailing norms on sustainable resource management, the fishing stop did not appear particularly unexpected or problematic.

closing access to coastal fisheries for the first time.[1025] There had been communicated political signals of a need to improve the economic performance of the fleet for a long time.[1026] Furthermore, the question of expanding the use of licences and restricting access in coastal fisheries was discussed in two different government appointed commission.[1027]

Action was taken and measures were prepared and discussed at the meeting of the Regulatory Council in September and November 1989.[1028] In an Order in Council of December 8, 1989, there were laid down regulations that articulated a set of requirements to participate in the coastal fishery for cod in 1990.[1029] A lot of controversy over the years can be traced to the qualification requirement on the basis of *historical catches* by the vessel in question. Under section 1(c) of the regulations the minimum quantities of cod a vessel had to have landed (depending on its vessel size) in one of the years 1987, 1988 or by October 1, 1989, were set out.[1030] Section 2 set out that the Ministry was to establish a *vessel quota* for the vessels that fulfilled the requirements in section 1. In section 5 it was laid down that vessels that did not fulfill the landing requirement in section 1 could participate in an arrangement of maximum quotas within a further specified *group quota*. It was motivated by a political ambition to adjust the fleet capacity to the resource base.[1031] The next year, and in following years, new participation regulations laid down that access to participate required that the vessel had participated in the fishery the previous year. The coastal cod fisheries had therefore in practice become limited entry fisheries. The system is often referred to an arrangement of Individual Vessel Quotas (IVQs) and it was the vessel that

[1025] According to Hersoug the crisis must have been seen as a "godsend" from the perspective of fisheries administration, as it opened for change. Hersoug (2005) page 113.

[1026] See for example Ot.prp. nr. 85 (1981–82).

[1027] NOU 1981: 3; Strucutral Commission 1989.

[1028] This is studied in detail in Skogvang (2010). I will therefore only refer to the main points.

[1029] Forskrift 11. desember 1989 om adgang til å delta i fiske etter norsk arktisk torsk med konvensjonelle redskap ord for 62 grader N i 1990 (Participation Regulations 1990).

[1030] For a vessel between 10–11 meters, the requirement was for example 10 tonnes of cod round weight. For a vessel up to 7 meters the requirement was 4 tonnes of cod.

[1031] Kongelig resolusjon nr. 24 av 8. desember 1989 (Order in Council 1989) page 4–5. See also reference to it in Skogvang (2010) page 220.

was the legal subject entitled to quotas (not the individual fisherman).[1032] By this the foundations of today's coastal fisheries were basically laid down over a few months of discussion in the public.

Whether the arrangement was intended to become permanent is not investigated in detail here, and is perhaps less relevant in an identification of legal trends as the main principles would last up to today with only minor modifications, modernisation and expansion to other coastal fisheries.[1033] This was obviously a politically delicate and highly debated issue as the coastal fleet was the backbone of many small coastal communities. Just the summary of the meeting in the Regulatory Council in December 1989 made it sound like a political top-down decision that involved little industry consultations. From the content and proposed policies in a White paper from June 1992 it is echoed rather explicit that the authorities wanted to continue with a flexible IVQ system on the basis of continuous assessment of regulatory needs.[1034]

It is also not for this inquiry to assess the legality of the measures, but some general reflections on the legal implications of the introduction and its placement in the current regulatory system can be made.[1035] To the latter, a participation regulation building on a principle of *closed access* for former participants that didn't fulfil the activity requirement, and to all new entrants, was a new form of limited entry, and the first time access to a coastal fishery was restricted. This was a legal structure that would last up until our times. To the

[1032] In Norwegian the IVQs are referred to as "fartøykvoter."

[1033] For a more thorough analysis, see Holm (2001); Maurstad (1997).

[1034] See particularly in chapter 3.2.5 in St.meld. nr. 58 (1991–92) Om struktur- og reguleringspolitikk overfor fiskeflåten.

[1035] There is analysis of the legality of the introduction of vessel quotas in Skogvang (2010). With support from relevant case law in Rt. 1995 s. 955; Salten herredsretts dom av 4. februar 1994; Oslo tingretts dom av 3. juni 2005 (TOSLO-2004-13225) Skogvang concluded that the introduction was not in violation of the prohibition on retroactive legislation in Article 97 of the Constitution. She suggested, however, that the relation to Articles101 and 23(2) of the Constitution could be problematized. She also expressed that there could be individual cases of such a character that the introduction of vessel quotas represented interference in violation of ECHR P1-1. Furthermore, she questioned whether the use of authority could violate Article 26 in the ICCPR.

former, the lack of legal *ex ante* examination and *ex post* evaluation is obvious and no new observation, but it is important to reiterate that these events followed an already under-scrutinised process with the adaptation of the Participation Act 1972. Additionally, the use of the authorization in the Participation Act 1972 sections 6 and 8 to limit access and set out participation requirements through regulations could have been problematized more as the justifications for these authorities in the Bill propositions prescribed a licencing regime that was quite different than what was established for the coastal fleet. The conclusion by the Supreme Court in Rt. 1995 s. 955 page 960, and the assumption Skogvang (2012) page 222, that the regulations are lawful might hold, but the scope of the original authority in the Participation Act 1972 could have been analysed more thoroughly in those discussions. This is especially as it has been pointed out that the measures in the cod crisis were "pure emergency measures," which were intended to be repealed as soon as the stock situation had improved, and that the industry saw them as temporary measures.[1036]

Although there were aspects of the measures that echoed signals given in different official documents in the 1980s, with a line back to the Cod Fishing Commission 1957 and the Profitability Commission 1937, the legal questions concerning the regulatory framework for the coastal fleet raised new questions that would have merited more attention, and should have been addressed more explicitly in this time period. Especially, the White paper[1037] from 1992, which was a follow up of the Structural Commission 1989, in my opinion failed to make necessary clarification of the future path for the coastal fleet with regards to participation rules, or at least to identify important questions for the authority of access restrictions and the development of a revised Participation Act. It hardly mentioned the issue of restricted access through regulations, but referred more to the quota question and introduction of an IVQ (vessel quotas) arrangement without discussion of the legal implications.[1038] What it did, however, was to signal and underscore the transformation that was to come with the phasing out of subsidies and the start of discussion on market-based instruments as an element in future policy discussions. The influence of the more general

[1036] Gullestad et al. (2014) page 175; NOU 2008: 5 page 220; St.meld. nr. 58 (1991–92) page 137.

[1037] St.meld. nr. 58 (1991–92).

[1038] St.meld. nr. 58 (1991–92) page 136–137.

trade policies in Norway that lead to the European Economic Agreement (EEA) between EU and EFTA cannot at the same time be overestimated. About a decade later, as will be seen below, the market-based orientation was to come to the fore of the regulatory agenda.

In retrospect, procedural weaknesses that took place in a different historical context might be more easily identified, and it is in the current state of the law that the substantive scope participation rules for the coastal fleet must be understood on the background of. There were also several processes for follow-up acknowledged in St.meld. nr. 58 (1991–1992).[1039] The problem, however, is that history repeats itself and that these are issues that also more recently have been criticized for lack of attention.[1040]

7.5 Establishment of long-term allocation of quotas

As seen, the regulatory system entering the 1990s consisted of a permanent licencing system for the *offshore* vessels (trawlers and purse seiners) issued through individual decisions, and IVQs in coastal cod fisheries set out in temporary regulations. The actual allocation of fish on the basis of annual quotas between fisheries and vessel groups, was and is, however, a different issue. The question of *who* can harvest *established quotas* in the quota system ultimately comes down to *political priorities*, but these are highly complex matters and at the core of contemporary discussions of access to resources. It is important to highlight the relevance of allocation in the regulatory system, and in relation to expressed *political signals* that are pertinent to the use of discretionary authorities. Paradoxically, however, allocation, being one of the most political issues and a tool for setting out political priorities, have to large extent been left to the industry. Quota allocation is also a multi-faceted issue as there are different evolutionary paths for the diverse commercial fisheries we have today. Up until 1990 allocation was mostly determined from one year to another, but due to the unstable resource situation entering the 1990s, the Norwegian Fisherman Association proposed a more long-term strategy of allocation to secure more stability for the industry actors.[1041] This was not without conflict between the different interest groups within the association

[1039] St. meld. nr. 58 (1991–92) page 146–147.

[1040] See for example Auditor General Report 2020.

[1041] St.meld. nr. 51(1997–98) Perspektiver på utviklingen for norsk fiskerinæring page 51.

and was a result of political bargaining.[1042] For cod the allocation key would become known as *the trawl ladder*.[1043] It set out the shares of the national TAC of cod to trawlers and the coastal fleet, the first decision for the period 1990–1994, and a modified key after 1995 lasting up until today.[1044] The shares were dynamic and would from 1995 and onwards increase from 28 % up to 33 % for the trawlers if the Norwegian TAC increased from respectively 130 000 tonnes up to 330 000 tonnes and over.[1045] The remaining shares were allocated to the coastal fleet. Allocation keys were also established for other major fisheries in 1994.[1046]

Over the next few years the authorities followed the advice from the industry and the Parliament expressed its support and highlighted the necessity of securing stable quota allocation in several Parliament recommendations addressing White papers in the 1990s.[1047] In 1998 the Norwegian fisherman Association appointed an internal commission that further examined the issues and proposed several allocation keys that were adopted as a compromise in 2001.[1048] The keys were revised in 2003 and 2007, but the main elements remain and are to a large extent followed by the authorities in current regulations. Quota allocation between vessel groups has generally up until today been a question of policies rather than one with biological, economic or, in the more contemporary political agenda,

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[1042] According to Hersoug (2005) page 140 the subgroup of offshore vessel owners required a guarantee that any efficiency gains through fleet reduction had to remain within the respective groups. In Gezelius (2002c) the Norwegian approach is analyzed through political comparative analysis between cod fisheries in Norway and Atlantic Canada. Gezelius sees the Norwegian approach of intra-industrial conflict as a conflict expressed horizontally within the industry as preferred by the state as the political costs can be reduced.

[1043] In Norwegian referred to as "trålstigen."

[1044] Meld. St. 32 (2018–2019) Et kvotesystem for økt verdiskaping. En fremtidsrettet fiskerinæring page 39.

[1045] Meld. St. 32 (2018–2019) page 39.

[1046] See more details in a document reproducing different quota decisions in Norges Fiskarlag here: https://www.fiskarlaget.no/index.php?option=com_edocman&view=document&id=137&catid=55&Itemid=194

[1047] Innst. S. nr. 93 (1998–99) Innstilling fra næringskomiteen om perspektiver på utvikling av norsk fiskerinæring page 13; Innst. S. nr. 50 (1992–93) Innstilling frå sjøfarts- og fiskerikomiteen om struktur- og reguleringspolitikk overfor fiskeflåten (strukturmeldinga) og forslag frå stortingsrepresentantane Jens Marcussen og Paal Bjørnestad om endringar i fiskeripolitikken (En lønnsom fiskerinæring - et håndslag til kystsamfunnet) page 15.

[1048] This commission was referred to as "Ressursfordlingsutvalget."

climate and emissions related underpinnings. These polices must at the same time be seen in relation to the strong position and centre of attention capacity reducing instruments were to gain as the new millennium was approaching.

7.6 Expanding the Unit Quota System

As seen in chapter 7.3, measures to reduce capacity in the offshore fleet had not been effective in the 1980s. In 1990, a more extensive quota unit system for trawlers was therefore laid down in regulations with the authority of section 5a in the Saltwater Fishing Act 1983. The measure was to last for five years (until the end of 1994) for all trawler groups over a certain vessel size.[1049] Except for the time limitations, this system built largely on a proposal by the Structural Commission 1989. In contrast to the 1984 regulations there was an additional requirement that the licence had to be renounced, and it had to be registered in the Norwegian Ship Register that the vessel could not be used for fishery.[1050] Furthermore, allotment of unit quotas to vessels in Southern Norway could *not* be done by vessels that were taken out of the fishery in Northern Norway.[1051] There was therefore a *geographical restriction* in the design to ensure that licences did not redistribute from the north to the south in the arrangement. This is the first use of geographical bindings in structural measures of this type that this thesis has identified in the material studied. As to the quota shares of individual licences, the use of the term *quota factor* had been established in administrative practices and used in calculations of vessel quotas in tonnes from 1976 onwards. This was an equivalence to the *basis quota* in the purse seine group. The quota factors on cod for different trawler categories were not equal for all trawler groups until the 1990s, when they were set at 1 for all trawlers, except smaller trawlers that had a factor of

[1049] Forskrift 12. januar 1990 nr. 10 om enhetskvoter og rederikvoter for trålerflåten (Unit Quota Regulations 1990).

[1050] Unit Quota Regulations 1990 section 2(2).

[1051] Unit Quota Regulations 1990 section 4(1).

0,35.[1052] For vessels that took part in the unit quota arrangements, the quota factors would add up as a result of the merging of licences.

In 1993, the authority to establish unit quotas under section 5a of the Saltwater Fishing Act 1983 was expanded to include the purse seine group.[1053] It was seen as an important measure to provide a balance between the harvest capacity of the fishing fleet and available resources.[1054] Although the authority was still laid down as a temporary provision lasting until the end of 1999, it represented a *general introduction* of *market-based capacity reducing measures* to the most important offshore vessel groups. It would take another decade, however, until it would be come the prevailing efficiency tool for all commercial vessel groups.

7.7 Delivery duties for trawlers and regional considerations

There had in the same time period as the above events been an evolution of new trends in the regulation of the trawler fleet in relation to the processing industry on land. As seen in chapter 6.3.1, the relevance of the processing industry within the scope of the thesis is first and foremost the exemption from the activity requirement in the participation rules in the issuing of trawler licences. It is at the same time an extremely difficult and complex task to set the delimitation to what extent fishery related activities on land is an element of the objectives of the statutes regulating the commercial fleet. As seen, the trawler policies were justified by social considerations related to maintaining a fish processing industry and employment in fishery dependent communities. With the negative developments in the resource situation and low profitability in the trawling fleet in the 1980s, the processing sector was also affected negatively. This further escalated when the Freezing Concession Act

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[1052] See Rt. 1993 s. 578 for an overview of the developments of quota factors in the trawler groups. The legality of changes in quota factors, and thereby redistribution of quota shares among trawler categories was up for analysis in the case. The Supreme Court ruled that the regulations that redistributed quota shares were valid as the Saltwater Fishing Act 1983 section 5(3) authorized differentiation of quotas based on land industry considerations. See more on these developments in Standal (2008).

[1053] Lov 11. juni 1993 nr. 73 om endring i saltvannsfiskeloven; Ot.prp. nr. 75 (1992-93) Om enhetskvoteordningen i saltvannsfiskeloven. See more on the more detailed policies that led to the law amendments in St. meld. nr. 58 (1991–92).

[1054] Ot.prp. nr. 75 (1992–93) page 4.

1963[1055] was repealed in 1984, which facilitated more processing and freezing onboard trawlers.[1056] This would again lead to more competition for processing facilities on land, as the raw material was scarce. Although there had been cases of allocating shares of the TAC for landing in regions with little alternative employment opportunities (especially the county of Finnmark with a first case in 1983), there was an amendment of the Saltwater Fishing Act in 1988 that more explicitly authorized the Ministry to lay down *district quotas* under a new section 4(2) as raw material for the processing industry on land in certain cases.[1057] Furthermore, it was clarified in section 5(3) that consideration to where the production of the raw material took place (on land or the vessel) was a relevant criterion when determining vessel quotas.

The filet processing industry had regardless of these measures large financial problems in the 1980s and 1990s and most producers went bankrupt.[1058] This was an industry that was connected to trawlers that delivered raw material, but in some cases the connection between vessel companies and processing plants had been weakened.[1059] It is important to emphasize that at this point there were two main categories of trawler ownership, which were 1) industry ownership with exemption from activity requirement and 2) fishermen ownership, which were rooted in licences issued on grounds of local ownership with vessel companies in collaborations between municipalities and banks, see the requirements set out above in chapter 6.3.1. To strengthen connections between the trawlers and the industry, the authorities started a practice of setting out *specific licence conditions* when issuing licences to *new owners* in industry and vessels that directed where catches had to be delivered, which

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1055 Lov 21. juni 1963 nr. 2 om bygging, innredning og utvidelse av anlegg for hermetisering og frysing av fisk og fiskevarer m.v. (Freezing Concession Act 1963)

1056 Lov 24. februar 1984 nr. 2 om oppheving av lov 21. juni 1963 nr. 2 om bygging, innredning og utvidelse av anlegg for hermetisering og frysing av fisk og fiskevarer m.v. The motivation was that it was regarded as redundant legislation given the liberal practice of approving most application for processing concession. Ot.prp. nr. 4 (1983–84) Om lov om oppheving av lov 21. juni 1963 nr. 2 om bygging, innredning og utvidelse av anlegg for hermetisering og frysing av fisk og fiskevarer m.v. See also an overview of the events and historical context in Finstad (2005) page 281–283.

1057 See more on the amendments in Ot.prp. nr. 77 (1987–88).

1058 Delivery Duties Expert Group 2016 page 13.

1059 NOU 2002: 13 Eierskap til fiskefartøy page 61.

is what is often referred to as *delivery duties*.[1060] As the duties came in the form of individual decisions, the conditions would vary (no generally standardization), but the main justification was to secure activities in the filet production industry in Northern Norway.[1061] The most known industry ownership was the different acquisitions by the corporate groups owned by the former fisherman Kjell-Inge Røkke and Bjørn-Rune Gjelsten through the company Norway Seafoods, which by the early 2000s was the owner of 18 vessels with delivery duties (of a total of 49 trawlers with delivery duties).[1062] What was characteristic for the ownership of Norway Seafoods was that a *production duty*[1063] was a part of the ownership conditions for specific processing plants.[1064] This meant that the delivery duties included a duty to maintain production at the plants at a certain level, and that the trawler licence could be revoked if production was reduced or closed.[1065]

This is a complex regulatory landscape to navigate with the non-standardized conditions, different types of duties and ownership constructions, and the task of how to ensure enforcement. All of this must also be seen in relation to the general macroeconomic and technological trends with more production and trade across borders globally, which further increased the competition of the raw material in these time periods. In the 1990s, the filet industry did for some years benefit from deliveries from Russian trawlers that made the duties less pertinent, but this changed towards the new millennium and the trawler obligations received new attention.[1066] A policy advisory commission was in 2001 appointed to broadly examine ownership of fishing vessels, including experiences with delivery duties.

[1060] Delivery Duties Expert Group 2016 page 13. In Norwegian these are referred to as "leveringsvilkår."

[1061] See a summary of the different types of conditions in NOU 2002: 13 page 62–63.

[1062] Delivery Duties Expert Group 2016 page 13; NOU 2002: 13 page 62.

[1063] In Norwegian this is referred to as "aktivitesplikt."

[1064] Delivery Duties Expert Group 2016 page 14.The relevant licences are today under new ownership. These are also the only licences with a production duty as the company Nergård made an agreement with the municipality that had the production facilities to abolish the production duty of the licence.

[1065] See for example the decision on the approval the ownership of Melbu Fiskeindustri AS, dated October 14 1996 in Fiskeridepartementet: Vedtak 14. oktober 1996 på søknad om endring i eiersammensetning i Melbu Fiskeindustri AS - Dispensasjon i henhold til deltakerlovens § 4 siste ledd. See also more in NOU 2002: 13 page 62; Delivery Duties Expert Group 2016 page 18.

[1066] Fiskeri- og kystdepartementet: Høring av 23. juni 2006 om forslag til endring av leveringsplikt for fartøy med torsketråltillatelse (Delivery Duties Hearing 2006) page 3.

It did find that the duties mostly were complied with, but with some reservations found that this was not the case for the county of Finnmark where about 49 % of the catches were delivered outside the county.[1067] The commission proposed to lay down a unified set of rules through regulations and called for more flexibility in the arrangements.[1068] It did not see that loosening some of the restrictions would be incompatible with the objective of ensuring that the marine resources would benefit the coastal population.[1069] At the same time the commission pointed to some of the dilemmas of balancing state interventionist district and settlement policies with consideration to fair competition and profitability for the actors in a more liberalised world economy.[1070]

After a public hearing on a proposal from the Ministry the Delivery Duties Regulations were adopted in 2003.[1071] Section 3(1) set out the main rule that the owner of a vessel within the scope of the regulations had to deliver catches according to the conditions in the licence. If the land processing industry in question didn't buy the catches, however, the catches had to be delivered within a defined geographical area pursuant to section 3(3). If no company in the region would buy the catch, the catches could be offered in the open market.[1072] Indirectly, this was establishing that the *duty to deliver* was a *duty to offer* catches to the processing industry in a certain order. The enacting of these regulations has caused a lot of controversy as critics have claimed that it was an undermining of the delivery duties. At the same time it is important to stress that there had not been a *buyer duty* connected to the delivery duties.[1073] The justification for the regulations was therefore that the vessel owner should not be liable if the relevant buyer on land either wouldn't or couldn't buy the catches.[1074] For the cases where there was the same owner of the vessel and the processing

[1067] NOU 2002: 13 page 63.

[1068] NOU 2002: 13 page 69.

[1069] NOU 2002: 13 page 69

[1070] NOU 2002: 13 page 62–64.

[1071] Forskrift 12. september 2003 nr. 1131 om leveringsplikt for fartøy med torsketråltillatelse (Delivery Duties Regulations).

[1072] Delivery Duties Regulations section 5(4).

[1073] See for example Delivery Duties Expert Group 2016 page 23 assessing this duty in a contemporary context.

[1074] See for example Delivery Duties Hearing 2006 page 16.

plant, the scope of the duty to deliver depended on interpretation of the specific conditions of the relevant individual decision.

In addition, the regulations laid down other rules for how much of the catch was subject to the duties,[1075] setting prices[1076] and the place of delivery.[1077] There was also enacted an authority to punish violation of the regulations, or revoke licences or permits under the Participation Act sections 11 and 18.[1078] These instruments, in combination with subsequent increased control efforts, were other important mechanisms to provide compliance to the duties, but they are also associated with costly and complex administrative activities.[1079] Only a few years later there were made several modifications of the regulations after a hearing.[1080] The major newcomer was the inclusion of a *duty to process*[1081] a certain share of the catches bought through the delivery duties. With this change, there was de facto three main duties under the delivery duties: 1) duty to offer catches in a specific order, 2) a production duty for owners of certain processing plants that also owned trawlers and 3) duty to process a certain share of the catches.[1082] The amendments of the regulations in 2006 neither managed, however, to settle any of the complex challenges with the delivery duties, but there were other concurrent events that continued to shape the regulatory framework for the fishing fleet that were important context to the later developments.

7.8 Modernisation of participation legislation

As seen above the authorities intended to further examine participation legislation and replace the Participation Act 1972 shortly after its adoption, but it did not happen until the

[1075] Delivery Duties Regulations section 4.

[1076] Delivery Duties Regulations section 5.

[1077] Delivery Duties Regulations section 6.

[1078] Delivery Duties Regulations section 7.

[1079] See for example Delivery Duties Expert Group 2016 page 19.

[1080] See more on the proposals in Delivery Duties Hearing 2006.

[1081] In Norwegian referred to as "bearbeidingsplikt."

[1082] These three duties are therefore in Norwegian referred to as 1) tilbudsplikt, 2) aktivitetsplikt and 3) bearbeidingsplikt.

enacting of the Participation Act that went into force from 2000. Although it was a consolidation of five statutes,[1083] there were important clarifications, codifications of former practices and new rules that can supplement the overview in chapter 3.6. A purpose clause was for the first time included in fisheries legislation in its section 1. The justifications in the Bill proposition basically reiterated the main goals, ambitions and considerations that were articulated in St.meld. nr. 58 (1991–92) and St.meld. nr. 93 (1982–83), and pointed to the protection of the resource base as the most central priority.[1084] In addition to six specific targets, it set out the following four general objectives:

- to preserve the main characteristics of the settlement patterns,
- to protect the resource base,
- to secure safe and good work opportunities, and
- to increase the real earning capacity of the fishing industry.[1085]

It is important to point out that the issue of overcapacity and profitability is thoroughly addressed in Bill proposition, with reference to the conclusions in the St.meld. nr. 58 (1991–92) By this, the central role of White papers and the two above papers specifically in relation to fisheries legislation, were highlighted by the legislator. The relevance and weight of these sources in the understanding and interpretation of the fisheries legislation by the judiciary branch is an area that deserves increased attention.

Chapter II of the new statute set out the requirements to participate in commercial fisheries. Previously the formal requirement to participate in commercial fisheries was that the relevant vessel was registered in the Fishing Vessel Registry. In the new system a commercial permit had to be issued prior to such registering. The Ministry was authorized to issue commercial permits and set more specific regulations for commercial permits.[1086] In

[1083] Fishing Vessel Registry Act 1917; Trawler Act 1951; Participation Act 1972; lov 16. juni 1939 om fangst av hval (Whaling Act 1939); lov 14. desember 1951 om fangst av sel (Sealing Act 1951).

[1084] Ot.prp. nr. 67 (1997–98) page 41.

[1085] Norwegian wording: "å bevare hovedtrekkene i bosettingsmønsteret, - å verne ressursgrunnlaget, - å sikre trygge og gode arbeidsplasser, og – å øke den reelle lønnsevnen i samfunnet."

[1086] Participation Act section 4(1).

practice this meant that *formal individual decisions* on commercial permit applications, which had not been issued previously, were now required by law.[1087] This can also be seen as a formal adjustment to the procedural steps and requirements set out in the Public Administration Act chapters IV–VI. *The activity requirement* to fish commercially was tightened as the applicant now had to have participated in fisheries for 3 of the last 5 years, in contrast to 3 out of the last 10 years in the previous statute.[1088] This strictness was, however, modified with the clarification that "active" in relation to the activity requirement did not entail only physical presence on vessels, but also that what is often referred to as *administrative vessel owners* on land could qualify, through a new articulation of the activity requirement in section 6(1). This had been an established administrative practice since 1985 since vessels had increased in size and crew members and administrative tasks on land had grown similarly.[1089] The authority to exempt from the activity requirement, when regional consideration could justify it, was moved from the King to the Ministry.[1090] There was also no longer a condition to obtain a statement from a advisory board before an exemption was made.

Through all the amendments the scope of the authority and flexibility of the Ministry to determine who was eligible to participate in commercial fisheries had been widened. At the same time there had been made specifications with regards to when a commercial permit application *could* be rejected, and when it *had to* be rejected, pursuant to sections 7 and 8, building on the previous state of law. Furthermore, section 11 set out situations when a licence *had to* be revoked and when it *could* be revoked. Except for the statutory requirements, administrative discretion would therefore still play an important role in the licence system as the rules set out in sections 7, 8 and 11 would also apply to the issuing of concessions.[1091]

[1087] Participation Act section 22. See for example the discussion in Ot.prp. nr. 67 (1997-98) page 34.

[1088] Participation Act section 6(1).

[1089] Fiskeri- og kystdepartementet: Høring - instruks om administrative redere 2013 (Administrative Vessel Owner Hearing 2013) page 2.

[1090] Participation Act section 6(3).

[1091] Participation Act sections 12(1) and 18(2).

The new statute also represented an expansion of the concession regime in offshore fisheries. Section 12(1) set out that all fishing with specific gear types, including purse seiners, was prohibited, unless a concession was issued. As seen, it was only for trawler such a prohibition previously had been enacted in statutes, whereas for other vessels such prohibitions were laid down in regulations. As the Trawler Act 1951 was consolidated into the statute, also trawling was included in this prohibition. The preparatory works expressed that this formally was an expansion of a statutory concession requirement, but that would be no notable changes in practice.[1092] As previously, the King in Council could lay down further requirements for a licence under section 12(2). Under section 12(4) the King in Council could lay down more specific regulations for the issuing of licences, in which emphasis had to be made on the importance of the fishery for the supply of raw material to specific districts.

For the coastal vessels, the state of law on access restrictions, which was continued with main elements explained above in chapter 7.4, was clarified in section 21(1), which authorized the King in Council to restrict access to fisheries for one year at the time on certain conditions when resource management considerations, the conduct of the fishery or profitability concerns necessitated such restrictions. It was still not presented as an enduring arrangement, but more of an expedient tool to limit harvest for regulating vessels that were not subject to a concession requirement.[1093] In retrospect, knowing that this is a construct that has been prolonged, and extended in practice up to today, it is interesting to notice some of the arguments by the Ministry in the Bill proposition. It was underscored that already introduced restrictions for coastal vessels was something different than the concession arrangements, as they did not represent a fixed amount of licences to conduct "a defined future business"[1094] and was therefore a design that was "not closed in the same

[1092] Ot.prp. nr. 67 (1997–98) page 48.

[1093] Ot.prp. nr. 67 (1997–98) page 52.

[1094] Norwegian wording: "en definer fremtidig virksomhet."

way as the licencing arrangements."[1095] The Ministry did at the same time explicitly open up for future assessments of the restrictions in the Bill proposition if the strict access conditions were continued from year to year with "the aim of either terminating the arrangements, relaxing access conditions or implementing the arrangements as ordinary concession arrangements."[1096]

Much can be said about these arrangements that have endured up until our time with the last adoption of the unified *fishery licence* in 2021, see more below. A weakness in the legislative process leading to adoption of the Participation Act in 1999 was that although some legal clarifications were made, there was little analysis and discussion of the legal nature of the use of either concessions, or limited entry for coastal vessels, with regards to general public law issues. The granting of licences and concessions to conduct certain activities is nothing unique for fisheries law, but exists in the regulation of other several other industries that is not open for everyone.[1097] The enacting of the new statute also represented a codification of different administrative practices that had emerged through the years, but whether the practices could be justified in a broader societal context was not problematized.

At the end of the 1900s much of the foundations of the modern fisheries legislation in Norway had been laid. The triadic enforcement system with the Directorate, the Coast Guard and the fish sales organization had been established, but the system did not put an end to problems of overfishing and related problems of controlling the harvest outtake that continued into the new millennium. It also left a period where the use of limited entry regimes had become the standard in most of the major commercial fisheries, but this shift had challenged some of the external legitimacy to the system, especially in coastal communities that were depending on small-scale fisheries. It was at the same time a

[1095] Ot.prp. nr. 67 (1997–98) page 52. Norwegian wording: "ikke lukket på samme måte som konsesjonsordningene."

[1096] Ot.prp. nr. 67 (1997–98) page 52. Norwegian wording: "med sikte på at man enten bringer ordningene til opphør, foretar lempinger i adgangsvilkårene eller gjennomfører ordningen som en ordinær konsesjonsordning."

[1097] For a general overview, see Alvik and Bjørnebye (2020).

regulatory system equipped for addressing issues of overcapacity and profitably more broadly in commercial fisheries. And it was the extension of efficiency and market-based instruments that would become the centre of attention in the transition into a new millennium.

8 Fisheries legislation in a digitalized world (early 2000s and onwards)

8.1 Intensification of efficiency considerations and market-based mechanisms

8.1.1 Introduction of structural measures in the coastal fleet

The new millennium started with the adoption of regulations in 2000 that expanded the use of the consolidation of trawler licences through the unit quota system that could last up to 18 years.[1098] The first principle change came, however, with the introduction of what is referred to as *structural quota arrangements*[1099] (SQAs) in the form of *consolidation measures* for the coastal fleet, and a decommissioning scheme, in 2003. The issue of decommissioning was first triggered by a request from the Parliament in May 1999 on whether unit quota arrangements could be implemented for coastal vessels.[1100] The following process led to the adoption of an authority to levy a fee on the first-hand value of the harvest in a new section 9b in the Saltwater Fishing Act 1983 in the Parliament in December 2002, which would go into a *Structural Fund* for capacity adjustment of the fishing fleet.[1101] The Parliament did at the same express that the overall resource allocation and structural policies in the industry had to be broadly discussed by the Parliament before any other measures were to be implemented.[1102]

[1098] Forskrift 30. juni 2000 om enhetskvoteordning for torsketrålflåten (Unit Quota Regulations 2000). Under section 8 it was set out that it would last for 18 years if the vessel that left the fishery was scrapped. If the vessel was not scrapped, it would last for 13 years. Similar arrangements had been in place for purse seine vessel from 1996, see forskrift 14. juni 1996 om enhetskvoteordning for den konsesjonspliktige ringnotflåten (Unit Quota Regulations 1996).

[1099] In Norwegian "struturkvoteordninger."

[1100] See more on the background in Ot.prp. nr. 76 (2001–2002) Om lov om endring i lov 3. juni 1983 nr. 40 om saltvannsfiske m.v. (strukturfond for kapasitetstilpasning av fiskeflåten) page 1–3.

[1101] Lov 29. mars 2003 nr. 19 om endring i lov 3. juni 1983 nr. 40 om saltvannsfiske m.v. (strukturfond for kapasitetstilpasning for fiskeflåten).

[1102] Innst. O. nr. 34 (2002–2003) Innstilling fra næringskomiteen om lov om endring i lov 3. juni 1983 nr. 40 om saltvannsfiske m.v. (strukturfond for kapasitetstilpasning i fiskeflåten) page 4.

Following the adoption of this authority and a hearing proposal on structural measures for the coastal fleet, a White paper on these issues was submitted to the Parliament in March 2003.[1103] This is an important document for the understanding of the current regime and therefore outlined in some detail. In addition to proposing a practical implementation of a decommissioning scheme, the report proposed the introduction of a *structural quota arrangement* (SQA) for coastal vessels of the group categories 15–21 meters and 21–28 meters and to introduce a one-year trial of a *quota exchange system*[1104] (QES) for coastal vessels in certain counties. The main idea of SQAs was that a vessel owner which had several vessels (or went out and bought one or more vessels), which each had an entitlement to a quota allocated through annual regulations, could fish the quotas with fewer vessels by entering into an SQA. The main condition was that vessels that did not fish their entitled quota was taken out of the fishery and scrapped.

The terminology can be confusing, but a *structural quota* in this system would be the quota a vessel taken out of a fishery would have been entitled to under annual regulations if it had remained in the fishery. If, e.g., an owner with two vessels wanted to enter into an SQA, one vessel would have to be scrapped, whereas the remaining vessel subsequently would be entitled to the structural quota in addition to what it was allocated through its annual permit in the fishery. The latter is often refer to as a *basic quota*[1105] of the vessel. It was therefore a voluntary instrument intended to reduce the amount of vessels (and thereby vessel capacity), and increase the resource base of the remaining vessels. At the same time the remaining vessel would only get 80 % of the structural quota, as 20 % of the quantity would be curtailed and distributed flat to all vessels of the group. In this way, all of the vessels would benefit some from use of the arrangements.

The proposed QES was in principle related to SQAs as it allowed for fishing quotas on fewer vessels, but it took form in a type of quota lease (quota exchange). This arrangement,

[1103] St.meld. nr. 21 (2006–2007) Strukturtiltak i kystfiskeflåten.

[1104] In Norwegian referred to as "driftsordninger."

[1105] In Norwegian referred to as "grunnkvote."

however, was of a temporary and more flexible character as no vessels had to be taken out of the fishery permanently and scrapped, and it was only to be established as a trial for certain areas for one year, with the possibility of extension. It was also acknowledged by the Ministry that this was a measure involving a higher transferability of quotas.[1106] Lastly, the Ministry proposed further examinations of the issue of resource rent taxation.

A majority of the Parliament Committee that addressed the proposals saw the over-capacity situation for the coastal fleet as a pressing one, which required urgent and specific action.[1107] This majority therefore supported the proposals, but set an upper limit of stacking three quotas for each vessel when using SQAs. In practice, this meant that a vessel could use SQAs for consolidation until it would be allocated three times the number of *quota factors* connected to its basic quota. This is what is often referred to as a *quota ceiling*.[1108] Additionally, a long list of concerns had to be accounted for when implementing structural measures, including maintaining a *differentiated fishing fleet*, securing a *stable geographical allocation* of access to resources, providing *flexibility* to the actors, *avoiding a large debt* for vessels that would go into the arrangements and contributing to the *highest national value creation* by regarding *fleet and industry as a whole*, to mention a few.[1109]

A more specific directive from the Parliament was that SQAs were only to be used within the relevant length group and under other existing geographical restrictions on sales of vessels to *ensure stability in the resource allocation*.[1110] Lastly, the Parliament called for an evaluation of the SQAs after three years of operation. A minor faction of the Parliament Committee did not endorse the proposals. It was of the opinion that the proposals, and their consequences, were not sufficiently informed, and that the structural quotas would be a step in the direction of introducing *transferable quotas* that could be freely traded in Norway.[1111]

[1106] St.meld. nr. 20 (2002–2003) page 66.

[1107] Innst. S. nr. 271 (2002–2003) Innstilling til Stortinget fra næringskomiteen om strukturtiltak i kystfiskeflåten page 7.

[1108] In Norwegian referred to as "kvotetak."

[1109] Innst. S. nr. 271 (2002–2003) page 10.

[1110] Innst. S. nr. 271 (2002–2003) page 11.

[1111] Innst. S. nr. 271 (2002–2003) page 8 and 11.

It also highlighted that transferable quotas would come in conflict with the idea of the marine resources as common resources, and that this was not problematized in the report.[1112]

Shortly after the Parliament process was concluded, the regulations on a fee for a Structural Fund were laid down on all first-hand sales of fish and went into force for a five-year period from July 1, 2003.[1113] What was new with the decommissioning scheme, in contrast to previous schemes, was that it was *partly funded by the industry* through the Structural Fund arrangement. The basic features was that all vessels under 15 meters could apply for decommissioning support, on the conditions that all licences were abandoned and that the vessel was scrapped.[1114] The Coastal SQA Regulations were adopted in November of the same year, building on the proposals in the White paper.[1115] One important feature of regulations was that it was specified that the structural quota was issued for one year at the time, but with no upper time limitation for how long a structural quota could be issued.[1116] This is, as will be shown shortly, a rule that would come under attention in relation to the introduction of structural quota arrangements (SQAs) in the offshore fleet that followed a few years later.

8.1.2 Introduction of structural measures in the offshore fleet

After a ministerial hearing in November 2004, Offshore SQA Regulations were laid down in March 2005.[1117] The hearing highlighted that there were still overcapacity of harvest effort in different offshore vessel groups, regardless of the different unit quota arrangements that had been in place for some years.[1118] The Ministry pointed out that the economic analysis

[1112] Innst. S. nr. 271 (2002–2003) page 8.

[1113] Forskrift 30. juni 2003 nr. 876 om strukturavgift og strukturfond for kapasitetstilpasning av fiskeflåten (Structural Fund Regulations).

[1114] Structural Fund Regulations sections 5,6 and 7.

[1115] Coastal SQA Regulations.

[1116] Coastal SQA Regulations section 10.

[1117] See also chapter 3.6.4.

[1118] Fiskeri- og kystdepartementet: Høring 26. november 2004 om strukturkvoteordning for havfiskeflåten (Offshore SQA Hearing 2004) page 13–20.

underpinning the time limitations of 13 or 18 years might not have been accurate enough, that many actors had a long-term perspective in the operations and that there was a need to stimulate ofan intensification of the use of structural measures in some of the groups with the highest overcapacity.[1119] On this background, and justified by consideration to harmonization of legislation, the Ministry proposed to remove the *predefined time limitation* for the use of unit quotas for offshore vessel groups and establish SQAs mostly in line with the arrangements in the coastal fleet. Previous curtailments in specific offshore groups and geographical restrictions were, however, continued instead of the general 20 % curtailment that applied to the use of SQAs in the coastal fleet. The Ministry underscored that the authority in section 5a in the Saltwater Fishing Act 1983 didn't require any time limitation, and that the arrangements did *not imply* that a buyer entering into an SQA would achieve any property rights to a certain share of the quotas.[1120] An arrangement of quota lease of up to 20 % of quotas by another vessel on certain conditions after a certain date (towards the end of the season) was furthermore continued in the regulations for all offshore groups. This was, and still is, referred to as the *leftover fishing arrangement*.[1121]

8.1.3 The "structural stop" and a revised structural policy

The rules concerning SQAs in the coastal and the offshore fleet would, however, not last for long in its original form. After the 2005 Parliament election a new majority government was formed by the three parties that constituted the minority fraction that as seen above didn't support the proposal in the White paper from 2003. The new government wanted to establish a policy that had broad support and to carry out a broad and holistic examination of the structural policy for the fishing fleet.[1122] It therefore paused the use of any structural measure from October 2005 (popularly referred to as the "structural stop"), and appointed a policy advisory commission that was to assess the effects of the structural measures and how they contributed to achieving important objectives of the fisheries legislation.[1123] The

[1119] Offshore SQA Hearing 2004 page 21–23.

[1120] Offshore SQA Hearing 2004 page 21 and 28.

[1121] In Norwegian this is referred to as "slumpfiskeordningen."

[1122] St.meld. nr. 21 (2006–2007) page 14.

[1123] Se for example St.meld. nr. 21 (2006–2007) page 14–15.

commission submitted its report in August 2006.[1124] There is a lot to say about the report and its different assessments, perspectives and recommendations, but suffice to say there was a majority faction of 8 that supported use of SQAs with a time limitation of 15 years and no resource rent taxation, whereas a minority faction of 7 proposed SQAs with no time limitation, in combination with a resource rent taxation.

Following a hearing of the report, the Ministry presented its proposals in a White paper to the Parliament in March 2007.[1125] The majority coalition in the Parliament endorsed the main principle of moving back into a predefined time limitation for all vessel groups, which was set to 20 years for new SQAs, and 25 years for SQAs that had been established prior to the structural stop under the previous legislation (2003/2005 regulations) with effect from 2008. The use of SQAs was also extended to coastal vessel between 11 and 15 meters, but with lower quota ceilings than the other groups. The quota ceilings were at the same time to be lowered for all groups in the coastal fleet. Furthermore, the decommissioning scheme was to be continued until July 1, 2008, whereas the QES was not continued after its trial. The question of whether there should be restrictions as to ownership (as of vessel concentration with fewer owners) was to be further examined by the government. The government was also to examine the SQAs in the coastal fleet by the end of 2009. The minority coalition in the Parliament opposed the re-introduction of a time limitation as it was a change in the "rules of the game" for actors that had entered into SQAs and invested in trust to the arrangements.[1126]

The general outcome of the process was basically that the use of SQAs as capacity reducing instruments had gained *broad political support*, but there were still different opinions on their design, what level of efficacy for capacity reduction should be chosen and if it should be introduced for smaller coastal vessels. There were also different calls for more consideration and examination of implications of the different rules and restrictions under

[1124] NOU 2006: 16

[1125] St.meld. nr. 21 (2006–2007).

[1126] See for example Innst. S. nr. 238 (2006–2007) Innstilling fra næringskomiteen om strukturpolitikk for fiskeflåten page 9.

the system. The issues of structural policies and regulatory design were therefore far from settled at that point, and these were also regarded as matters in need of continuous attention due to the continuous productivity increases in the fleet.[1127] There would soon, however, be a shift in attention over to some of the core legal aspects of the system. An offshore vessel company in 2010 took legal action on the validity of the new regulations for the offshore fleet that followed the Parliamentary process on the grounds that it was retroactive legislation in conflict with Article 97 of the Constitution. Before going into this case, the adoption of a new statute for the management of the wild-living marine resources in 2008 marked an important event that needs an introduction.

8.2 The new Marine Resources Act

In the same time period that the SQAs were being developed, there was revision of the Saltwater Fishing Act 1983. In 2003 a policy advisory commission was appointed with a broad mandate to examine an expansion of the scope, and to clarify and modernize the regulatory framework for the management of the fish resources in accordance with international obligations. The commission submitted an extensive report in 2005, NOU 2005:10, which was followed by a hearing, a Bill proposition and the adoption of the Marine Resources Act in the Parliament in May 2008. The statute expanded previous legislation as all living wild marine organisms came under the scope of the Act, including marine genetic material. Furthermore, it enacted a *purpose clause* and a provision on the *right to the resources*, it established a *management principle*[1128] and it set out the principles and fundamental considerations for the management of the resources.[1129] Several of these considerations represented an incorporation of modern environmental safeguards from international fisheries law, including the precautionary principle and the ecosystem approach,

[1127] See for example St.meld. nr. 21 (2006–2007) page 14 and 60.

[1128] See chapter 2.4.

[1129] See chapter 3.5.

The purpose clause in section 1 constitutes the articulation of *new overarching management objectives* in the regulatory framework.[1130] The objectives are, as seen in chapter 3.5.1, of a tribid nature including promoting environmental, economic and social sustainable management of the resources. The objectives are at the same time broadly set out, and the preparatory works give little specific guidance, including setting out priorities, as long as decisions are made within a sustainable frame.[1131] As to the socio-economic considerations, it is underscored that this must be understood as a management of the resources that provides for a "surplus for the society when one accounts for both pricing of resources in the markets and other resources society values."[1132] Lastly, it was highlighted that other factors that might not be socio-economically profitable can be considered, but it is left to political priorities within the scope of the Act how the objectives of employment and settlement are to be achieved.[1133] The vagueness and large degree of political maneuvering room in the balancing of economic and social interests represent a legislative dilemma. For what is the scope of the law on these matters more specifically? Another formulation in the Bill proposition underlines that the objective of socio-economic profitability will limit how distributional policies can be used to change "the market solution."[1134] This does not clarify the extent to which more socially and culturally oriented policies can be used as governance tools. And should the purpose provision more explicitly articulate and underscore the environmental consideration as an overriding priority when this is implicitly expressed in the preparatory works? These are difficult questions that are further reflected in part IV.

The objectives must also be seen in close relation to section 2 of the Act setting out what the thesis in chapter 2.5 articulated as a principle of *common shared resources*.[1135] The public advisory commission was mandated to examine whether the Act should or could have a

[1130] See for example Ot.prp. nr. 20 (2007–2008) page 177.

[1131] As noted above in chapter 3.5.1.

[1132] Ot.prp. nr. 20 (2007–2008) page 177. Norwegian wording: "overskot for samfunnet når ein tek omsyn både til ressursar som er prissette i marknadene og andre ressursar samfunnet verdset."

[1133] Ot.prp. nr. 20 (2007–2008) page 177.

[1134] Ot.prp. nr. 20 (2007–2008) page 30. Norwegian wording: "marknadsløysinga."

[1135] See also more in chapter 3.5.1 on this provision.

provision on the property right of the state to the resources.[1136] The commission proposed laying down a property right for the state to the wild living marine resources in their wild state, with the exception of resources on private property. The government did not pursue this proposal, but rather took the idea from the committee of the right as an expression, or "symbolic property right," of the *management responsibilities of the state*, and assumed that the proposal of the committee echoed the right of the public to the resources, in contrast to privately owned natural resources.[1137] As seen in chapter 3.7, the Ministry also rejected any claims from the industry that the resources had been privatized,[1138] and proposed a provision that clarified that "the wild marine resources belong to Norwegian society as a whole," which was adopted by the Parliament. This was also a legal embodiment of previous statements by the Parliament.[1139]

Of other legal newcomers, the previous authority to order all catches landed was extended into a statutory *duty to land all catches of fish* in section 15, which included an authority for the Ministry to make exemptions. It was therefore an expansion on the previous state of law which authorized the prohibition of discards through regulations, mainly justified by environmental concerns.[1140] Important in the triggering of the duty is when the fish is considered a "catch."[1141] Of other major changes, the control and inspection rules were strengthened, the criminal liability was further specified (listing punishable acts and omissions in sections 60–62), the penalty frame was extended, and an authority to issue administrative fines for violations of the Act was laid down. The preparatory works underscore that a responsible resource management is a crucial *public interest* and that this justifies a reaction system in a form, and at a level, that promotes the prevention of crime.[1142]

[1136] Ot.prp. nr. 20 (2007–2008) page 11.

[1137] Ot.prp. nr. 20 (2007–2008) 40–41.

[1138] Ot.prp. nr. 20 (2007–2008) page 41–42.

[1139] Ot.prp. nr. 20 (2007–2008) page 178, with reference to chapter 2.3 in Innst. O. nr. 20 (1988–89). See also Innst.O. nr. 45 (2007–2008) Innstilling fra næringskomiteen om lov om forvaltning av viltlevande marine ressursar (havressurslova) page 14.

[1140] See more in chapter 3.5.3.

[1141] See more in Ot.prp.nr. 20 (2007–2008) page 189 on the demarcation.

[1142] Ot.prp. nr. 20 (2007–2008) page 161.

The Ministry also assessed whether the current state of law, in which negligence and intent were the fault requirements, were to be reconsidered as a Bill proposition on a new Penal Code under consideration at that time had expressed that it was natural that gross negligence was the primary degree of fault, in order not to criminalize more actions than necessary.[1143] The question was therefore whether gross negligence should replace simple negligence. With reference to the already mentioned public interest, the importance of compliance in environmental regulation and the profit potential for unlawful behavior, the Ministry pointed out that the rules in the Marine Resources Act could differ from other areas of law, and proposed to continue with an ordinary negligence requirement.[1144] The Ministry also highlighted that the industry must accept a *stricter control* and *more extensive reporting duties* than other industrial activities since: 1) fishermen harvest of common shared resources, 2) the harvester depend on a sustainable management of the resources and 3) many of the fisheries have limited entry and there is excess harvest capacity in some fisheries.[1145] The Ministry at the same time underscored that important rule of law principles would apply to administrative and criminal prosecuting under fisheries legislation.[1146]

Although there had been laid down an authority to issue administrative fines in the Participation Act in 2004, the new authority laid down in section 59 of the Marine Resources Act would mark an important shift in the reaction system at a practical level.[1147] This was, as seen in chapter 3.10.2, also a shift that resonated with the general trend in Norwegian criminal and administrative law to decriminalize some types of offences. It was justified by providing an *alternative sanctions mechanism* for less serious offences than those pertinent for criminal prosecution.[1148] It was at the same time to be designed for discretionary calls to

[1143] Ot.prp. nr. 20 (2007–2008) page 162. The Bill proposition is found in Ot.prp. nr. 90 (2003–2004) Om lov om straff (straffeloven) page 115.

[1144] Ot.prp. nr. 20 (2007–2008) page 162–163.

[1145] Ot.prp. nr. 20 (2007–2008) page 129–130.

[1146] Ot.prp. nr. 20 (2007–2008) page 130.

[1147] See more on this provision in chapter 3.10.4.

[1148] Ot.prp. nr. 20 (2007–2008) page 167.

choose either administrative or criminal prosecution even when all criminal liability requirements were fulfilled.[1149] It would also represent an opportunity to sanction offences not under criminal liability.[1150] Violations of reporting duties were pointed out as particularly relevant for the use of administrative fines in the preparatory works.[1151]

Lastly, the use of administrative confiscation was merged from section 7 and 11 in the Saltwater Fishing Act 1983, into one provision in section 54 of the new statute.[1152] The Ministry did not express that the changes represented any substantive change in the state of law, but it was a significant expansion of the authority since catches "harvested or delivered" in violation of any of the provisions in the Participation Act were included in the scope. This would mean that infringement of a long list of formal duties required to harvest commercially could lead to administrative confiscation of a harvest. There were no justifications for this articulated in the Bill proposition other than that the Ministry seemed to have accepted the premise by the policy advisory commission that there might be cases of violation of participation rules that would not lead to forfeiture pursuant to the Participation Act section 27, or be a harvest in violation of rules under a new Marine Resources Act, which justified an expansion of the forfeiture provision in the Marine Resources Act.[1153] The Bill proposition reiterates several times that administrative confiscation is not a sanction with a penal element, but a confiscation of illegal harvest resulting from an unlawful behaviour that the harvester is not entitled to, which is also justified by environmental considerations.[1154] The administrative confiscation practices are, as noted in chapter 3.10.3, under recent attention after several court cases, new case law from the ECtHR and legal scrutiny. Rui (2020) concludes that practices of administrative forfeiture of illegal harvest that is not excess harvest (which means harvest from other violations of the legislation than overfishing the quota) with no fault requirement and

[1149] Ot.prp. nr. 20 (2007–2008) page 167.

[1150] Ot.prp. nr. 20 (2007–2008) page 167.

[1151] Ot.prp. nr. 20 (2007–2008) page 222.

[1152] See overview in chapter 3.10.3.

[1153] Ot.prp. nr. 20 (2007–2008) page 103.

[1154] Ot.prp. nr. 20 (2007–2008) page 106–107.

compensation of costs have a penal element and are offences under the ECHR.[1155] There is at the time of the thesis submission a hearing proposal to amend section 54 under consideration.[1156] This involves amending the provision to include authorization to exempt certain types of offences from the use of administrative confiscation.

8.3 An updated statute for regulation of sales of fish in first-hand

A few years later a new and modernised statute was adopted for the regulation of sales of fish in the Fish Sales Organization Act, which went into force from January 1, 2014.[1157] It was first and foremost a modernisation, clarification and harmonization of legislation, and no major substantive changes were made. The process did at the same time, however, put the question of the unilateral authority of the sales organizations to establish minimum prices for sales of fish in first-hand more explicitly on the political agenda. A temporary arrangement of mediation when negotiations between the fishermen and buyers failed to agree on prices was tested in 2007 and 2009. This was subsequently evaluated and addressed by a working group in a report submitted in December 2011.[1158] The majority of the working group (the buyer organizations and leader of the group) proposed that an independent third-party (arbitrator) was to establish minimum prices in cases of disagreement.[1159] As seen in chapter 6.1.3, a similar idea (but through a price council mechanism) was not pursued when the Raw Fish Act was adopted in 1938. The Ministry did not pursue the majority proposal as it found it problematic that an independent arbitrator would become responsible for the minimum prices if the negotiations between the parties did not

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[1155] See for example Rui (2020) page 68-69. Rui highlights that after the judgment by the European Court of Human Rights (ECtHR) in *G.I.E.M. and others v Italy* of June 28, 2018, there is no doubt that ECHR is preventing use of punishment without a fault requirement. One recent judgment from case law is LH-2020-148002 where a forfeiture decision of 430 000 NOK was found invalid by the Court of Appeal. The judgment does at the same time go into the substantive scope of section 54 of the Marine Resources as it found that the fisherman had not violated a rule in question.

[1156] Fiskeridirektoratet: Høring 14. juni 2021 om forslag til endringer av havressursloven § 54 om administrativ inndragning (Administrative Confiscation Hearing 2021).

[1157] See overview of the statute in chapter 3.8.

[1158] Working Group First-hand Sales 2011: Gjennomgang av råfiskloven: Forslag til ny lov om førstehåndsomsetning av viltlevende marine ressurser.

[1159] Working Group First-hand Sales 201 page 20.

succeed.[1160] It found it more appropriate that the sales organizations, representing the fishermen, would sit with this responsibility and that it had to be assumed that:

> this clear relationship between authority and responsibility secures that responsible decisions are made. In this context, the Ministry would like to remind that the fishermen, as sellers in the first-hand sales, do not unilaterally have an interest in the highest possible first-hand price. The fishermen also have an interest in long-term opportunities for sale of his/her catch, and consequently that the buyers also have a reasonable return of their business.[1161]

It therefore proposed a solution where mandatory mediation was required in cases of disagreement. The mediation would be chaired by a person appointed by the State Conciliator of Norway, and two person appointed by respectively the sales organizations and the buyer organizations. If the mediations did not succeed, however, the sales organizations could fix a minimum price unilaterally (this was the minority proposal of the working group with fishermen representatives). This arrangement was adopted as section 12 in the new statute.

[1160] Prop. 93 L (2012–2013). There was a third proposal by one member of the working group of using arbitration through the State Conciliator of Norway (In Norwegian "Riksmeleren"). In this solution one person was to be appointed by the State Conciliator, and two other persons by the Ministry upon proposal by the industry organisations. The result of the arbitration would become binding to the parties. The Ministry saw a weakness in the proposal as it would open up for strategic positioning prior to the negotiations that could decrease the will to negotiate, lead to polarization between the parties and increase the discontent with the system. It also found that the proposal did not address how disagreements were to be handled, and could therefore not support the proposal. Prop. 93 L (2012–2013) page 26–27.

[1161] Prop. 93 L (2012–2013) page 26.Norwegian wording: "denne klare samanhengen mellom myndigheit og ansvar sikrar at det vert teke ansvarlege avgjerder. Departementet vil i den samanheng minne om at fiskarane, som seljar i førstehandskjøpet, ikkje einsidig har interesse av høgast mogleg førstehandspris. Fiskarane har også interesse av langsiktige moglegheiter for sal av fangsten sin, og dermed av at kjøparane også har ei rimeleg avkastning på verksemda si."

8.4 Recent developments, current issues and challenges

8.4.1 Structural quota arrangements (SQAs) in the offshore fleet for judicial review in the Supreme Court of Norway

As noted, in 2010 a vessel company (Volstad) challenged the legality of the Offshore SQA Regulations in the Norwegian court system. The case was dismissed by the plenary of the Supreme Court of Norway in 2013.[1162] It was for consideration in the plenary as it was a principally important case that involved interpretation of Article 97 of the Norwegian Constitution, which sets out that "[n]o law must be given retroactive effect."[1163] The judgment also included legal reasoning and statements on the scope of the regulating authority of the executive branch (within constitutional and ECHR frames), and the legal character of the structural quotas in the offshore fleet.[1164] It is therefore a central case on the interpretation of fisheries legislation more generally.

The majority of 9 judges in the Supreme Court ruled that the change of the Offshore SQA Regulations did not contravene Article 97 of the Constitution, whereas a minority of 8 judges in two separate votes came to the opposite conclusion. It is an extensive judgement, but only the main points most relevant to this thesis are introduced here.[1165]All three votes concluded that Volstad had established a *legal position*[1166] that could be protected by Article 97 of the Constitution, although there were some differences in the assessments, which are briefly outlined in the following. The decisive factor for the outcome was related to the choice of the norm for constitutional review. The majority chose the norm that only the "particularly unreasonable or unfair"[1167] retroactive legislation in the case at bar would contravene the Constitution. The question was therefore whether the amendment of the

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[1162] An application for review in the ECtHR was not admitted.

[1163] This is the wording used in a translation of the Norwegian Constitution published in www.lovdata.no. See more on this provision in Høgberg (2010a).

[1164] See chapter 3.7 for an introduction to these questions.

[1165] See more in Arntzen (2016a).

[1166] See for example Rt. 2013 s. 1345 para 78.This is the wording used in a translation of the judgment in www.lovdata.no. See also footnote 270 above.

[1167] See for example Rt. 2013 s. 1345 para 94 and 101, with reference to judgment in Rt. 1996 s. 1415 page 1426.

regulations had been "particularly unreasonable or unfair" to Volstad. After a thorough assessment on the impact of the amendments, and the considerations and assumptions made by the Ministry and the Parliament when addressing the proposed policies in the White paper from 2007, the majority found that the regulations were not particularly unreasonable or unfair for the vessel company.[1168] It furthermore found that the intervention fulfilled the proportionality requirement in ECHR P1-1(2). Both minority votes of 7, on the other hand, found that the norm for review was whether there had been demonstrated "strong public interests"[1169] that allowed for the amendment of legislation with retroactive effect. The two minority votes of 4 and 3 judges found that the government had not justified the changes with consideration to strong enough public interests.[1170] The vote of 3 also concluded that the amendment constituted a violation of ECHR P1-1.[1171] The thesis will not go further into the case law and theoretical discourse on the norms for constitutional review, but the decisive impact of the choice of norm in this particular case is acknowledged.[1172]

As noted, all votes agreed that Volstad had established a legal position that could be protected by the Constitution, but the reasoning for this differed. This illustrates the challenging task of making assessments of the scope of what the *authorities legally can do*, and what the *actors legitimately can expect*, in the regulatory framework for commercial fisheries. The *first voting judge*[1173] of the majority highlighted that changes in regulations, as for example a vessel's relative share of a quota, were generally not an intervention of a constitutionally protected right, but a "consequence of an agreed political goal for stable framework conditions for the fishing fleet" and therefore not a "reflection of a right in the

[1168] Rt. 2013 s. 1345 para 137.

[1169] See for example Rt. 2013 s. 1345 para 217. These are in the translation in www.lovdata.no translated into "strong societal considerations," but I find that the wording "strong public interest" better resonate the Norwegian wording of "sterke samfunnshensyn."

[1170] Rt. 2013 s. 1345 para 226.

[1171] Rt. 2013 s. 1345 para 260.

[1172] See more on the discussions in Smith (2013); Skoghøy (2011); Høgberg (2010b).

[1173] In Norwegian this is referred to as "førstevoterende." This is judge that (upon rotation arrangements) is selected to write the judgment in a case. If this vote becomes a minority vote, the order of the vote is changed.

ordinary sense."[1174] The first voting judge at the same time found that Volstad had established a legal position that could be protected by Article 97 of the Constitution due to the *circumstances in the specific case*, see more below[1175]

The *second voting judge*[1176] also found that the case represented a legal position that could be constitutionally protected but disagreed with the first voting judge that the established quota shares are exclusively a result of political desires, but that it also represents a fisherman's expectation of a right to fish that "has a certain legal basis."[1177] The judge also underlined that the fact that rights are transferred with the vessels at high prices militates in favour of constitutional protection. [1178] The judge sees the original decision on structural quotas as a decision on an allocation key that persists from year to year,[1179] but highlights that this is not a property right to the marine resources "in the sense of a perpetual claim of a specific quota," but a *protected share of an allocation* within the relevant vessel group "as long as issuing of fishing rights is done on basis of the existing quota system."[1180] The second voting judge found that the amendment of regulations was unconstitutional as no strong public interests were demonstrated by the government, and subsequently did not find it necessary to review whether it was a violation of the ECHR.[1181]

The *third voting judge*[1182] concurred with the result of the second voting judge, and in general to her reasoning, but undertook additional analysis and found that the amendments also violated ECHR P1-1. The judge found that licences undoubtedly must be regarded as

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[1174] Rt. 2013 s. 1345 para 70. As translated in www.lovdata.no. Norwegian wording: "konsekvens av en omforent politisk målsetting om stabile rammevilkår for fiskeflåten" and "utslag av en rettighet i vanlig forstand."

[1175] Rt. 2013 s. 1345 para 78.

[1176] In Norwegian this is referred to as "annenvoterende."

[1177] Rt. 2013 s. 1345 para 173. As translated in www.lovdata.no. Norwegian wording: "en viss rettslig forankring."

[1178] Rt. 2013 s. 1345 para 176.

[1179] Rt. 2013 s. 1345 para 174.

[1180] Rt. 2013 s. 1345 para 178. As translated in www.lovdata.no. Norwegian wording: "i den forstand at de har et evigvarende krav på å fiske bestemte kvoter" and "så lenge tildeling av fiskerettigheter skjer på grunnlag av det någjeldende kvotesystemet."

[1181] Rt. 2013 s. 1345 para 226–228.

[1182] In Norwegian this is referred to as "tredjevoterende."

existing *property rights/assets*[1183] that are awarded protection under ECHR P1-1.[1184] Furthermore, under an assessment of the proportionality requirement, the judge found that the state did not invoke the strong public interested needed to ensure the balance between the interests of the state and the private party, and that there were discriminatory elements in the case.[1185] Lastly, the judge found that the margin of appreciation for a state did not justify deference in this specific case as it was a question of what is required by a state when exercising its powers towards citizens, and how political goals should be balanced against due process for the citizens.[1186]

From these votes it can be extracted that the first voting judge assumes a broad discretionary authority for the executive to regulate fisheries, including to change quota shares within a vessel groups, but that there can be cases of special circumstances that create legal positions that can be constitutionally protected. As noted in chapter 3.7, such circumstances can be cases where the authorities have made a promise or entered into agreements with a private party with certain reciprocal or coordinated action, which could limit the future exercise of an executive body. In Norwegian legal literature a *dualistic character* of public licences has ben highlighted. Licences are on one hand public permits and regulatory instruments within a *public law perspective* subject to extensive regulation, but can on the other hand be seen as a binding promise with more of a *private law perspective*.[1187] This distinction is pertinent to fishery licences as licences in many fisheries have become highly valuable in the last decades, and with many interests at stake. This dualistic nature also creates tensions between the regulatory authority of the government and the *legitimate expectations* of licence holders and investments made in trust to their established positions on the other hand.[1188] In the thesis these two positions will be viewed as licences within a *fisheries governance context* on one hand, and licences within a *commercial context* on the other.

[1183] In the judgment this is referred to as "formuesrettigheter." See Rt. 2013 s. 1345 para 234.

[1184] Rt. 2013 s. 1345 para 232–237. Reference is made to Solheim (2010) page 218 ff.

[1185] Rt. 2013 s. 1345 para 241–244 and 253.

[1186] Rt. 2013 s. 1345 para 259.

[1187] Alvik (2020) page 100. They do at the same time not see the distinction between private and public law as so important, as the binding promise perspective does not automatically trigger private law rules.

[1188] Alvik (2020) page 86.

The second voting judge differs from the first-voting in that she sees the established shares of vessels *within one group* under the current system as a position that itself awards constitutional protection. In other words, the executive cannot change quota shares of vessels within a vessel group under the current quota system. By this the regulatory scope of the executive is narrower than what the first voting judge has established. The third voting judge finds that the nature of the licences in question itself qualify them as existing *property rights* which are awarded protection under the Norwegian Constitution and the ECHR.[1189] The legal implications of the case in relation to future decision-making is further reflected on in part IV, and some of these issues are also viewed comparatively in part III. Isolated, and in practice, the judgement meant that the Offshore SQA Regulations were valid and that the structural policies could be continued in their adopted form. From a more principal perspective, the strong dissent and different reasoning on the scope of the regulating authority is central, but not necessarily clarifying.[1190]

8.4.2 Further development of participation rules

The Participation Act has undergone several rounds of modifications since it was passed in 1999, which all cannot be addressed in detail in this thesis. From a substantive perspective, a Bill proposition from 2013 represented a larger revision of the statute with some significance.[1191] The *concession requirement* to participate in certain offshore fisheries in section 12 was one central provision that was amended. Justified by flexibility considerations, the explicit listing of specific gear types, including trawl and purse seining, was replaced with a *general concession requirement* for all commercial fishing by an "offshore vessel."[1192] It was furthermore laid down that the King could set out in regulations what was considered an "offshore vessel."[1193] By this, the legislation would according to the Ministry not be rigid as to which gear types could be used in offshore fisheries, and thus impede the use of more energy efficient harvest methods.[1194] It was also pointed out that the

[1189] Rt. 2013 s. 1345 para 234–235.

[1190] This is also the conclusion of Arntzen (2016a).

[1191] See more in Prop. 59 L (2012–2013) Endringer i deltakerloven, fiskeforbudsloven mv.

[1192] Participation Act section 12(1).

[1193] Participation Act section 12(2).

[1194] Prop. 59 L (2012–2013) 21.

size of the vessel was a natural point of departure when the fisheries administration was to assess what forms of fishing and harvest that were to be subject to licencing arrangements, and what licence group a vessel should belong to.[1195]

In 2015, some principal amendments of the Participation Act were made that are important for two particular reasons.[1196] First of all, these were amendment that represented a codification of an administrative practice of allowing for transfers of concessions, annual permits and structural quotas between different vessel owners. The amendments at the same time simplified these practices, as transfers of licences now could be approved without sales and resales of *physical vessels* that were necessary under the previous practice. A new section 17(1)(c), opened up for the issuing of a new concession, on the condition that the previous owner renounced a similar concession. A new section 21(3) set out that the rules in section 17(1) and section 17(2) could be applied similarly in regulations laid down pursuant to section 21(1), which allowed for similar transfers of annual permits. Secondly, there was an acknowledgement in the Bill proposition that there is a *certain degree of transferability* of licences in the Norwegian system, and that the law amendments would result in an increased degree.[1197] At the same time it was underlined that the degree of transferability would still be limited and that it is only the public authorities that can issue licences.[1198]

In relation to these changes, this was a time period where attention to the administrative discretion in the issuing of commercial permits and licences came under particular attention, especially on the question of vessel size as there was no longer an upper length of 28 meters for coastal vessels (in effect from 2008).[1199] In the wake of this amendment, a requirement of proportionality between the vessel size and its resource base developed in

[1195] Prop. 59 L (2012–2013) page 21.

[1196] Lov 19. juni 2015 nr. 78 om lov om endringer i deltakerloven (tildeling av spesiell tillatelse og adgang til å delta i fiske)

[1197] Prop. 88 L (2014–2015) page 11 and 26.

[1198] Prop. 88 L (2014–2015) page 26.

[1199] See more on the rationale for this in Fiskeri- og kystdepartementet: Høringsnotat 20. august 2007 om størrelsesbegrensning for store kystfartøy (Vessel Length Hearing 2007).

administrative practice.[1200] Up until 2016 it was conducted on the discretion of the Directorate, but in an Executive Order from 2016 there were set out objective guidelines.[1201] These might seem to be technical details, but the issue of vessel size is a politically controversial topic as replacement of smaller vessel with larger and more efficient vessels (and also fewer vessels under specific circumstances) changes the fleet structure and also impacts the buyer structure on land.

Lastly, the delivery duties has been under continuous attention, *inter alia* due to accusations of trawlers not fulfilling their duties, and that the authorities has loosened some of the requirements. One municipality has sued the government for damages, claiming that bankruptcies in the processing industry was caused by trawlers violating their duties, but the case was dismissed by the Court of Appeal as it could not establish damage liability in the case, which points to the discretionary and political nature of these issues.[1202] An expert group was in 2016 mandated to assess the duties and come up with specific recommendations that could contribute to socio-economic profitability for the fleet and industry on land, and contribute to settlement and employment in coastal communities.[1203] The group and Ministry found that the system was not working as intended, and that it is a system not designed for a modern economic context. The Ministry, in a White paper to the Parliament, proposed abolishing the duties, but allowing the trawlers that were exempted from the activity requirement to continue their operations with some deduction of the resource bases and a payout of the duties.[1204] The proposal did not gain broad political support and was revoked.[1205]

8.4.3 A new, future quota system and transformation to a unified *fishery licence*

The design of a *future quota system* in the commercial fisheries has been the subject of an ongoing and controversial process resulting in the adoption of several amendments of

[1200] Vessel Length Hearing 2007 page 2.

[1201] Executive Order on Proportionality 2017.

[1202] LH-2007-50902.

[1203] Delivery Duties Expert Group 2016.

[1204] Meld. St. 20 (2016–2017) Pliktsystemet for torsketrålere.

[1205] Meld. St. 37 (2016–2017) Tilbaketrekking av Meld. St. 20 (2016–2017).

legislation in by the Parliament in 2021, which at the time of the thesis submission are not yet in effect.[1206] The main legal newcomer was the adoption a general authority for the Ministry to lay down licencing regimes in different fisheries through a *unified fishery licence* in a new section 12 of the Participation Act. When in effect, the Ministry will have a broad discretionary authority to determine which fisheries should be subject to a licencing regime, and to set out conditions.[1207] Furthermore, the Ministry is authorized through a new section 13 to set out in regulations that a fishery regulated with fishery licences pursuant to section 12 is to be *closed*.

When the new state of law goes into force, there is therefore no longer a *statutory concession requirement* for offshore vessels to fish commercially, although the amendments of 2013, see above, did reduce the significance of this requirement as the definition of offshore vessels could be set out in regulations. In practice, this is a construct that takes us back to the design of the Participation Act 1972 sections 6 and 8 where the King in Council could decide a licencing requirement for certain fisheries, and further specify conditions. What is different to the state of the law in 1972, however, is that the Ministry does not have to consult the whole cabinet (King in Council), or appoint a board of stakeholders that comes up with a statement, prior to its final decision. Any proposal must at the same time be examined and heard under the normal requirements in the Public Administration Act chapter VII and the Executive Order on Examination.[1208] Connected to the new fishery licences is the authority for the Ministry to lay down a system based on *unified quota factors* in a new section 15. This system means the Ministry can lay down a group of quota factors *(quota factor group)*

[1206] Lov 5. mars 2021 nr. 7 om endringer i deltakerloven og havressurslova (endringar i kvotesystemet). See more on the amendments in Prop. 137 L (2019–2020) Lov om endringar i deltakerloven og havressurslova (endringer i kvotesystemet) and Innst. 190 L (2020–2021) Innstilling frå næringskomiteen om Lov om endringar i deltakerloven og havressurslova (endringar i kvotesystemet). There is at the time of the thesis submission an ongoing hearing by the Directorate on proposed regulations for the new fishery licence that have not been studied due to time limitations. See more in Fiskeridirektoratet: Høringsnotat 12. oktober 2021 om ny forskrift om tildeling av fiskeritillatelser og kvotefaktorer (Fishery Licence Hearing 2021).

[1207] The Ministry emphasizes in the Bill proposition that one of purposes of the amendments has been to establish a "robust legal framework that gives sufficient maneuvering room for the authorities." Prop. 137 L (2019–2020) page 7. Norwegian wording: "robust juridisk rammeverk som gjev tilstrekkeleg handlingsrom for styremaktene."

[1208] See more on these practices in the comparative study in part III.

that forms the basis for allocation of quotas to vessels pursuant to Marine Resources Act section 12(1). Furthermore, the Ministry shall fix a total amount of quota factors for each quota factor group, which can be increased upon the decision of the Ministry after consideration of the purposes of the Act. In reality, it seems that a quota factor group is to replace the vessel groups in which quotas are allocated to under the current regime.

The next major legal newcomer is the introduction of an arrangement of *quota exchange* and establishment of a market mechanism to ensure effective, transparent and flexible exchanges.[1209] This is nothing new as such, as use of leftover quotas up to 20 % can be exchanged in some offshore fisheries, but by being general for all fisheries and involving the establishment of a market mechanism it represents a *remarkable shift* in how commercial fisheries will be conducted. The minority of the Parliament committee that addressed the proposals in the White paper that preceded the amendments of legislation that saw this as "another step in transforming fishing rights into transferable assets."[1210] A majority of the Parliament furthermore supported to task the cabinet to introduce a fiscal fee on commercial fisheries and to find a new way of grouping coastal vessels according to its physical length.[1211] Lastly, all parties of the Parliament confirmed that the structural quota arrangements (SQAs) will be terminated after the time limitations of 20 and 25 years expire. Structural quotas are then to be distributed among vessels of the relevant vessel group.

The amendments represented major legal changes which were in short supply of legal analysis, and a lot is yet not decided on their final content and design. What these amendments and processes have demonstrated, is that history repeats itself and little efforts were made to remedy the previous lack of broad and principled analysis and debate. The Bill proposition sets out that the proposal is merely a "technical finish" of proposals that were endorsed in the processing of a White paper presented to the Parliament in 2019.[1212]

[1209] Innst. 243 S (2019–2020) Innstilling fra næringskomiteen om Et kvotesystem for økt verdiskaping. En fremtidsrettet fiskerinæring page 16.

[1210] Innst. 243 S (2019–2020) page 16. Norwegian wording: "nok et steg mot å gjøre fiskerettigheter til et omsettelig formuesgode."

[1211] Innst. 243 S (2019–2020) page 18.

[1212] Prop. 137 L (2019–2020) page 7.

8.4.4 Resource control and enforcement

A last topic under current scrutiny in the legislative framework is the question of how to reduce fisheries crime and increase compliance to fisheries legislation. The last major development was the submission of a report by a policy advisory commission with a mandate to examine the future fisheries resource control in November 2019.[1213] It is an extensive report which addresses the issues broadly, theoretically, diagnostically and prescriptively. It also had a strong emphasis on the role of technology in the system. The commission has pointed out four areas with improvement potential.[1214] The first is the potential to increase digitalization and to realize an automatic documentation system for Norwegian fisheries, building on an infrastructure for exchange of relevant data between the authorities. Under this overarching proposal, the commission has assessed specific measures to promote compliance by reducing opportunities for crime, and streamlining the control and supervisory functions of the authorities. Central is the aim of providing verifiable harvest data that are not existing today.

The second point goes to a general recommendation by the commission to design regulations that promotes compliance. By this the commission means regulations that can be complied with and are controllable, and that use of exemptions from general rules or special arrangements can undermine the legitimacy of the rules. Thirdly, the commission recommends to improve the quality and organization in the resource control work, and proposes the establishment of a common infrastructure for exchange of data between relevant authorities. Of other major changes, the commission recommends that the role of the sales organizations is reduced to pure sales and market-based tasks, and no longer operative resource control, in a more long-term perspective. And lastly, the commission recommends a thorough assessment of the fisheries legislation that addresses all recommendations of the committee. In this regard, it is highlighted that sanctioning provisions and the punishment level are reviewed in light of proportionality and effectiveness. This thesis will not pursue any of the outlined paths, but will in the synthesis

[1213] NOU 2019: 21. See chapter 1.2.

[1214] See NOU 2019: 21 page 15–23 for a prompt summary of these four areas.

and discussion in part IV reflect on these issues in a general regulatory context and problematize important legal considerations.

This last chapter of the legal historical inquiry has demonstrated the increasing role of market-based instruments for most of the fisheries in the last two decades, and that technology is expected to play an important role in future enforcement of the industry. The long-lasting overcapacity challenges has been addressed in the legislative framework, and profitability of the industry has been found satisfactory.[1215] The current state of the law is at the same time a fisheries legislation facing some major challenges and undergoing extensive revision, both with regards to the licence and quota system and the critique of the social performance by the Auditor General of Norway, and with regards to enforcement and compliance issues. This could be said to represent challenges both related to external and internal legitimacy, as defined in the thesis, and an unclear and unpredictable situation. Before moving over to reviewing some of the rules of the system in more detail comparatively in part III, the overall legislative trends in the legal historical inquiry are identified and preliminary reflected on in chapter 9.

9 Legislative trends legal historically and preliminary reflections for further analysis

9.1 Overview: Regulatory trends as a contemporary snapshot and timeline

Centuries of evolution of how we fish, how different people have sought a livelihood from fisheries, and how the politicians and authorities have balanced different objectives within society and under changing external impetuses, have as demonstrated in the inquiry contributed to the shaping of the structures and content of the current regulatory system for commercial fisheries in Norway. I will reflect further on some of the main findings in chapter 9.2, but will first attempt a synoptic outline of the general regulatory trends. To assist such an overview the thesis distinguishes between the following six main categories of *objectives* and *considerations*:

[1215] Auditor General Report 2020.

- **Order (pink)**: Securing order and preventing conflict on fish grounds
- **Public enforcement (grey)**: Compliance strategies through deterrence and use of public enforcement instruments
- **Environment (green)**: Protecting wild-living marine species or marine ecosystems
- **Social considerations (yellow)**: Ensuring employment and settlement, supporting coastal communities, or other socially justified objectives (for example holy day regulations)
- **Co-management (dark blue)**: Compliance through empowerment strategies by lettings users participate in the enforcement system
- **Economy(blue)**: Securing efficient and profitable fisheries

Figure 11 summarizes the regulatory tendencies over the course of time based on these six categories (horizontal axis), and the relevant legislation (vertical axis). The figure presents both a *contemporary snapshot* and a *timeline*. As a *contemporary snapshot*, the figure first of all demonstrates how the different bits and pieces of current legislation are outcomes of a long evolution that also can be gauged as different layers and structures of *a whole*. Each of the regulations or statutes represented the introduction of a new regulatory tool or legal innovations still found in the current legislation in some form. It is therefore important to stress that the introduction of a measure in one particular year does not mean that the measure was relevant only for that year, or time period, but became permanent (although significance might have changed, see more below). The more specific tools or objectives are listed under the regulations and statutes with the coloring of the category it is labelled under. Thereby we see that some legislation that was adopted was a mix of different categories.

Some general trends can be derived from the overview as a *timeline*. The first is that social considerations and public enforcement have played a key role since the first regulations and up to our time. The other is that environmental and economic considerations since the mid-1800s have played an increasing role in the justification of new regulatory tools, and since post-WWII they have dominated the evolution of new elements of the legislation. A systematic review of the legal material since its first origins, and compiling of these findings into this outline, represents something new in fisheries law literature.[1216] That protection of

[1216] Some works that addresses bits and pieces of some of the material studied in this inquiry, and with emphasis the last century, are Gezelius (2008b); Jentoft and Kristoffersen (1989); Holm (1996).

biodiversity was up at the legislature as early as 1821 is another new insight that seems to have received little attention in fisheries literature more generally.

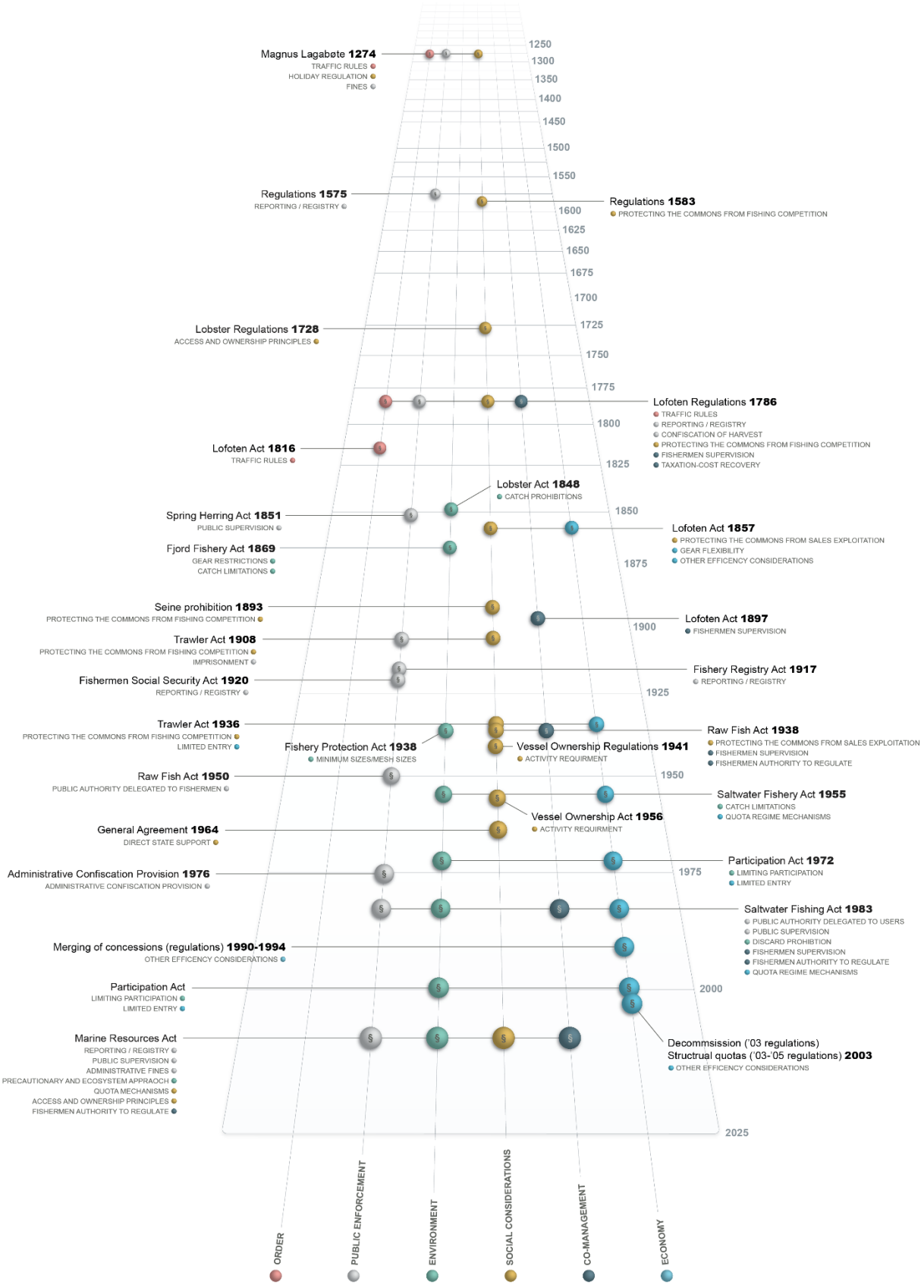

Figure 11 Norwegian legal framework as a timeline and contemporary snapshot

The simplification of the timeline through these categories is at the same time not without reservations. The distinguished categories are first and foremost vague and not clearly delimited. It could, for example, be argued that the introduction of environmental and efficient considerations also were developments that benefitted coastal communities. It is important to acknowledge that policy objectives are malleable and can change along with general structural changes in society. Secondly, the figure does not show how stakeholders or the public have been involved in decision-making processes prior to adoption of rules. And thirdly, the *role of technology* is not reflected. This is primarily a consequence of technology not being an objective on its own, but a means to achieve management goals, for example monitoring technology in enforcement. Moreover, innovations and new technology (for example new gear types) are as demonstrated important *driving forces for legislative change*. This is also to be further reflected on in part IV.

The illustration must therefore be understood as a simplified visualization that highlights how the current system is a complex product of historical events and legal innovations under changing policies and considerations. These general findings therefore resonates with some of the theoretical ideas presented in chapter 1.3.1 of institutions as products of history and with deeper structures and a multi-layered nature. The figure must at the same time be interpreted and used with caution and be seen in relation to the comparative study in part II and more specific key findings of the legal historical inquiry that follows.

9.2 Main findings and preliminary reflections for further analysis

9.2.1 A paramount interventionist role of the state

There are six main features within the regulatory system I have identified and singled out from this inquiry that are to be further synthesized in part IV. The material first of all demonstrates the paramount *interventionist role of the state* in the evolution of fisheries legislation, which basically runs through all the following features, and how legislation has been a tool for achieving political objectives in line with the evolution and progress of society more generally. This resonates with some of the ideas in the sociology of law presented in chapter 1.3.1. The first rules of conduct in commercial fisheries were most likely justified by securing order and preventing conflict on fish grounds, but *protection of*

the livelihood of *the fishing commons* from competition of new and more expensive gear types early on became important to the ruling authorities, with a continued line up through the years with the protection of fishermen through the legal monopoly on first-hand sales established in Raw Fish Act 1938 and later modifications, up until the adoption of section 2 of the Marine Resources Act on establishing a principle of commons shared resources in 2008. Another characteristic is at the same time how the legislator has been facing different, and to different degrees, conflicting objectives. From the late 1700s liberal ideas became increasingly influential and the promotion of innovation, and freedom of business have been identified with different intensity up through the inquiry. These are elements that point to some of the difficult legislative dilemmas a legislator faces, and how to *define and weigh* the different *public interests* when governing fisheries in a society under continuous development. This underscores the diverse nature of legislating fisheries, which also points to the underlying proposition of FLA as a mix of perspectives.[1217] These are ideas that are to be further matured in part 4 after revealing some comparative insights.

9.2.2 Conferred authorities and adaptive governance

The second main feature is the extensive use of *conferred authorities* to the executive branch of the government to regulate harvest more specifically as a deliberate *legislative design choice* in the management of Norwegian commercial fisheries. This also draws attention to the role of *administrative discretion* in the system, and how the above-mentioned *legislative dilemmas* also become an element of *subordinate legislation and practice*. As seen in chapter 5.6, the adoption of the Lobster Act 1848, followed by the Fjord Fishing Act 1869, represented the first examples of conferring regulatory powers by statute. Both these statutes were justified by the protection of marine species and a need for flexibility to establish more targeted rules restricting fishery operations at the local level, which also demonstrates how biological considerations were driving forces for more local decision-

[1217] As proposed in chapters 1.1 and 2.4.

making. As seen in the inquiry and chapter 3 this is still a key component of the regulatory system.[1218]

9.2.3 Collaborative legislative processes

A third and similarly related issue is how the evolution of legislation has been characterized by many broad *collaborative legislative processes* with involvement of stakeholders, experts, the public and the authorities. As far back as the late 1700s various forms of public commissions have been used with different levels of intensity and detail to examine problems, collect knowledge and/or opinions, assess solutions and advise or inform the legislator. One general observation, however, is the lack of a broad and principal legal assessment prior to adoption of the Participation Act 1972 and the Participation Act that could be seen as a *breach* with some of the previous processes studied.[1219] Another observation is that White papers in the same time period (1970s and onwards) have become influential documents in legislative processes, but that their authoritative relevance and weight might not have been properly established.

9.2.4 Limited entry licencing regimes with an increasing market orientation

Connected to these issues is the emergence of *limited entry licencing regimes*, and the increasing role of the *market and efficiency considerations*, as the fourth main feature of the regulatory system. As seen in the inquiry, the foundations of the basic commercial permit gradually evolved as an element of ownership rules in one path post-WWII, but also highly influenced by the rules in the trawler legislation. In a different, but closely related path the two different licence schemes for offshore vessels (concession) and coastal vessels (annual permits) have developed separately until the recent amendments of fisheries legislation with the adoption of provisions that authorize the Ministry to establish a *common fishery licence* with a connected *quota factor unit*, with the aim of simplifying and harmonizing the quota

[1218] Some of the primary sources studied reveal that there were examples of local decision making prior to the adoption of the Norwegian Constitution in 1814. I still, however, mark the events in the mid-1800s as the first introduction of conferred authorities as we know it in legislation today (through powers set out in statutes).

[1219] The lack of assessment of legal and practical implication of the proposal prior to the Participation Act 1972 was for example highlighted by the Norwegian Fisherman Association. Ot.prp. nr. 22 (1971–72) page 2. See also Auditor General Report 2020 page 144.

system. There are three points to make in relation to this evolution. The first is that a commercial permit, with an additional permit to access closed fisheries, have become a fundamental part of the system as the instrument to set out the requirements and duties to participate in, and regulations that apply to, the commercial harvest at any time.

Secondly, this is the part of the system which limits ownership of commercial fishing vessels (and thereby who can be issued licences) through the activity requirement and nationality requirement. These ownership restrictions are principles rooted far back in time and statutory rules that contribute to local ownership and proximity to the harvest operations. A third point is what could characterized as a *state of flux* and *uncertainty* concerning the nature of limited entry and regulatory scope of the authorities in relation to these constructs, especially with regards to what legal actions would imply an interference with a legal position that could be protected by the Norwegian Constitution and the ECHR. The licence and quota system in the licencing regimes is complex and with a lot of technicalities and sector specific terminology. At the core of this is the wide administrative discretion both for setting out access regulations under the Participation Act and the establishment of harvest limitations and quota allocations under the Marine Resources Act, and what discretionary limits the legislature has intended for these matters. Ostensibly small modifications such as, for example, placement of a vessel into a specific length group, can have a negative impact for an individual licences holder if they reduce the quota allocated to the vessel annually. Loosening restrictions on structural quota arrangements (SQAs) for certain groups upon discretion can leave other groups with a lower profitability potential. Similarly, small adjustments in quota allocations through the annual regulations can affect some actors negatively. But what are the limits for these modifications, and who determines what is justifiable from case to case? What are to be defined as "administrative cases," as expressed in the Parliament when discussing the authority of the sales organizations in 1938?[1220]

As seen in the inquiry, the authority to set *harvest limitations* at stock level was first laid down in the Saltwater Fishery Act 1955. With the adoption of Participation Act 1972 section

[1220] See chapter 6.1.3.

10, and codification of some administrative practices in 1976,[1221] the executive was authorized to *establish and allocate vessel quotas*, which were decisions that were *not* rooted in a broad principal discussion of legal implications of these powers, but that basically laid the legal foundation of the licence and quota system of today. It also demonstrated how the administrative discretion based on *biological assessments* in a way was transformed into an additional administrative discretion for access regulations building on economic assessment, and facilitating for commercial realities, that have sustained and been expanded to coastal fisheries up to today. Consideration of biological and economic factors can be viewed as separate assessments, and other considerations are also relevant in subordinate decision-making under these authorities,[1222] but the issue of *quota allocation*, *quota shares* and *access regulations* are inextricable interwoven. In other words, the linkage between *what can be fished*, and *who can fish*. The legislative choice of moving the authority to establish vessel quotas back to the Saltwater Fishing Act 1983 section 5, building on the rationale that one thing is regulating harvest operations and the other is regulating participation, does not change this interdependency.[1223] Connected to this is also the market orientation the authorities have facilitated for, which makes the system highly dynamic as there are continuous dispositions of the actors through use of SQAs, transfers of vessels and licences and a new and quota exchange mechanism, which details are not yet clear at the time of the thesis submission.

9.2.5 Mixed enforcement strategies

The fifth feature is the *mixed enforcement strategies* with strong element of participatory governance through the sales organizations and an increasing use of administrative sanctions and self-reporting, in combination with more traditional enforcement approaches of risk-based controls, criminal prosecution, issuing of fines and sentencing of punishment by police authorities and courts. As seen, the traditional enforcement with use of fines goes back to the first regulations in the 1200s, but whether violations were actually enforced in the early years is a topic for further scrutiny. A component of participatory

[1221] See chapters 7.1 and 7.2.1.

[1222] See Marine Resources Act section 7. Some of these are elaborated in chapter 3.5.1.

[1223] See chapter 7.2.2.

governance has come in different forms, starting with a system of elected supervisors among the harvesters in the Lofoten fisheries in 1786, which was modified in 1816.[1224] The inquiry reveals that these mechanism didn't function as intended, and it wasn't until the harvesters were delegated authority to adopt rules of conduct in the Lofoten fishery that the enforcement found a form that would function in seasonal cod-fisheries until harvest quotas were introduced in the 1980s.

For the herring fisheries, on the other hand, the establishment of stronger at sea monitoring through *public enforcement* became the main strategy from the mid-1800s onwards. The reason why user participation was not an element in these fisheries is not clearly revealed in the material, but these were perhaps fisheries that lacked some of the predictability that the Lofoten fisheries had.[1225] For all fisheries, seasonal *ad hoc* public supervision was common until a permanent fisheries administration was established and evolved in conjunction with military and civil supervision at sea during the 1900s. As seen, the shift into a quota system would change enforcement challenges radically. New problems of overfishing emerged, and ensuring correct quota accounting became one of the core activities in the enforcement system, which led to an increased role of the fishermen sales organizations being responsible for the sales of fish upon landings. The enforcement has since then be modified on several occasions to find the optimal approaches, but although there is more use of self-reporting, electronic monitoring of vessel activities and increased responsibilities for the sales organizations, the problems of unreported catches, discards and overfishing still occurs in the current system.

9.2.6 Increasing role of technology in enforcement

A last feature of the system is therefore the increasing influence *technology* has in the monitoring part of the enforcement system, with a potential for increased use with the *digital revolution* we have been witnessing in the last few years. The inquiry has e.g. revealed how scales to weigh fish was technology used in relation to landing operations in the 1500s,

[1224] See chapters 5.5.1 and 5.5.3.

[1225] See chapter 5.7.1.

although probably justified by securing revenues to the King.[1226] Furthermore, vessel technology has over the course of time been an element of at-sea supervision, with the emerging motorization starting from around 1900 making the public enforcement more mobile (as also the fishing fleet would get).[1227] In the last few decades, the use of electronic monitoring has become an element of the resource control. This is to be studied in more detail in the comparative study in part III. As seen in chapter 8.3.4, the policy advisory commission that recently came up with recommendations sees increased digitization and an automatic documentation system to provide verifiable data from harvest operations.

9.2.7 Transition into comparative perspectives

This chapter has singled out and given some preliminary reflections on six key features in the legislative framework for commercial fisheries in Norway. The thesis now moves on to the comparative study to gain additional insights on how we legislate fisheries. As noted in chapter 2.3, the comparative study will provide both an introduction to the general legal and legal historical context in the Canadian Pacific fisheries, and study two selected fisheries comparatively in more detail. This can both contribute to increased knowledge on how another jurisdiction legislates a commercial fishery and how some of the central norms in both jurisdictions are set out in practice. The key elements identified in this part of the thesis will to the extent possible run through the material in the comparative study, until the final synthesis in part IV.

[1226] See chapter 5.3.

[1227] See chapter 6.4.

PART III EMPIRICAL MATERIAL: A COMPARATIVE CASE STUDY OF NORWAY AND PACIFIC CANADA

10 Introduction to Canadian law and fisheries legislation

10.1 Introduction

This part of the thesis shifts over to a comparative outlook to fisheries legislation in Canada based on the scope and methodology presented in chapter 2.3. The Canadian and the Norwegian fisheries legislation have evolved, and functions today, in a different legal, historical, economic and social context. This chapter aims to provide some basic background to the comparative case study on halibut fishing with hook and line in Pacific Canada, and the Norwegian coastal cod fishery, that follows in chapter 11. It is therefore an element in discussing the legislative context and regulatory system that would have been elements in identifying a Canadian fisheries legislator approach (FLA). The purpose now, however, is to give comparative perspectives for the synthesis of the Norwegian FLA and possible universalities. Throughout this chapter similarities and differences will be highlighted in relation to the Norwegian framework to better understand the role of legislative context in a specific jurisdiction. Although chapter 10 is primarily descriptive, information provided by the respondents are included when pointing to how the rules are practiced. This chapter therefore tries to reveal some of the *legal formants* in Canadian fisheries (see chapter 2.3.), especially in chapter 10.5.

The inquiry starts with an historical brief of the creation of the Dominion of Canada and its constitutional evolution and legal influences in chapter 10.2. Chapter 10.3 follows with an outline of the main elements of the current institutional structure and legislative framework especially relevant to fisheries governance, including an introduction to important principles in Canadian administrative law and criminal law. The following chapters moves into fishery specific issues, starting with an overview of the legal history of fisheries in Pacific Canada in chapter 10.4, while chapter 10.5 outlines the current legislative framework for regulating commercial fisheries, with a Pacific fisheries emphasis. In sum, this chapter provides a general and fishery specific context found necessary to understand the case study in the next chapter.

10.2 Colonialization and creation of constitutional Canada

The geographical areas that constitute Canada have been inhabited by diverse indigenous[1228] groups for thousands of years. This brief overview, however, has a colonial perspective with a main motive to outline the creation of constitutional Canada, its relations to Britain and the reception of English and French law.[1229] In 1583 the first North American English colony of Newfoundland was founded, whereas New France (later Quebec) was a colony with French settlements in Quebec City from 1608. In the next century several other English colonies were established south of Newfoundland. The British claimed significant lands through the Hudson Bay Company (HBC), and it was under the Charter of the HBC that English law first was brought to Canada in 1670.[1230] These were times of wars and disputes over the colonies, with the war between the British and French between 1756 and 1763, resulting in a British victory, and the American War of Independence and creation of United States, formally recognized by England in the Treaty of Paris 1783, as the two major events. From a legal point of view, these were also times when the imperial powers gradually recognized that it could be beneficial to make treaties with the natives.[1231] The *Royal Proclamation of 1763* from the British king formed a basis for such agreements, but the intention of transferring formal title to the Crown[1232] in return for protection of native rights such as self-government through the use of treaties, was not consistent up through the years.[1233]

[1228] I will use the term "indigenous" interchangeably with "aboriginal" and "natives," and in the historical material also with the term "indian." When I use either of the terms, I refer more generically to different cultures and ethnic groups that falls under "First Nations," "Inuit" and "Métis," unless otherwise specified.

[1229] The influence and impact of a thousand years of presence of diverse cultures and traditions must at the same time not be understated. As will be shown later, aboriginal entitlement, law, tradition and culture has gained increased recognition in Canadian law. See for example. Hughes, Kwasniak and Lucas (2016) page 11–15 for a snapshot of issues related to natural resources in Canada pre-European contact.

[1230] Gall (2004) page 57.

[1231] Fitzgerald, Wright and Kazmierski (2010) page 20.

[1232] "The Crown" is a concept used to refer to the state and its government in various ways in Commonwealth countries. "Crown" can for example be a characterization of public land and resources, by referring to Crown land and resources. I will use "public" and "Crown" interchangeable in this regard. "The Crown" can also be used to refer to the public prosecutor of Canada.

[1233] Fitzgerald, Wright and Kazmierski (2010) page 20.

More formal reception of English law came with the British defeat of the French in 1763. Tensions arose, however, between French and British settlers, which led the British Parliament to pass a *Quebec Act* in 1774 (the province of Quebec was the former New France colony), with a reception of civil law. This was not well received by the British colonist, so a *Constitutional Act of 1791* divided Quebec into English Upper Canada (which later become the province Ontario) and French Lower Canada (todays Quebec). Upper Canada adopted fully English law by enacting the first laws of the province in 1792.[1234] For the other maritime colonies the reception of English law occurred for Nova Scotia and New Brunswick in 1758, Newfoundland in 1832 and Prince Edward Island in 1763.[1235]

In 1867 the Dominion of Canada was created. This was a confederation of the provinces of Ontario, Quebec, New Brunswick and Nova Scotia. The British Parliament passed the British *North America Act of July 1, 1867*, and thus Canada was established as a nation, independent of Britain.[1236] The *British North America Act* is later renamed the *Constitution Act of 1867*, which I will use as reference in the following. In the years to follow the HBC surrendered more land over to the Dominion. The Constitution provided the framework for admission of the new provinces, including Manitoba in 1870, British Columbia in 1871, Prince Edward Island in 1873, Saskatchewan and Alberta in 1905 and Newfoundland and Labrador in 1949.

The British Parliament, however, kept its power to pass laws that would apply to Canada after the *Constitution Act 1867* was adopted. Canada was not allowed to pass its own laws or enter agreements with other countries until the *Statute of Westminster*[1237] passed in 1931.[1238] Canada didn't get complete legislative independence to change its Constitution until an amending formula was adopted after years of negotiations on April 17, 1982. This was set out in the *Constitution Act of 1982*, which also included a new *Charter of Rights and*

1234 Gall (2004) page 59.

1235 Gall (2004) page 58.

1236 *The Constitution Act, 1867 (UK), 30 & 31 Victoria, c 3 (Constituion Act 1867).*

1237 *Statute of Westminster, 1931 (UK), 22–23 George V, c 4 (Statute of Westminister).*

1238 See for example Gibson (1996) page 19; Forcese et al. (2015) page 7.

Freedoms.[1239] The Constitutional evolution and basis is therefore complex and encompasses several written and unwritten sources.[1240] It is also argued that several so-called quasi-constitutional statutes including the *Canadian Bill of Rights*,[1241] the *Supreme Court Act*,[1242] and provincial bills of rights[1243] fall within the constitutional realm.[1244] Constitutional issues will not be reflected any further in the thesis unless there are explicit matters relevant to fisheries legislation.

10.3 General legal framework

10.3.1 Federal institutions

Canada is a Constitutional monarchy and a federation of ten provinces and three territories.[1245] The sovereign monarch is Queen Elizabeth II of the United Kingdom (UK)[1246] and the country is as described above an independent part of the Commonwealth. The *Constitution Act 1867* establishes the legislative authority, the executive government and the judicial authority in Canada. The Parliament of Canada is the legislature of Canada, which under section 91 of the *Constitution Act 1867* is authorized exclusive power to make federal laws for 29 matters outlined in the provision, including criminal law and fisheries law. Section 92 similarly grant exclusive power to provincial legislative authorities for 16 matters. Saltwater fisheries is under federal jurisdiction, and the emphasis in the following is therefore on federal matters.

1239 *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11 (The Constitution Act 1982)*

1240 See more on this in Gall (2004) page 68–83.

1241 *Canadian Bill of Rights, SC 1960, c 44 (Canadian Bill of Rights).*

1242 *Supreme Court Act, RSC 1985, c S-26 (Supreme Court Act).*

1243 See for example *Human Rights Code, RSBC 1996, c 210 (Human Rights Code BC).*

1244 Gall (2004) page 69.

1245 The provinces are: Nova Scotia, Newfoundland and Labrador, New Brunswick, Prince Edward Island, Quebec, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia. The territories are: Nuvanut, Northwest territories and Yukon.

1246 UK is the political term of the country today, but I will also use the terms "British," "Britain," "Great Britain," "England" and "English," when speaking of legal structures and other influences from UK and its predecessors.

The executive power of the government is under section 9 of the *Constitution Act 1867* vested in the Queen. The Queen is, however, only the formal executive, while the Prime Minister and Cabinet are the informal and *de facto* executives as set out by constitutional conventions.[1247] The Monarch of Canada (federal vice regal) is the Governor General, which is appointed by the Queen on advice of the Prime Minister. The Minister of Fisheries and Oceans and the Coast Guard is a member of the Cabinet,[1248] and the Department of Fisheries and Oceans Canada (DFO) is the administrative body of the Minister. This part of the government is therefore responsible for the various elements of fisheries management in Canada. The Canadian Coast Guard (CCG) is a special operative agency within DFO.

This institutional structure for federal matters does not differ substantially from Norway, which also is a Constitutional Monarchy. Under Article 75 of the Norwegian Constitution the Norwegian Parliament is authorized exclusive authority to pass laws by its 169 elected members, whereas the executive power is vested in the King or Queen under section 3 of the Constitution.[1249] The Norwegian Minister of Fisheries is similarly a member of the cabinet, and has a main administrative body that currently is organized under the Ministry in Oslo. The role of subordinate agencies of various Ministries, such as the Directorate and Coast Guard, is further described in chapter 3.

10.3.2 Legislative processes

The Parliament and the Cabinet with its administrative departments are based Ottawa, the federal capital of Canada. The Parliament consists of two chambers/houses, which are the House of Commons and the Senate. The House of Commons is the law-making body of currently 335 elected members (MPs). The Senate consists of 105 senators appointed by the General Governor on recommendation from the Prime Minister. The Prime Minister and normally all ministers of the Cabinet are also members of the Parliament who sits and vote in the House of Commons. The legislative process normally starts with the introduction of a Bill to The Parliament from the government, usually by cabinet members, parliamentary

[1247] Fitzgerald, Wright and Kazmierski (2010) page 45.

[1248] Hereafter referred to as *the Minister*.

[1249] See Langford and Berge (2019) on Norway's Constitution in a Comparative Perspective.

secretaries[1250] (public bills) or by individual parliamentarians (referred to as a Private Members' Bill).[1251] The Bill then goes through a number of specific stages in committees of the House of Commons and Senate before it becomes legislation. There are several standing committees that address different matters. Fisheries are under the Standing Committee on Fisheries and Oceans (FOPO), but temporary legislative committees may be created to study a particular Bill. During the examination of Bills committees can hold hearings with witnesses, or request briefs from groups and individuals unable to appear as witnesses, to inform cases. The legislative process is complex and can take different routes from Bill to Bill, but all text must at the end be approved by both Houses of the Parliament, with a subsequent Royal Assent in a traditional ceremony.[1252] Once Royal Assent is granted the Bill becomes law and enters into force on the date provided within the Act or specified by an order of the Governor in Council.

The process does not differ substantially from the Norwegian system, but a main difference is that the Norwegian Parliament does not any longer have two formal chambers, and appointed Ministers who are MPs (which is not always the case) do not attend meetings at the Parliament during the appointment, but are represented by their proxies.[1253] Bill proposals are submitted in Bill propositions by the executive branch through the cabinet, or proposals from individual MPs. Proposals are thereafter discussed in the relevant Parliament Committee, which typically includes hearings with organizations and stakeholders affected by a Bill proposal, which results in a committee recommendation. These recommendations are in most cases adopted after two stages of negotiations in the plenary of the Parliament. Similarly to Canada, a Royal Assent by the King in Council is

[1250] These are members of the Parliament from the governing party appointed by the Prime Minister to assist Cabinet members in their parliamentary duties. See more in *Parliament of Canada Act, RSC 1985, c P-1 (Parliament Act)* section 45.

[1251] See more details on the process in "The House of Commons Procedure and Practice", third edition, 2017: https://www.ourcommons.ca/About/Compendium/LegislativeProcess/c_g_legislativeprocess-e.htm
The specific rules for public bills are set out in *Standing Orders of the House of Commons* chapter IX. See more on the Parliament committees in chapter XIII:
https://www.ourcommons.ca/About/StandingOrders/Index-e.htm

[1252] See more in *Royal Assent Act, SC 2002, c 15 (Royal Assent Act).*

[1253] Article 62(2) of the Norwegian Constitution.

needed before it can enter into force. The committee recommendations and Bill propositions (preparatory works) are important authoritative legal documents in a Norwegian context as they provide additional information on the intention, and justifications, of a Bill proposal. They are therefore relevant for subsequent interpretation of the law by courts and others that apply the law, which is a difference between the Norwegian and Canadian legal tradition.[1254]

10.3.3 The common law tradition in Canada and the public right to fish

As seen above in chapter 10.2, English common law was adopted in the colonialization and confederation process of Canada. The common law tradition is of course important to acknowledge in relation to the Norwegian tradition, which is often labelled under the Nordic legal tradition as a hybrid with elements of the civil law tradition in the European main land, and elements from a common law tradition.[1255] The thesis will not go into great detail comparing the two legal systems as such, but will try point to main similarities and differences under the Canadian system that are of particular relevance to fisheries law, with emphasis on administrative law, production of subordinate legislation and practice, and some criminal law matters.

The common law in Canada must also be understood in a Canadian context. Once the formal reception had happened, this marked the date in which further statutory enactments in England would no longer apply to the colony, but must come from the colony itself.[1256] The common law that was adopted, was also only applicable as far as it was suitable to the local conditions.[1257] It is not for this thesis to pursue these complex issues, but in a fishery context it is relevant to draw attention to the question of fishing rights and property law. In common law there is a *doctrine on the public right to fish*, that marks the point of departure. This has in literature been seen as a "marvellous" example of the application of common

[1254] See also footnote 86 above. That preparatory works are regarded as a source of law in its own merit is a unique feature that Norway shares with other Nordic countries, Kjølstad, Koch, and Sunde (2020) page 118.

[1255] Kjølstad, Koch, and Sunde (2020) page 142.

[1256] Cote (1977); Harris (2008) page 78.

[1257] Blackstone (1771) Section of the forth, 107; Harris (2008) page 78–79.

law in a Canadian context.[1258] As seen above in chapter 4.5.2, the concept of property rights and ownership itself is subject to many approaches. The issue of individual property over fish is similarly complex and dependent on many circumstances. When the fish is in its wild state, the common law concept of capture of wild things (*ferae nature*) applies. This means that animals in their wild nature are not subject to ownership. Only after a fish is caught, and under the control of someone, is it reduced to possession and subject to ownership. In Norway, it is similarly the state of law that a fish in a wild state is ownerless.[1259]

As for rights to fishing grounds, or rights to a fishery, three important geographical distinctions are made in the English common law recognition of property interest in rights to catch fish:

1. Fisheries offshore in areas that are not anyone's property in the sense of common law. These are areas often referred to as *res nullis*.
2. *Tidal waters*, which are closer to shore, where shallow estuaries and bays can be referred more specifically to *inshore tidal waters*.
3. *Non-tidal fisheries* in *non-navigable waterways*, inland and freshwater fisheries that I will refer generically to as "interior fisheries."

It is fisheries in tidal waters that are subject to the common law doctrine of the *public right to fish*, originating from the Magna Carta (1215), which entails that the Crown holds the right to fish in tidal waters in trust for the public.[1260] It is furthermore the legislative authority that can authorize granting of fishing rights in these areas, which prior to the Magna Carta was within the prerogatives of the Crown. The reason why this doctrine was not necessarily applicable to a Canadian context was that North America has different geographical characteristics than England with its grand waterways and lakes that were non-tidal, but navigable. Harris (2008) problematizes these issues as they were important in

[1258] Harris (2008) page 79.

[1259] See footnotes 433, 975 and 976 above.

[1260] See for example FAO (2004) page 3; Harris (2008) page 80–81. Barnes (2011) page 442, on the other hand, asserts that the point of origin is not entirely clear, but often mistakenly ascribed to the Magna Carta.

relation to a process of allotment of land for First Nations reserves, and access of the natives to fish, in the early colonialization of BC in the decades following 1871, which is further addressed in chapter 10.4 below.

10.3.4 Regulations and administrative law in the common law context

As in Norway, the use of regulations to carry out the intent of statutory law in more specific legislation, or creating an administrative decision-maker for administering a statutory scheme, are institutional design choices commonly used in Canadian law.[1261] There is therefore an extensive and diverse administrative apparatus in the executive branch of the Canadian government that act as legislators, supervisors and enforcers of statutory law. Powers are delegated by an enabling provision in the relevant statutes. The enabling provision, in combination with other relevant provisions, will therefore set out *who* can make a decision, *what* type of decision can be made, the *content* of a decision and *how* the decision must be made. Further specifications are often laid down in government policies, and common law supplements relevant statutory law. This, in combination with the diversity of statutory schemes at the provincial and federal level that many types of agencies, boards or tribunals operate within, makes the administrative landscape complex, fragmented and in a state of flux.[1262] As interpretation of the Canadian fisheries statutory scheme is an element of this comparative analysis, the thesis will briefly outline the main features in the regulation-making process and Canadian administrative law to give a minimum of context to better understand federal legislation such as fisheries legislation.

10.3.4.1 Making regulations and public transparency

The *Statutory Instruments Act*[1263] sets out the general rules for the adoption of regulations. Regulations are statutory instruments established under legislative authorities conferred under an act of the Parliament that may result in the imposition of legal sanctions if violated.[1264] The statute prescribes rules for examination[1265] of proposed regulations through

[1261] See for example Green (2013) page 126; Mullan (2001) page 134.

[1262] See for example Flood and Dolling (2013) page 3.

[1263] Se full citation in footnote 93 above.

[1264] *Statutory Instruments Act section 2(1).*

[1265] See in particular *Statutory Instruments Act* section 3(2).

the Clerk of the Privy Council[1266] in consultation with the Deputy Minister of Justice,[1267] and other rules, including transmission and registration of regulations,[1268] when they come into force and how they are published,[1269] revised and consolidated,[1270] scrutinised[1271] and revoked.[1272] There are, however, no other detailed statutory requirements for public decision-making more generally, which can be found in the Public Administration Act in a Norwegian context. Case law developed in the common law tradition is therefore authoritative in Canadian administrative law, see more in the following chapters. In Norwegian law the Public Administration Act defines regulations as decisions made in the exercise of public authority which determines the rights or duties of an "indefinite number or an indeterminate groups of persons."[1273]

In the making of Canadian regulations there is at the same time a *Cabinet Directive on Regulation*[1274] that sets out more specific guidelines and requirements for developing regulations that are registered under section 6 of the *Statutory Instruments Act*.[1275] It is, however, to apply to the directive to the "greatest extent possible" for other regulations.[1276] Section 3 of the directive sets out the following four general principles that apply to all regulating activities by departments and agencies:

- regulations protect and advance the public interest and support good government,
- the regulatory process is modern, open, and transparent,

1266 The head of the federal public service, and therefore the highest-ranking civil servant of the government. The Privy Council is also known as the Prime Minister's Office.

1267 The highest-ranking civil servant at the Ministry of Justice.

1268 See in particular *Statutory Instruments Act* sections 5(1) and 6.

1269 See in particular *Statutory Instruments Act* sections 9(1), 10(1) and 11(1).

1270 See in particular *Statutory Instruments Act* section 15(1)

1271 See in particular *Statutory Instruments Act* section 19

1272 See in particular *Statutory Instruments Act* section 19.1(1). See more in chapter 10.3.4.3.

1273 Public Administration Act sections 2(a) and 2(b). This is from an English translation found in www.lovdata.no. See more in chapter 10.3.4.2.

1274 Treasury Board of Canada Secretariat: Cabinet Directive on Regulation (*Cabinet Directive on Regulation*).

1275 *Cabinet Directive on Regulation* section 2.0.

1276 *Cabinet Directive on Regulation* section 2.0.

- regulatory decision-making is evidence-based, and
- regulations support a fair and competitive economy.

The rest of the directive sets out in more detail roles and responsibilities, and how these principles can be achieved, through requirements in the phase of developing regulations (section 5), issues to consider during the regulatory management (section 6) and review and scrutiny requirements (section 7). Running through all stages is a duty for regulators to seek opportunities for stakeholder engagement, regulatory cooperation and alignment and coordination with all levels of the government. Figure 12 below summarizes the different elements of the regulatory cycle.

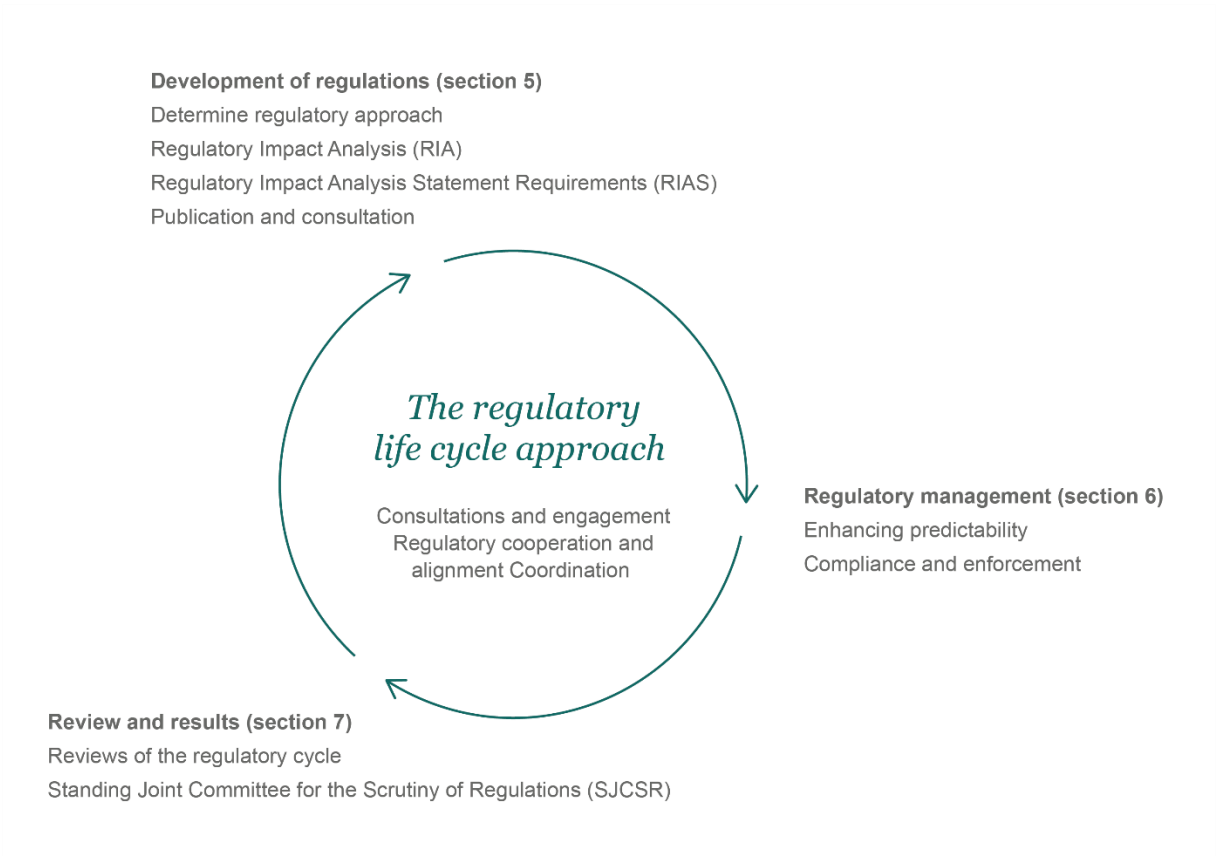

Figure 12 The regulatory life cycle approach

In addition, there is a *Cabinet Directive on Law-Making*[1277] that sets out expectations of Ministers in relation to development and design of federal statutes and regulations. These two cabinet directives have Norwegian equivalents in the Executive Order of Examination, with an objective of informing all cases of public decision-making, and Ministerial Guidelines on Law-making.[1278] As with the Nature Diversity Act and the Planning and Building Act in the Norwegian context (see chapter 3.3) there is also environmental legislation that sets out procedural requirements for public decision-making in Canada at federal level. The *Impact Assessment Act*[1279] sets out the general legal framework in which the precautionary principle is enshrined. The expectations of the ministers and cabinet on strategic environmental assessments (SEA) are set out in the *Cabinet Directive on the Environmental Assessment.*[1280]

Lastly, the issues of public transparency in the Canadian government is addressed through the *Access to Information Act*,[1281] in which there is a general right of access to government records for Canadian citizens or permanent residents.[1282] The are several exemptions from the general rule, however, including information obtained in confidence,[1283] law enforcement and investigations,[1284] personal information[1285] and third-party information such as trade secrets[1286] and more. The rules must also be seen in relation to protection of personal information under the *Privacy Act.*[1287] The Norwegian equivalent is the Freedom

[1277] Privy Council Office: Guide to Making Federal Acts and Regulations: Cabinet Directive on Lawmaking (*Cabinet Directive on Lawmaking*).

[1278] Justisdepartementet: Veileder februar 2000 i lovteknikk og lovforberedelse (Guidance on the drafting of law and regulations).

[1279] *Impact Assessment Act, SC 2019, c 28, s 1 (Impact Assessment Act)*.

[1280] Pricy Council Office: Strategic Environmental Assessment. The Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals (*Directive on Environmental Assessment*).

[1281] *Access to Information Act, RSC 1985, c A-1 (Access to Information Act)*

[1282] *Access to Information Act* section 4(1).

[1283] *Access to Information Act* sections 13(1) and (2)

[1284] *Access to Information Act* section 16(1).

[1285] *Access to Information Act* section 19(1).

[1286] *Access to Information Act* section 20(1).

[1287] *Privacy Act, RSC 1985, c P-21 (Privacy Act).*

of Information Act and Environmental Information Act with a similar general right of access to official documents in the government, and with similar exemptions as in the Canadian case, and the implementation of the General Data Protection Regulation (GDPR) in the EU in the Personal Data Protection Act,[1288] which regulates handling of personal information.

10.3.4.2 Structural and procedural issues

As noted, there are no *general rules* that apply to public decision-making whether frontline decision-making under conferred authorities, or through appeals and adjudication in tribunals or boards.[1289] This is therefore an area of law where the common law tradition supplements statutory law when no specific procedural rules are laid down in administrative schemes (which is not the case for fisheries law). To secure procedural fairness in public decision-making processes is a principal concern in Canadian administrative law. This is reflected in the framing of statutory schemes and in courts reviewing decisions against constitutional, common law and international standards. It is well-established in jurisprudence that there is a *common law duty of fairness* that applies to administrative decisions that affect the rights, privileges and interest of an individual.[1290] So, even if the statutory schemes do not set out procedural rules, the duty of fairness might be triggered depending on the nature of the decision. The threshold for this determination was first set out in *Cardinal v. Director of Kent Institution*. It is established that the duty applies to *administrative decisions*, and not to *legislative decisions*.[1291]

[1288] Lov 15. juni 2018 nr. 38 om behandling av personopplysninger (Personal Data Protection Act).

[1289] Several provinces have, however, adopted provincial statutes with administrative procedural requirements, for example, *Administrative Procedures and Jurisdiction Act, RSA 2000, c A-3* in Alberta and *Administrative Tribunals Act, SBC 2004, c 45* in British Columbia.

[1290] *Cardinal v. Director of Kent Institution,* 1985 CanLII 23 (SCC), [1985] 2 SCR 643 para 14. The case is also referred to in Huscroft (2013) page 153.

[1291] See for example *Att. Gen. of Can. V. Inuit Tapirisat et al.*, 1980 CanLII 21 (SCC), [1980] 2 SCR 735. This case is also referred to in Huscroft (2013) page 156.

Cabinet and ministerial decisions often will be characterized as legislative in nature.[1292] *Carpenter Fishing Corp. v. Canada*[1293] illustrates, however, that there can be ministerial decisions that are administrative in nature. The case at bar concerned a decision by the Minister of Fisheries and Oceans to implement an owner restriction, which was a part of a formula to determine the quota in the halibut fishery. The federal court found that the decision did not trigger a common law duty of fairness. It was set out in the analysis of the court that "[t]he imposition of a quota policy (as opposed to granting a specific licence) is a discretionary decision in the nature of policy or legislative action." The court therefore made a distinction where administrative action would be the "granting of a licence," whereas "the establishment of a quota policy" would be legislative action. In *Imperial Oil v Quebec*[1294] a decision by the Quebec Minister of Environment ordered that an oil company to prepare, at its own expense, a site characterization study, was also regarded as legislative in nature in the field of industrial/environmental regulation. The court summarized that:

> The Minister was not performing an adjudicative function in which he was acting as a sort of judge. On the contrary, he was performing functions of management and application of environmental protection legislation. The Minister was performing a mainly political role which involved his authority, and his duty, to choose the best course of action, from the standpoint of the public interest, in order to achieve the objectives of the environmental protection legislation.[1295]

As highlighted in the quote, performing typical management functions is to be considered legislative action in which the procedural rights under the duty of fairness do not apply. Case law has set out the framework for administrative decision-makers to determine the *content* of a duty of fairness that will supplement relevant statutory provisions. It is to be decided "in the specific context of each case"[1296] and the nature of the decision and the

[1292] Huscroft (2013) page 156–157.

[1293] 1997 CanLII 6391 (FCA), [1998] 2 FC 548 [*Carpenter*].

[1294] 2003 SCC 58 (CanLII), [2003] 2 SCR 624 [*Imperial Oil Ltd.*].

[1295] *Imperial Oil Ltd.* para 38. The case is also referred to in Huscroft (2013) page 160–161.

[1296] *Knigt v. Indian Head School Division no. 19,* 1990 CanLII 138 (SCC), [1990] 1 SCR 653 [Knight] page 682.

statutory scheme, the importance of the decision to the individual or individuals, the doctrine of legitimate expectations and to account for and respect the choices of procedure made by the agency are five non-exhaustive factors in the consideration of the duty set up in *Baker*.[1297] Later case law gives more authoritative directive in the application of the Baker test to different types of cases.[1298] Similarly, case law sets out rules of disqualification and impartiality, and a test for when there is reasonable apprehension of bias of an administrative decision-maker is set out in *Committee for Justice and Liberty et al. v. National Energy Board et al.*[1299]

These are areas that are more standardized in the Public Administration Act in Norwegian law. There is made a distinction between two types of administrative decisions.[1300] An i*ndividual decision* pursuant to the Public Administration Act section 2(1)(b) concerns the "rights "rights or duties of one or more specified persons," whereas adopting *regulations* pursuant to section 2(1)(c) as noted above, determines the rights of duties of an "indefinite number or an indeterminate group." This distinction seems to resemble the essence of the distinction between respectively an *administrative* and a *legislative* decision in Canadian law. Although the distinction is defined in statutory law in Norway, the boundaries are not

[1297] See more on the criteria in *Baker* para 23–28.

[1298] See different examples in *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 (CanLII), [2008] 1 FCR 385, *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 SCR 190 [*Dunsmuir*], *Chrétien v. Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities*, 2008 FC 802 (CanLII), [2009] 2 FCR 417, *Howard Johnson Inn v. Saskatchewan Human Rights Tribunal*, 2010 SKQB 81 (CanLII).

[1299] 1976 CanLII 2 (SCC), [1978] 1 SCR 369 page 394. Also referred to in Jacobs (2013) page 256–257. It was set out that "apprehension of bias must be a reasonable one held by reasonable and right mined persons, applying themselves to the question and obtaining thereon the required information. In other words of the Court of Appeal, that the test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through conclude."

[1300] An administrative decision is a "decision made in the exercise of public authority which generally or specifically determines the rights or duties of private persons (individual persons or other private legal persons)." Public Administration Act section 2(a).

always clear in specific cases, but it's not unusual for a legislator to discuss the institutional design choice when a specific statutory scheme is laid down.[1301]

Chapter II of the Public Administration Act sets out rules concerning disqualification that apply to all public decision-making, whereas there are set out different rules for the preparation and adoption of individual decisions (chapter IV and V) and regulations (chapter VII). For individual decisions these are *inter alia* the requirement of advance notification,[1302] duty to examine a case,[1303] right of parties to acquaint themselves with documents in the case,[1304] that grounds are given for a decision,[1305] and a right to appeal to the immediate superior of the agency that made the decision.[1306] These are procedural safeguards that do not differ substantially to rights granted under a high degree of fairness for administrative decisions in the Canadian context. As to rules of disqualification, there is a subjective rule disqualifying the official under section 6 if there are "any other special circumstances which are apt to impair confidence in his impartiality," in which there are examples on case law clarifying the scope of "other special circumstances."[1307] This is an example of the important role jurisprudence also can play in a Norwegian context.

10.3.4.3 Accountability mechanisms and challenging administrative action

The tensions that can occur with an increasing promulgation of subordinate legislation, often under extremely broad discretion conferred, in relation to the constitutional role of the Parliament as supreme legislator, is central in administrative and environmental law

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1301 One example of this is the establishment of a new management regime in Norwegian aquaculture legislation where production capacity can be reduced for all actors in an area through regulations. In the hearing proposal in Nærings- og fiskeridepartementet: Høringsnotat 21. september 2016 om implementering av Meld. St. 16 (2014–2015) (Aquaculture Regulations Hearing 2016), concerning the implementation of an adopted policy in the Parliament, the Ministry discussed whether reduction where to be done in regulations or individual decisions. See more in chapter 5.1.2 of the hearing. It concluded that the reduction could be set out in regulations.

1302 Public Administration Act section 16.

1303 Public Administration Act section 17

1304 Public Administration Act section 18.

1305 Public Administration Act sections 24 and 25.

1306 Public Administration Act section 28.

1307 See for example Rt. 1998 s. 1398; Rt. 1992 s. 1642.

literature and discourse in Canada.[1308] The issues concerning this tension are complex and with no simple definitions, but boil down to questions concerning the different aspects of the unwritten principle of the rule of law and division of powers that is fundamental to the Westminster system of government in Canadian law.[1309] The central legislative dilemma was articulated as follows in Arthurs (1970):

> Should parliament itself assume responsibility both for articulating policy and for filling in the details of that policy and direction the manner of its implementation? Or should the cabinet instrumentalities be permitted wide latitude to make "subordinate legislation", subject only to fairly broad policy instructions given by the Legislature?[1310]

An increasing use of subordinate legislation that is not accompanied with the development of control and review mechanisms of the bureaucracy has been highlighted in Canadian literature and it has been claimed that "we seem to be moving closer to a regime where legislatures have really ceased to be legislators in any traditional sense of the term."[1311] Canadian administrative law literature points to how the modern administrative state has developed and created the executive as a powerful branch in the system of government.[1312] The issue of administrative discretion in fisheries legislation is further addressed in chapters 10.5, 11 and part IV, but suffice to say for now that a wide executive discretion is a characteristic for both fisheries jurisdictions. The three main accountability mechanisms in a Canadian context are 1) legislative scrutiny, 2) public consultation and 3) judicial review, as distinguished in literature.[1313]

[1308] Green (2013) page 129–146; Mullan (2001) page 134–144; Stacey (2015). See also more on these tensions in a historical context in Flood and Dolling (2013) page 11–16.

[1309] An overview of the rule of law legally, practically and theoretically in Canadian context is given in Liston (2018) page 139–159.

[1310] Arthurs (1970) page 315.

[1311] Mullan (2001) page 135–136.

[1312] Liston (2018) page 143. See also Flood and Dolling (2013) page 11–16.

[1313] Mullan (2001) page 136–144.

As to *legislative scrutiny*, there is as noted above *ex ante* requirement of examination of legality, form and content of proposed regulations by the Clerk of the Privy Council, in consultation with the Minister of Justice, under section 3 of the *Statutory Instruments Act*. Under section 19 regulations (and any other statutory instruments) can be reviewed and scrutinized *ex post* by the Standing Joint Committee for the Scrutiny of Regulations in the Parliament. A regulation (or portion of it) must be revoked within 30 days (or otherwise specified) by the relevant authority if both Houses in the Parliament decide it.[1314] Due to time, expertise and information constraints, the legislative review, however does not necessarily secure adequate oversight of subordinate legislation.[1315] There are no similar statutory review mechanisms in Norwegian law.[1316]As to *public consultation*, there is no statutory duty of public consultation when establishing subordinate legislation in Canadian law similar to the duty in the Public Administration Act section 37 in Norway to clarify the case, give advance notification and give stakeholders an opportunity to express opinions before regulations are issued, amended or repealed in Norwegian law. As seen above in chapter 10.3.4.1, the *Cabinet directive on regulations* instructs the executive branch to consult and ensure stakeholder involvement in the regulatory processes. A common law duty for the Crown or provinces to consult with aboriginals is established in case law.[1317]

[1314] *Statutory Instruments Act* section 19(9).

[1315] Green (2013) page 134; Mullan (2001) page 137.

[1316] There are, however, control on more random and case to case basis by the Committee for Scrutiny and Constitutional Affairs at Stortinget and by the Auditor General of Norway.

[1317] The duty was clarified with the decisions *Haida Nation v. British Columbia (Ministry of Forests)*, 2004 SCC 73 (CanLII), [2004] 3 SCR 511[*Haida Nation*] *Taku River Tlinit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 (CanLII), [2004] 3 SCR 550. As to the content of the duty was stated in para 39 in *Haida Nation*: "The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed." *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (CanLII), [2005] 3 SCR 388, *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 (CanLII), [2010] 2 SCR 650. *Beckman v. Little Salmon/Carmacks First Nation* 2010 SCC 53 (CanLII), [2010] 3 SCR 103 have further clarified the nature of the duty. For an overview of the development and incorporation of traditional ecological knowledge in the consultations, see the master's thesis: Pudovskis (2013)

The participatory process in the making, implementing and evaluating fisheries law will be more thoroughly addressed in the comparative analysis in chapter 11.

Judicial review is the third accountability mechanism for legislative review. Judicial review is an element in a complex arsenal of mechanisms to challenge an administrative decision whether it is on procedural and/or substantive grounds. How to challenge an administrative decision will also depend on the statutory scheme in the administrative area at hand. Briefly, there are two major avenues. Remedial options (and appeal mechanisms) at the tribunal stage, or to seek judicial review in courts. As to the former, there are a variety of differently structured tribunals that have different powers to impose a particular remedy, depending on what the enabling provision authorizes.[1318] As to challenging a remedy ordered by a tribunal, there might be established internal agency or external non-court appeal mechanisms in the statutory scheme. There is therefore no general right to administrative appeal mechanism for individual decisions as set out in chapter VI in the Public Administration Act in the Norwegian context. I will return to remedial options at tribunal stage where relevant in the case study in chapter 11. Alternative action could be private law remedies or external court mechanisms.

As to the remedies on judicial review, I acknowledge the complexity and historical evolution of these matters in the British common law tradition that this thesis cannot emphasize. Relevant in this context where federal legislation is the subject matter was that the adoption of *the Federal Courts Act*[1319] attempted to clarify complex procedures surrounding judicial review.[1320] Judicial review under *the Federal Courts Act* is therefore a relevant statutory scheme, and the Federal Court of Canada is the principal forum for judicial review and has virtually exclusive jurisdiction over judicial review of federal administrative action.[1321] The role of the ancient writs is, however, still considered relevant in understanding the scope

[1318] For an overview of tribunal remedies, see Ford (2018) page 46–61.

[1319] *Federal Courts Act, RSC 1985, c F-7 (Federal Courts Act).* Several other statutes tried to clarify procedures on judicial review in provinces. In BC rules are laid down in: *Judicial Review Procedure Act, RSBC 1996, c 241.*

[1320] See for example Ford (2018) page 78.

[1321] Mullan (2001) page 425.

and range on remedies available under judicial review.[1322] I will further go into the substantive review of administrative decisions below. The hierarchical structure of the court system is presented in figure 13.[1323]

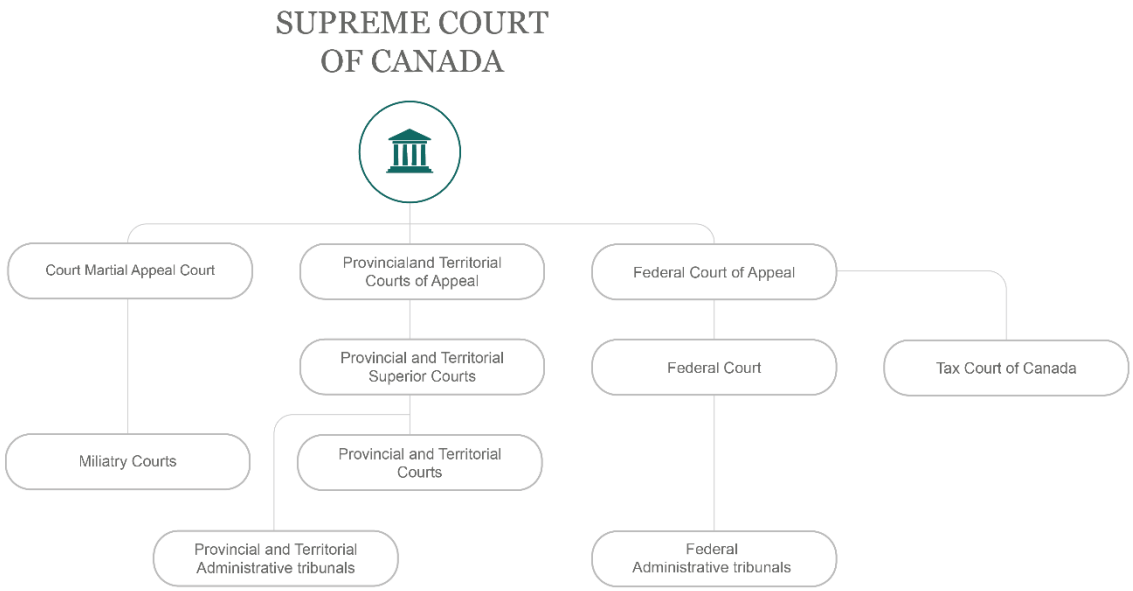

Figure 13 Outline of Canada´s Court System

The Federal Court would be the first court instance to review an application for judicial review of an administrative decision by DFO that a plaintiff is not satisfied with. The defendant would be DFO represented by the Attorney General of Canada. The first appeal level is the Federal Court of Appeal. Lastly, the Supreme Court of Canada is the final court of appeal. As to criminal cases, the path will be different. The thesis will return to that in chapter 10.3.5. The court system of Canada is therefore more complex than in the Norwegian context with one common (federal) court system of three instances (and certain statutory tribunals/specialized courts that are not relevant to fisheries legislation), with the

[1322] Ford (2018) page 75.

[1323] The figure is a reproduction of a figure on the Department of Justice (Justice Canada) website on the judicial structure:
https://www.justice.gc.ca/eng/csj-sjc/just/07.html

Supreme Court at the top,[1324] in which all civil and criminal cases concerning fisheries legislation are brought forward, admitted/rejected and proceeded pursuant to rules in the Dispute Act and the Criminal Procedure Act. [1325]

10.3.4.4 Judicial review of administrative decision-making

Judicial review of public decision-making by the judiciary branch of the government is an essential component of the rule of law principles in a democratic and constitutional state such as Canada and Norway. As noted, the executive branch has become powerful in the modern Canadian government with extensive conferred authorities to regulate a "broad array of complex social and economic challenges,"[1326] including environmental protection, agriculture, labour relations, welfare programs and more. [1327] The Supreme Court of Canada has set out that the function of judicial review of exercise of public authority is "to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes."[1328] Although the relevant executive must act within its powers, it is also a question to what degree the courts must respect a legislative intent of delegated responsibilities to an administrative actor and degree of *deference*[1329] to an administration decision-maker if a decision is challenged in courts. This brings attention to questions concerning *substantive review* in Canadian administrative law. The *standard review analysis has developed* in Canadian jurisprudence to determine the degree of deference. This is an analysis that "strives to determine what authority was intended to be given to the body in relation to the subject matter."[1330] This is, however, an area of Canadian law that has been under broad attention and state of flux for many years, in latest years due to challenges to

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[1324] The Norwegian Constitution Article 88. Rules concerning the structure of the court system are set out in Lov 13. august 1915 om domstolene (Courts of Justice Act).

[1325] See also an overview of the Norwegian court system in Kjølstad, Koch, and Sunde (2020).

[1326] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*] para 202.

[1327] *Vavilov para* 202. See also Liston (2018) page 143; Flood and Dolling (2013) page 11–16.

[1328] *Dunsmuir* para 28.

[1329] Mullen (2001) page 542 defines deference as: "Judicial respect for the actions or decisions of a statutory or prerogative authority reflected most generally in a requirement that an applicant for judicial review make out a very strong case for error before the court will intervene."

[1330] *Dunsmuir* para 29.

select either the *reasonableness standard* or the *correctness standard* through a framework developed in *Dunsmuir*[1331] from 2008, and how to apply the reasonableness standard.

In *Vavilov* from 2019 the Supreme Court of Canada undertook an extensive effort to clarify and simplify the law of judicial review. In a revised analysis framework a presumption for a reasonableness standard whenever a court reviews administrative decisions is set out by the majority of seven judges.[1332] This standard entails deference to the administrative decision-maker if it the outcome is "defensible in respects of the facts and law"[1333] and is not demonstrably unreasonable. When conducting a reasonableness review "a court must consider the outcome of the administrative decision in light of the underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified."[1334] The court must therefore respect a decision that falls within the range of possible outcomes. The correctness standard, on the other hand, means no deference to the decision maker and when applying it "the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view … the reviewing court it ultimately empowered to come to its own conclusions on the question."[1335] Derogations from the presumption in the new framework are for situations where the legislature has legislated a standard of review, or statutory appeal mechanisms.[1336] Furthermore, the applicable standard is correctness where it is required by the rule of law for certain types of legal questions articulated as 1) constitutional questions, 2) general questions of law of central importance to the legal system as a whole and 3) jurisdictional boundaries between two or more administrative bodies.[1337] The majority reasoning also provides extensive guidance on how to conduct the reasonableness review in practice.[1338]

[1331] See full citation in footnote 1298 above.

[1332] *Vavilov* para 16.

[1333] *Dunsmuir* para 47.

[1334] *Vavilov para 15.*

[1335] *Vavilov* para 54, with reference to *Dunsmuir* para 50.

[1336] *Vavilov* para 33–52.

[1337] *Vavilov* para 53.

[1338] *Vavilov* para 74.

The majority reasoning departs from previous case law in the selection of the standard and by providing a more rigorous reasonableness review (with the potential for less deferential courts and more willingness to quash decisions for unreasonableness).[1339] In particular, it is a significant change that a correctness standard applies for any cases where there is a statutory right of appeal. The two concurring judges in *Vavilov* sees the majority approach as "an encomium for correctness and a eulogy for deference"[1340] and a dramatic expansion of "the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis."[1341]

Judicial review of administrative decisions is similarly a complex topic in the Norwegian legal discourse where the degree of deference by courts to administrative decisions has been developed in case law.[1342] Put briefly, the conceptualization of the issues are somewhat different, and with different approaches advocated in Norwegian legal theory, than the Canadian standard review analysis. A common distinction made is between administrative decisions based on law/legal requirements on one side, and on decisions based on administrative discretion on the other.[1343] No deference applies to the former, or to questions of legality, interpretation of the content of statutory law or constitutional questions, which are for courts to determine exclusively for all cases.[1344] For the latter, a judiciary will generally defer to the exercise of discretion by an executive in specific cases as long as it has not failed to take account of all relevant factors (and no irrelevant factors are

1339 See for example Cottrill (2020) page 164.

1340 *Vavilov* para 201.

1341 Vavilov para 201.

1342 There are examples of tribunals independent of the executive and the court system in Norwegian law. The National Insurance court (Trygderetten) is an example of an appellate tribunal for social welfare decisions. Due to its expertise on specific matters, an appellate court can only try the legality of decisions by this tribunal. See more in Lov 16. desember 1966 nr. 9 om anke til trygderetten (National Insurance Court Act).

1343 See more on these conceptualizations in Graver (2015) page 232 ff; Moen (2019) 20 ff.

1344 See judgment in Rt. 1995 s. 72 page 77. The application of the law on facts in specific cases (subsumption) can also be scrutinized by courts, see for example the judgment in Rt. 1995 s. 1427. There are, however, deviation from the main rules in cases of vague and discretionary concepts building on specific expertise which calls for a higher degree of deference. See for example Rt. 2007 s. 257; Graver (2015) page 249.

considered) and is not unreasonably discriminatory, arbitrary or in other ways representative of an abuse of discretion.[1345] These are features that can be identified in the reasonableness review in the Canadian context. These are complex issues that this thesis will not pursue in more detail generally, but that represents principled discussions that also impact institutional design choices and administrative practices in the realm of fisheries law that runs through the thesis.

10.3.5 Criminal law and prosecution

Enforcement and prosecuting law offences are essential parts of fishery instituions. Prosecutorial issues inevitably surface in criminal law. A synoptic introduction to Canadian criminal law is therefore necessary to provide a minimum of legal context of the fisheries enforcement system. As in many societies, the basic of criminal law is the criminalization of certain behaviour, with the threat of punishment for unlawfulness, through the legislature. The *Constituion Act 1897* and *the Constituion Act 1982* are the supreme sources of criminal law, which prevail over primary legislation and judge-made common law. Only the federal Parliament can enact criminal legislation.[1346] Canadian criminal law, similar to Norwegian law under the Norwegian Constituion, is limited by the rights and freedoms enshrined in the *Charter of Rights and Freedoms* (*The Charter*) in *the Constitution Act 1982*. Its significance to criminal law can be summarized as follows:

> The Charter pervades the whole of criminal law from the initial decision to criminalize the conduct, through the investigation of crime by police, the prosecution of offences, the determination of criminal liability, and even the sentencing of offenders.[1347]

Many substantive and procedural principles in criminal law in Norway and Canada share some common characteristics. The fundamental principle in criminal liability in both jurisdictions is the maxim *actus non facit reum nisi mens sit rea*, which "conveys the idea that there can be no culpable act unless it is performed with a culpable mental state," and

[1345] See for example Rt. 1995 s. 72; Rt. 2012 s. 1025 para 68.

[1346] *The Constituion Act 1897* section 91(27).

[1347] Roach et al. (2020) page 16.

conversely "no criminal liability unless a guilty mind express itself in the performance of a prohibited conduct."[1348] The act or omission that is prohibited by legislation in criminal law, the *actus reus*, is therefore one important element of liability. Another important element is the mental element required to establish guilt, the *mens rea*. By the principle of contemporaneity, it is required that there is a temporal overlap between the unlawful conduct and the mental fault.[1349] The public prosecutor (the Crown) must therefore prove beyond reasonable doubt that the accused committed the prohibited act, and that this was done by the required fault element. The basic principle that no innocent should be found guilty or punished in criminal trials, i.e. a presumption of innocence, is therefore paramount.[1350] The Crown must also prove beyond reasonable doubt that the accused did not have a relevant defence (principles of exculpation), e.g. self-defence as laid down in *Criminal Code*.[1351] Mental disorder is another type of defence. The Parliament can abolish a common law defence to a crime by enacting clear legislation if it is within the constitutional limits.[1352]

A distinction is made between a "criminal offence" and a "regulatory offence" in Canadian law that is important in a fisheries governance context, and with no equivalent distinguishment set out explicitly in Norwegian law.[1353] Criminal offences are laid down in criminal law enacted by the federal Parliament, with the *Criminal Code* as the central statutory instrument. This code includes typical criminal offences such as murder, robbery and sexual assaults and others.[1354] These are laws that "are primarily designed to denounce and punish inherently wrongful behaviour, and to deter people from committing crimes or

[1348] Roach et al. (2020) page 345; Eskeland (2017) page 285–286.

[1349] Roach et al. (2020) page 399.

[1350] See more on this in Roach, Healy and Trotter (2004) page 4. See Strandbakken (2003) on the presumption of innocence in a Norwegian context.

[1351] *Criminal Code, RSC 1985, c C-46 (Criminal Code)* Criminal Code.

[1352] Se more on this in Roach (2012) chapter 2.

[1353] The distinction is for example set out in *R v. Wholesale Travel Group Inc*, 1991 CanLII 39 (SCC), [1991] 3 SCR 154 [*Wholesale Travel Group Inc.*].

[1354] Roach et al. (2020) page 7.

engaging in behaviour that presents a serious risk of harm."[1355] Regulatory offences, on the other hand, are other types (and the majority in numbers) of offences that can be laid down in federal, provincial or municipal legislation. The primary purpose of regulatory offences is "to deter risky behaviour and prevent harm before it happens, rather than to punish intrinsically wrongful and harmful behaviour."[1356] It is therefore an element in protecting the public/public interest in a modern regulatory state, and typical offences are traffic offences, environmental offences and non-compliance with health and safety regulations by persons or corporations. Section 7 of *the Charter* sets out the principles of fundamental justice. These have been interpreted to prohibit the use of vague, arbitrary, overbroad and grossly disproportionate laws.[1357] Case law has developed distinct rules for this type of offences that makes it easier for the state to investigate and prosecute these offences.[1358] Regulatory offences apply to individuals and corporations or other organizations, and corporations can therefore be charged with regulatory offences relating to the environment.[1359]

For regulatory offences, i.e. a typical fishery law offence, the content of the fault element has been developed in case law. This is particularly interesting in comparison to corporate crime and the use of administrative penalties in Norwegian fisheries legislation. Traditionally there were two liability standards. The first was *absolute liability*, which does not require a fault element and with no opening for a *due diligence defence*. This standard can be problematic in relation to section 7 of *the Charter*.[1360] The second standard in Canadian context is *proof beyond a reasonable doubt of a subjective fault element*, either guilty knowledge or negligence, for what referred to as *true crimes* or *the doctrine of the guilty*

[1355] Roach (2012) page 6.

[1356] Roach (2012) page 6.

[1357] Roach (2012) page 7. Roach highlights that this is a terminology that is distinctly Canadian "so that what other jurisdictions call strict liability would in Canada be classified as absolute liability. Similarly, strict liability in tort law is analogous to absolute liability in Canadian criminal law." Roach (2012) 222–223.

[1358] Roach (2012) page 213.

[1359] Roach et al. (2020) page 471.

[1360] See more in Roach et al. (2020) page 219–221.

mind.[1361] This latter standard requires the Crown to prove someone in a large organization had guilty knowledge.

Strict liability has emerged as a third option in Canadian law and is now dominating the area of regulatory offences.[1362] The essence of this liability is that once the Crown has proved the prohibited act beyond a reasonable doubt, the fault element is presumed unless the accused demonstrates that all reasonable steps were taken to avoid the offence (a *due diligence defence*), or that the act was a reasonable mistake of fact.[1363] That *mens rea* is not an essential ingredient of regulatory offences that were not "criminal in the true sense" was established in a case concerning fishery offences in *R v. Pierce Fisheries Ltd*.[1364] This was a case concerning a company charged with having undersized lobsters in its possession in contravention of lobster regulations pursuant to the *Fisheries Act* at the time of the offence. Put simply, the question was whether the fisherman could be found responsible for having undersized lobsters without knowing of the existence of these lobsters. It was seen as a regulatory offence, as the lobster regulations were justified by protecting lobster beds from depletion, and thereby securing public interests, and that the statutory language did not contain the wordings "willfully, "with intent" or "knowingly," which would create offences where *mens rea* was "an essential ingredient."[1365]

In *R. v. Sault Ste. Marie*[1366] the Supreme Court of Canada recognised the three categories of offences and further determined that the overall regulatory pattern adopted by the legislature, the subject matter of the legislation, the importance of the penalty and precision of the language used was primary consideration in determining whether the offence was absolute or strict liability. It argued that it to prove wrongful intention in most regulatory

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1361 Roach (2012) page 213.

1362 Roach (2012) page 213.

1363 Roach (2012) page 222–224.

1364 1970 CanLII 178 (SCC), [1971] SCR 5 [*Pierce Fisheries Ltd*.]

1365 *Pierce Fisheries Ltd*. page 17.

1366 1978 CanLII 11 (SCC), [1978] 2 SCR 1299 [*Sault Ste. Marie*].

cases was a "virtual impossibility," but it opened up for the defendant to prove that reasonable and all due care had been taken on the balance of probabilities.[1367]

In *R v. Wholesale Travel Group Inc.*[1368] the court established that offences for which mens rea is not necessary does not violate section 7 of the Charter when a due diligence defence is available. As to *corporate liability*, it is not necessary to find someone with the required fault of regulatory offences under strict liability.[1369] Both corporations and individuals can therefore be charged for these offences. As to criminal offences, Parliament enacted new statutory provisions in the *Criminal Code* for corporate crimes in 2003 that replaced an old common law of directing minds developed in jurisprudence, which allowed courts to extend liability to corporations, although the directly responsible actor was an employee low in the organizational hierarchy.[1370] In 2003, the Parliament enacted new statutory provisions for corporate criminal liability in the *Criminal Code*.

To try to draw a comparison with the substantive rules concerning regulatory offences in Canada to the Norwegian approach with a criminal and administrative path is challenging and only some brief observations will be made. As seen, there has been a transformation in Norway to more use of administrative sanctions for offences that would be labelled *regulatory* in the Canadian context, but with the criminal path still applicable from case to case at the discretion of the administrative agency in question. The Norwegian equivalent to absolute liability is referred to as "objective criminal liability"[1371] with no fault requirement or opportunity of due diligence defence, which as seen in chapter 3.10 applies for corporate crimes, whether pursued in the criminal or administrative path, and for administrative confiscation.[1372] Disregarding jurisdiction and procedural issues, which

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1367 *Sault Ste. Marie* page 1325.

1368 See full citation in footnote 1354 above.

1369 Roach (2012) page 214.

1370 Roach et al. (2020) page 613.

1371 In Norwegian "objectivt straffeansvar." I will use the term absolute liability for this in the following.

1372 These are from my understanding not to be confused with an "objective" fault element in Canadian law which is a fault element that depend on what a reasonable person in the circumstances would have known or done., see for example Roach, Healy and Trotter (2004) page 5.

chapters 10.5 and 11 will briefly touch upon for fisheries cases, the use of administrative fines in a Norwegian case compared to strict liability under regulatory offences in Canada might not principally nor substantially differ that much. A main difference is that the prosecutor must prove necessary guilt in the Norwegian case, and the assessment of *actus reus* and *mens rea* coincide. In the Canadian case of strict liability, the burden to demonstrate a due diligence defence, once the wrongful act is proven beyond reasonable doubt by the Crown (as guilt is then presumed), falls upon the accused. Furthermore, the standard of proof is *clear and convincing* for the prosecutor in the Norwegian case to prove guilt, whereas it is a *balance of probabilities* (preponderance of evidence) in the due diligence defence of the accused in the Canadian case. For all cases pursued in the criminal path in the Norwegian context, the standard of proof is to prove guilt beyond any reasonable doubt, but for fishery cases prosecuted under the Saltwater Fishing Act 1983 the due diligence requirements have in literature been identified as so strict that it is closer to absolute liability.[1373]

Questions concerning criminal process and procedural fairness, including police powers, and the trial process are similarly complex in both a Canadian and Norwegian context. There are extensive procedural rules in the *Criminal Code* regarding court jurisdiction. Put briefly, most criminal offences, except the most serious ones, are dealt with in provincial courts. It is the superior courts in a province or territory that try the most serious criminal cases, see the hierarchy of the court system in figure 13. Some elements of the system, sentencing principles and cases for fisheries legislation more specifically are addressed in chapters 10.5.6 and 11. This chapter now moves on to the more fishery specific topics, starting with a legal historical outline of Pacific fisheries, before the description of the current fisheries legislation.

[1373] Dahl (2002).

10.4 Legal history of fisheries legislation in Canadian Pacific fisheries

10.4.1 Introduction and point of departure

As noted, British Columbia (BC) became a province under the Dominion of Canada in 1871. The *Fisheries Act 1868* [1374] therefore became the first colonial statute that applied to fisheries in the province and marks the point of departure for a legal historical overview. Omitting previous developments in legislation limits this inquiry in two ways. The first is that the body of law, written or unwritten, that predated the adoption of the *Fisheries Act 1868* in the Atlantic fisheries has not been studied. This means that the origin of the different elements of the statutory framework at that point has not been identified. Second, and highly relevant in a Pacific fisheries context, is that the overview does not address the content, and origins of, regulatory systems in indigenous salmon fisheries (the most important resource) that existed when BC was colonized. Harris (2001) highlights how the indigenous population regulated the fisheries through ownership of fishing sites, allocation of resources, and prescription of rules of when and where to fish and sanction violations.[1375] These were regulatory systems that were not recognised by the colonial powers, who saw these fisheries as open access fisheries. The encounter with the colonial powers, and imposing of state law in the salmon fisheries that followed, is a separate story that is thoroughly analyzed in Harris (2001) and Harris (2008). Some of his findings related to the implementation of new legislation in BC fisheries are drawn into the subsequent chapters to highlight some of the early developments in the province. Harris refers to the course of the events succeeding the colonialization as the "legal capture" of salmon in BC.

This overview is therefore not a fully aligned exercise to the Norwegian legal historical inquiry in part II. It is still relevant to draw up some of the main events from 1871 onwards, with an emphasis on halibut fisheries, so that the current regulatory framework is not to be understood in a cultural and historical vacuum, and that the main differences (and similarities) to factual developments in Norway can be identified and provide input to part IV. The material must at the same time be handled with caution.

[1374] *Fisheries Act, S.C. 1868 (Fisheris Act 1868).*

[1375] Harris (2001) page 19.

10.4.2 1867–1914: Establishment of fisheries legislation in Pacific Canada[1376]

10.4.2.1 The Fisheries Act 1877 (1868): Basic framework

Prior to outlining the developments in the Pacific fisheries, the legal framework in the *Fisheries Act 1868* needs an introduction. This was a statute that laid the foundations for the fisheries management for Canada up to today. The Act was assented on May 22, 1868, but didn't come into force in BC until 1877. A fisheries administration also came into place in this time period with the establishment of the Department of Marine and Fisheries,[1377] with Peter Mitchell as the first Minister of Fisheries on July 1, 1867.[1378] A. C. Anderson was the first Inspector of Fisheries in BC when the Act came into force in the province.[1379] Section 1 of the Act authorized the appointment of fishery officers, and thereby the *public supervision* of fisheries under the Department of Marine and Fisheries. Fishery officers had magisterial powers and were to perform duties laid down in the Act and regulations under it, and by instructions from the Department. Fishery officers were also authorized to issue *licences* under section 2, which set out that:

[1376] The following outline structure (timeline) and headlines are to some extent inspired by a historical overview of the fisheries in Canada in Gough (2007) and Swenerton (1993). These works also supports the study of the primary legislation with important factual descriptions.

[1377] In the historical outline I will refer to all fisheries authorities generally as "Fisheries" if not specifically referring to a role or position in the authorities, whereas "DFO" is used for parts addressing contemporary law.

[1378] See more on this in Gough (2007) page 85–86. An extensive civil apparatus also evolved in BC in the years to come. According to Harris (2001) page 90–91, the lowest level in the administrative hierarchy in 1904 were the "Fishery Guardians" which enforced in assigned areas in the field and reported to a "Fishery Officer." The Fishery Officers were responsible for a larger area, but took part in actual field operations. The Fishery Officer reported to the Fisheries Inspector, which was the highest position in the province. Until 1904 there was only one inspector, but in the following years BC was divided into three districts. The Inspector in turn reported to the Dominion Fisheries Commissioner in Ottawa, who reported to the Minister of Fisheries.

[1379] The title was originally Fisheries Overseer until the tenure of Anderson ended in 1882. Gough (2007) page 141.

> The Minister of Marine and Fisheries may, where exclusive right of fishing does not already exist by law, issue or authorize to be issued fishery leases and licences for fisheries and fishing wheresoever situated or carried on; but leases or licences for any term exceeding nice years shall be issued only under authority of and Order of the Governor in Council.

The general fisheries legislation had therefore established a licencing framework, which was not yet for many years to appear in Norwegian fisheries legislation. The justifications for introducing licencing practices were economic and conservation considerations.[1380] The rationale was further reflected in an 1873 annual report by the Minister were it was set out that:

> It is unnecessary, after several years of its beneficial operation, even though but partially carried out, to explain at lengths its advantages. Primarily, it *systemizes the fishing business*, and it also induces *private expenditure* both in *guarding and improving the streams*, which outlay would otherwise require to be defrayed from public funds. Secondarily, it *promotes investment* of capital, and gives permanence and security to fishing industries, *enhancing the value of fishing privileges* to *both individual fishermen and the public* which hitherto had but a fitful existence and were fast becoming altogether unproductive.[1381] (emphasis added)

In an 1876 report it was furthermore argued that:

[1380] Gough (2007) page 92–94 and 149–151.

[1381] I have only studied a rendering of excerpts of the report in Gough (2007) page 93–94.

> Besides securing fishermen in the exclusive enjoyment of certain fishing privileges and obviating all disputes, the plan of leasing or licencing enables us *to dispense with the numberless and cumbrous regulations which at present exist*, as *conditions could be embodied in the leases or licences* equivalent to prohibitory on directive licences.[1382] (emphasis added)

These two renderings highlight several points relevant to this thesis. First of all, it indicates that already from the very beginning of the federal legislative framework licencing schemes were intended to play a central role in the management system.[1383] Second, it demonstrates the importance of investments and security for the industry. A third point is that it underscores a presumption that private ownership promotes responsible stewardship by industry actors. Fourth, it might indicate an underlying need for overview of participants in a fishery ("systematizes the fishing business"). And lastly, it gives insights into the rationale of setting out conditions in licences, as opposed to regulations, seemingly as means of reducing complexity in legislation. The last point is particularly relevant to the differences in regulatory design that will be demonstrated in the case study that follows in chapter 11. Some of these underlying ideas are, as seen in part II, found in Norwegian context in this time period, but the way they are articulated above has a stronger contemporary touch to them.

As to the *rules of conduct*, the statute itself had various provisions addressing specific fisheries and setting out different regulating rules and prohibitions, including close seasons, technical regulations and typical "traffic rules" to secure order on fish grounds. Most important as to the actual regulation of the fishery operations, however, was section 19, which set out:

[1382] Reproduced in Gough (2007) page 94.

[1383] See also Scott and Neher (1981) page 10.

> The Governor in Council may from time to time, and from time to time vary, amend or alter, all and every such Regulation or Regulations as shall be found necessary or deemed expedient for the *better management and regulation* of the sea-coast and inland fisheries, to prevent or remedy the obstruction and pollution of streams, to regulate and preserve fishing, *to prohibit the destruction of fish* and to forbid fishing except under authority of leases or licences, every of which Regulations shall have the same force and effects as in herein contained and enacted, notwithstanding that such Regulation may extend, vary or alter any of the provisions of this Act respecting the places or modes of fishing or terms specified as prohibited or close seasons, and may fix such other modes, times or places as may be deemed by the Governor in Council *to be adapted to different localities*, or may be thought otherwise expedient. (emphasis added)

This quote is also rendered as it reveals a number of fisheries governance characteristics important to the thesis. First of all, it articulates conservation purposes in statutory language, which was not set out as explicitly in the Norwegian case (although justified in preparatory works, see chapter 5.6). Second, it reveals that adaptive governance also was acknowledged in the legal framework in this time period.[1384] Lastly, and in conjunction with the above executive discretion, it reveals the broad executive authorities far back in time also in the Canadian case.

The fishery officers also had wide powers in relation to *enforcment,* including authorization to convict offences punishable under the Act and to search, or warrant search, when there was cause to believe fish was caught illegally.[1385] There was also authorization for confiscation of materials used, and all fish caught, in fishing in contravention of the Act or regulations under it.[1386] The fines and penalties levied were to be divided between Her Majesty and the prosecutor, i.e. the fishery officer. Interestingly, all proceeds from sales of

[1384] Smith (2016), however, highlights how it was a centralized and bureaucratic approach that did not work well until it was replaced by a more flexible and decentralized system in the 1890s. See also more below.

[1385] *Fishery Act 1868* sections 18(1) and (2).

[1386] *Fishery Act 1868* section 16(4)

confiscated articles, and the share of the fines to her Majesty, were to be "paid to the Receiver General through the Department of Marine and Fisheries and be applied towards expenses incurred for the protection of fisheries"[1387] We can here see a difference in the arrangements in Norwegian legislation in the 1800s where fines and confiscated values were divided between the relevant user supervisor (or informer) and the poor. It is also interesting that the payment to the Crown in the Canadian context had to be directed to the public fisheries management costs. So, there was at least some way that the confiscated values were directed back to the sector, but somewhat differently organised than the confiscation institute that developed in the Norwegian system much later.[1388] I have not come across any information on how the actual money were applied in the Canadian context. To summarize the state of the law with the *Fisheries Act 1868* coming into force in BC, the words of Swenerton are apt:

> The Fisheries Act itself was one of the most sweeping and powerful pieces of legislation drafted by the new government. The Act was intentionally vague, permitting flexibility in the face of new developments.[1389]

How the law in action was to develop in a Pacific fisheries context, however, might not necessary have reflected how it looked on paper.

10.4.2.2 Establishing a licencing regime and first steps of limiting a native fishery (regulation of salmon fisheries)

The main fishery in British Columbia (BC) when the *Fisheries Act 1868* went into force was a salmon fishery that supported a small commercial fishery for salted and barrelled salmon, but this changed with the introduction of the tin can technology in the 1870s that expanded commercial production.[1390] By 1880 there were a total of 12 salmon canneries in the province.[1391] These emerging industrial fisheries challenged from the very beginning the

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1387 *Fisheries Act 1868* section 16(16).

1388 See chapter 7.2.

1389 Swenerton (1993) page 12.

1390 Gough (2007) page 140.

1391 Gough (2007) page 140.

native fisheries' right to fish.[1392] Commercial fisheries for herring and halibut by colonial immigrants also emerged in the late 1800s.[1393] These fisheries were, however, relatively small and unregulated until the 1900s. The salmon fishery is therefore the subject matter of this sub-chapter. The salmon fishery is at the same time a highly complex issues that also must be seen in relation to the growing non-native settlements and Indian reserve policy on land. This broader perspective is generally of less relevance in a comparison to Norway, as the fisheries legislation studied in the thesis does not apply to salmon fishing (or interior fisheries) in a the Norwegian context. The developments in BC are still relevant as they point to more general characteristics of implementing a set of rules in a new jurisdiction.

It soon became apparent that the *Fisheries Act 1868* was not well suited for the conditions on the Pacific coast. It has been highlighted that "[n]one of the sections had been drafted with the West Coast fishery in mind, and much of it was irrelevant," but that "parts of the act were general enough to apply to either coast and the commercial industry" and that the administration was soon prepared "to enforce those parts against the Native fishery."[1394] Some of the intention of the legislation was to restrict native fisheries, and section 13(8) of the statute set out a general prohibition on fishing salmon (and other species) with specific technologies, with an exemption for natives to "catch fish for their own use" on certain conditions when authorized by the Minister in a licence or lease.[1395] This was, however, a licence regime in conflict with the fishery the aboriginals had conducted for a long time for both consumption and trade. Literature has pointed out that the local Fisheries led by the Fisheries Inspector Anderson in the beginning approached the issues pragmatically.[1396] Harris points out that Anderson "undertook to manage and police the fishery as he saw fit" and that his "discretionary policy amounted to general non-enforcement."[1397] With an increasing activity on fish grounds, and competition between canning operations, there was

[1392] Harris (2008) page 25.

[1393] Gough (2007) page 146–147.

[1394] Harris (2001) page 40.

[1395] Harris (2001) page 40.

[1396] Harris (2001) page 41.

[1397] Harris (2001) page 41.

at the same time court cases and informal arrangements to settle disputes that arose on the fish grounds in 1877.[1398]

In 1878 a first set of regulations were adopted for the salmon fishery in BC that neither were fit to the local circumstances, nor were enforced.[1399] These were regulations that banned nets in non-tidal and fresh waters, i.e. interior fisheries. This had serious consequences for the native fisheries. These were events that also must be seen in conjunction with native reserve policies on land, which is briefly introduced here for the broader context of early Pacific fisheries. Land was distributed to new settlers from the Crown either through sale or pre-emption, and these new property lines led to tensions and conflicts with natives who lived on the lands. In attempt to try to settle the land question, a Joint Indian Reserve Commission (JIRC) was established in 1876, in which Fisheries Inspector Anderson was one of three commissioners. The commission was mandated to gather evidence about Indian land use and recommend parcels set aside as Indian reserves.[1400] The relevance to salmon regulation is that the ties between land and fisheries were to some extent acknowledged, and were to play a role in the allotment of reserves by the commission.

After two rounds of travels in native areas in 1876–1877, the commission was dissolved. It has been highlighted in literature that the main reason for this was that the provincial government found the process too expensive and the commission too generous in their reserve allotments.[1401] After some pressure, however, it was continued with only one commissioner, Gilbert Malcolm Sproat, who was given an authority to make decisions in field.[1402] It has been pointed out in literature that Sproat saw the 1878 regulations as a threat to the food security for the native population, and also other officials raised concerns.[1403] Fisheries was therefore instructed to exempt natives from the regulation and Sproat

[1398] Harris (2001) page 41–42.

[1399] Harris (2001) page 44; Swenerton (1993) 12. *Salmon Fishery Regulations for the Province of British Columbia, Order in Council, May 1878 (Salmon Regulations 1878).*

[1400] Harris (2008) page 37.

[1401] Harris (2008) page 42.

[1402] Harris (2008) page 43.

[1403] Harris (2001) page 44; Harris (2008) page 51–55.

continued his work on the basis of this "informal resolution" to reserve land that would secure natives' access to fish.[1404] Both Inspector Anderson and commissioner Sproat were for various reasons concerned with the protection of native fisheries and saw them legally entitled to continue their fisheries.[1405] There were, however, many that did not share these sentiments in the provincial government.[1406]

In 1879, regulations that prohibited salmon fishery, unless authorized through a licence or lease, was adopted for all of Canada.[1407] It was at first ignored in BC, but in 1881 a licencing scheme was introduced to control the fishing practice of the canneries.[1408] The scheme was perceived as a success by some, but there was also a growing concern that licences were issued too freely and a report from the British Columbia Board of Trade warned of the *dangers of over-fishing*, followed by a resolution questioning the discretion of the Inspector.[1409] The legal historical material therefore reveals growing awareness of the biological limits of the resource, however, the canneries also pushed for limitations to avoid competition.[1410] As to the native fisheries, Fisheries also started to enforce the *Fisheries Act* 1868 from1881 in cases when the natives were using modern technology and selling catches to the canneries in competition with non-native fisheries.[1411] Fisheries had, however, mixed success enforcing the law in the fields.[1412] This resulted in regulations of 1888 that specifically addressed native fisheries, which included a licence requirement for natives in order to sell caught fish.[1413] Although the legal capture of the native fisheries continued, the

[1404] Harris (2001) page 46–47; Harris (2008) page 54.

[1405] Harris (2001) page 46.

[1406] Harris (2001) page 46–47.

[1407] *Fishery Regulations, Order in Council, 11 June 1879 (Fishery Regulations 1879)*. See also more in Harris (2001) page 56.

[1408] Harris (2001) page 56.

[1409] Harris (2001) page 56–57.

[1410] Harris (2001) page 57. See also more in Gough (2007) page 144.

[1411] Harris (2001) page 57.

[1412] Harris (2001) page 66. Harris highlights on page 68–69 that the lack of personnel and size of the territory to patrol lead to sporadic surveillance.

[1413] Harris (2001) page 66.

following section moves on to the commercial licencing regime more specifically as it is most relevant to the thesis objectives.

10.4.2.3 Expansion of the commercial licencing regime in the salmon fisheries

Although there was an awareness of biological limitations of salmon stocks, it was not until 1889 that the number of licences in the Fraser River was limited to 450, whereof 350 to cannery owned boats and 100 to independent harvesters.[1414] This was later increased to 500 due to pressure from independent harvesters, but the restrictions didn't last long as the limitations were removed in 1892, followed by new licencing regulations in 1894.[1415] It has been claimed that it was "politically difficult to deny access to what was considered a public resource."[1416] In context of this thesis the granting of licences under sections 12–20 of the regulations is particularly relevant. These were all licences labelled "commercial" and the fee was 10 CAD for each licence.[1417] A "*bona fide* fisherman" being an "actual resident" of BC was entitled to obtain 1 licence.[1418] A "firm, company or person" engaged in different types of processing was entitled to obtain from 7 up to 20 licences, depending on the type of production.[1419] Common to all categories was, however, that the licence had to be a "British subject" and "actual owners or proprietors of the business, nets, boats and fishing gear" and that the production of all the salmon caught had to take place in BC.[1420] By this it is clear that requirements on residency, involvement in the business, a duty to process in BC, and ownership and trading limitations were regulatory instruments used in a licencing regime in this time period. These were all instruments that, as seen in part II, would gradually emerge in the next century in Norwegian legislation. These restrictions did not, however, stop the rush to the salmon fisheries in the time period and rules were maybe not

[1414] Harris (2001) page 57 and 69.

[1415] Harris (2001) page 69; Gough (2007) page 144. *Fishery Regulations for the Province of British Columbia (Fishery Regulations 1894).*

[1416] Swenerton (1993) page 15.

[1417] *Fishery Regulations 1894* section 21.

[1418] *Fishery Regulations 1894* section 12.

[1419] *Fishery Regulations 1894* sections 13–18.

[1420] *Fishery Regulations 1894* section 19.

enforced strictly.[1421] In the same time period, there were efforts made to strengthen the enforcement service with more personnel.[1422]

As to the actual compliance by the industry, it is pointed out in literature that it is hard to know, but that enforcement has always been a problem although "a certain Canadian respect for authorities goes a long way back in the fisheries."[1423] Some literature highlights that fishery guardians and officers were politically appointed, which could cause discipline problems, and that the practice of letting officers receive half of the fines levied could make enforcement challenging.[1424]

A period of increased fishing capacity, was followed by consolidations and various new efforts of limiting the entry in the early 1900s.[1425] It has been claimed that the Pacific fisheries were pioneering in introducing limited entry for plants and boats.[1426] It has also been pointed out that:

> By 1910, the B.C. industry, only about three decades old, already seemed more consolidated, better regulated, and more able to do things together than the Atlantic industry. And fishery managers on the Pacific, both federal and provincial were most likely to take hold and do something thoroughly.[1427]

In explaining the differences it has been emphasized that the general economy of BC seemed stronger, that resource depletion was still fairly new on the Pacific, there were fewer species, that there was a better flow of information with more centered population, better

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1421 The licence limitations on every enterprise may have caused the building of new canneries. The number went from 27 in 1892, 54 in 1897, to 73 by 1901. There were in 1983 1174 boats, of which the canneries owned 909, working in the Fraser River area. By 1900 the fleet was about 3683, with the canneries owning 450. Japanese immigrants held around 1804 licences. See more on this in Gough (2007) page 144.

1422 Harris (2001) page 69.

1423 Gough (2007) page 150.

1424 Harris (2001) page 91.

1425 Gough (2007) page 145.

1426 Gough (2007) page 146.

1427 Gough (2007) page 150.

organization and more streamlining, better education and better connectedness.[1428] Licence holders were obliged to pay the rent, comply with regulations and sometimes other obligations, e.g. to use local people to work in a cannery.[1429]

The limitations, however, were again to be lifted in 1917 because there was need for work for returning soldiers from World War I (WWI).[1430] It has been claimed that the conservation policy in the first decades of salmon regulation mostly relied on the use of gear, area and time restrictions as the licence regimes in practice didn't restrict effort.[1431] In addition, the lack of enforcement, or willingness to implement rules locally, also seems to be common in this time period.[1432] It has been claimed that a fundamental problem with limiting the number of licences "appeared to be the difficulty of developing an acceptable mechanism for allocating licences."[1433] As will be shown, this is even up to today a core problem, and cause for constant tensions in fisheries policies, both in Norway and Canada.

Several *royal commissions*[1434] were established in this time period to investigate the issues. These were the first commissions of inquiry into Pacific fisheries policy specifically.[1435] The two first commission under Samuel Wilmot (Superintendent General of Fish Culture) failed, mostly due to lack of knowledge of the biology of the species and for not addressing economic aspects of the fishery, and therefore gained little support from the industry.[1436] As will showed below, the design and implementation of licencing schemes and the use of royal

[1428] Gough (2007) page 150–151.

[1429] Gough (2007) page 146.

[1430] Swenerton (1993) page 17.

[1431] Swenerton (1993) page 19.

[1432] See for example how local authorities ignored a directive from Ottawa to close Fraser River after a landslide blocked the river to returning salmon in 1913, and seemed unable to enforce habitat protection measures. Swenerton (1993) page 17–18.

[1433] Swenerton (1993) page 19.

[1434] The use of inquiries by royal commissions and commissions of inquiry goes far back in time. The current *Inquiries Act, RSC 1985, c I-11 (Inquiries Act)* was first passed in 1868 and sets out the framework for public inquiries.

[1435] Gough (2007) page 144; Swenerton (1993) page 15.

[1436] Gough (2007) page 144; Swenerton (1993) page 15.

commissions appears to have had a central position in the development of the Canadian Pacific fisheries management. However, also the lack of close evaluation of the management measures has been pointed out in historical reviews.[1437] The failure of the first commission draws attention to the importance of a sound knowledge basis when developing management proposals. Lessons were perhaps learned in the appointment of the third commission, which spent two years looking into the various issues at hearings. This commission was led by the federal Fisheries Commissioner at that time, Dr. Edward E. Prince, who also was a key person in developing marine fisheries research in Canada.[1438] This was a period when the federal policy started being more and more influenced by increased understanding of biological sciences.[1439] Fisheries research originated in 1903, followed by the establishment of a Pacific biological station in Nanaimo in 1908.[1440]

As set out in the *Constitution Act 1867*, management of marine fisheries fall under federal jurisdiction, see chapter 10.3.1 above. The federal government was also the authority that established the first salmon regulations in BC. In the late 1800s and first half of the 1900s, however, there were disputes between the federal and provincial government on jurisdiction. The question came up in the *Queen v. Robertson*[1441] from 1882.[1442] The court concluded that the Crown authority to grant exclusive fishery rights in non-tidal and rivers (interior) fell under provincial jurisdiction. The federal government could still legislate all fisheries. In 1898 the question of control was further clarified in a judgement by the Judicial Committee of the Imperial Privy Council.[1443] The judgement split the authority between federal and provincial government. This basically laid the foundation of the current state of law with interior fisheries, except for salmonids, being a provincial responsibility, and the other federal. As to the question of authority to issue licences for fish processing, there was

[1437] See more in Gough (2007) page 151.

[1438] See for example Swenerton (1993) page 13.

[1439] Swenerton (1993) page 13.

[1440] Swenerton (1993) page 13.

[1441] 1882 CanLII 25 (SCC), 6 SCR 52.

[1442] The case is thoroughly examined in Harris (2008).

[1443] Referred to in Gough (2007) page 113; Scott and Neher (1981) page 12.

a decision by the Supreme Court of Canada from 1928 that cannery licencing was under provincial authority.[1444]

10.4.2.4 Expanding licence schemes (herring and halibut) and the beginning of organization

Commercial herring fisheries had started up by 1877, whereas halibut fisheries strated in the early 1890s.[1445] These were, however, fisheries that didn't gain the same attention as the salmon fisheries.[1446] Apparently the government pursued a *laissez-faire* policy in what often is referred to as "ocean fisheries."[1447] This was the case despite objections from traditional longline fishermen towards increased use of seine to fish halibut, cod and other deep sea fisheries, building on the government rationale of abstaining to interfere with the fishery and the lack of demonstrable evidence of seines having a negative impact on the resources.[1448] As seen in part II, these were similar types of gear conflicts in the Norwegian cod fisheries throughout the 1800s, with the escalation and establishment of new legislation in 1897. In 1908 and 1910 Fisheries introduced licences for various types of seine in herring fisheries.[1449]

There was little management in the halibut fishery until 1920s and 1930s.[1450] The first attempts of fishermen organizing themselves in unions were, however, in the halibut fisheries. Gough has reflected on why this first evolved in the Pacific:

[1444] Reference as to constitutional validity of certain sections of the Fisheries Act, 1914, 1928 CanLII 82 (SCC), [1928] SCR 457.

[1445] Gough (2007) page 147–156. Apparently Italian immigrants were the pioneers in the beginning of herring fisheries, using shore-based drag seines. The start of the halibut fishery was influenced by New Englanders (East Coast of US), and Scandinavians as more boats entered the fisheries.

[1446] Confirmed in Swenerton (1993) page 19.

[1447] Scott and Neher (1981) page 11.

[1448] Scott and Neher (1981) page 11; Swenerton (1993) page 19.

[1449] Gough (2007) page 147.

[1450] Gough (2007) page 147.

> Atlantic fishermen were scattered along thousands of miles. But B.C. fishermen were grouped up at the river mouths, and saw each other at the canneries. B.C.'s populations already had an urban character. Recent immigrants from Europe were used to organize in their home countries. These circumstances helped fishermen's organizations to spring up more quickly than in the east.[1451]

These observations are interesting in comparison to the evolution of Norwegian unions, which as seen above, started developing in the late 1800s. The Norwegian fishermen had, however, influenced the evolution of legislation for a long time prior to the more formal organizing. Interestingly, Gough has referred to cultural differences among fishermen highlighting Scandinavian influence:

> The Pacific Halibut Fishermen's Union started up in 1901. This group had many members of Scandinavian origin, and Scandinavians are generally more organization-minded than most Canadian fishermen.[1452]

The actual influence of the organizations in the first years of the organization is little reflected in the sources studied, but becomes more pertinent in the development of international collaboration in the halibut fisheries that is addressed in the following.

10.4.3 1914–World War II: Establishment of international cooperation, quota management and increased stakeholder influence

10.4.3.1 International collaboration in the halibut fishery

Issues related to territorial jurisdiction and the relationship to the US are also important perspectives in the evolution of fisheries legislation on the Pacific coast of Canada, with emphasis on the halibut fisheries that is the case study in chapter 11. There had been attempts on joint management of certain fish stocks in the1800s and early 1900s, but it was

[1451] Gough (2007) page 148.

[1452] Gough (2007) page 148.

first after WWI that an effective agreement was made for the halibut fisheries.[1453] In the period 1917–1919, Canada and the US convened a joint commission know as the American-Canadian Fisheries Conference, which was dealing with both trade and conservation related issues in the Pacific coast fisheries.[1454] As to conservation, there were at the time of WWI observations of declining stock levels of halibut.[1455] A treaty dealing with these issues were drafted during a conference in 1918, but the US Senate blocked it. Discussions continued until a Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean was signed in 1923.[1456] This agreement laid the foundation for future collaboration by establishing an International Fisheries Commission that was to carry out its own scientific work. In 1931 the two governments ratified a renewed convention, the International Pacific Halibut Commission (IPHC), which remains the commisions' name of today.[1457] A permanent staff, including scientific experts, was set up in Seattle to support the commission, which consisted of an equal number of commissioners from both sides.

The commission could enact closed seasons, establish regulatory areas and minimum fish sizes, require licencing and logbooks (for statistical purposes), regulate gear use and establish area catch limitations (quotas). The commission therefore could, and did, establish quotas to control the level of fishing. By this the halibut fishery became the first among Pacific fisheries in Canada that could be controlled on levels of fishing through *total*

[1453] Scott and Neher (1981) page 17. According to Scott and Neher the need for international agreement was recognized by the federal government in the 1890s, and the salmon fishery in the Fraser River was an early example in that respect. The salmon runs crossed both US and Canadian territory, and there were salmon fisheries on both sides. As early as the 1880s there was fear of the potential overexploitation of salmon runs, and several conservation measures were implemented on the Canadian side during the decade, for example closure periods and setting fishing boundaries, ban on seine and fish traps and closed seasons. The US fishery, on the other hand, was according to Scott and Neher "basically unrestricted." The difficulty of reaching agreement is by Scott and Neher explained by the novel nature of regulation, trade issues and constitutional and jurisdictional challenges.

[1454] The process is thoroughly described in Gough (2007) page 164–166. The further description builds on this overview.

[1455] Scott and Neher (1981) page 17; Gough (2007) page 165.

[1456] According to Gough (2007) page 165 this was the first treaty that Canada, or any other Commonwealth nation, signed in its own right, i.e. separately from Great Britain.

[1457] The Protocol amending the Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea (IPHC). See more on the commission on its webpage www.iphc.int.

allowable catches in *quota management.*[1458] An industry advisory body was also set up, the Conference board, and the strong influence of the Scandinavian fishermen in these processes has been highlighted in literature:

> In particular, Scandinavian fishermen with their cross-border relationships and their character influenced the whole development and operation of this venture in international co-operation. The commission would put its proposed regulation for the year before an open meeting of fishermen, thereby building up trust. With strong associations, halibut vessel owners had a big influence.[1459]

This quote indicates that the stakeholders through the work of the commission influenced the decision-making process in the early management of the halibut fisheries, and that cultural distinction was important in that regard.[1460] More generally, however, an era of cooperatives and industry associations came in interwar period, as also seen in the evolution of fisheries associations in Norwegian context above in chapter 6.1. Fishermen in other fisheries than halibut also formed unions and associations, and in 1929 the first cooperative in BC was created, the B.C. Fishermen's Co-operative Association.[1461] In contrast to Norway, however, the cooperatives in BC were not formally organized on cooperative principles, and with no legal attention.[1462] Post-WWII the cooperative model lost its importance in a Canadian fisheries context more generally due to post-war prosperity, but also individualism of fisherman and lack of attention to good business principles as has been highlighted in literature.[1463]

[1458] According to Gough (2007) page 166 these were the first quotas in any Canadian ocean fisheries, and international quotas anywhere.

[1459] Gough (2007) page 165.

[1460] This is supported by Crutchfield (1982) page 23 who has claimed in a case study on the halibut fisheries in the Pacific that industry groups "have always exerted a significant influence on regulatory policy."

[1461] Gough (2007) page 206 and 211.

[1462] Gough (2007) page 211.

[1463] Gough (2007) page 180.

10.4.3.2 Further development of fisheries administration and halibut regulations

As in Norway the evolution of Canadian fisheries legislation more generally during, and post WWI, were impacted by the volatile times caused by international events, corresponding macroeconomic trends, and the significant technological shift into motorized vessels. From an organizational perspective, there were also important administrative reforms in the fisheries administration, leading to the establishment of the Department of fisheries and Oceans (DFO) in 1930.[1464] There had prior to this been complaints about how Fisheries were organized and that many of the staff were poorly paid and part-time employed. This was followed by strengthening of regional set-ups of DFO, establishment of technical stations for research along coastal areas, and a general strengthening of scientific research to become full-time activities and establishment of a Biological Board.[1465]

Halibut fisheries expanded in the postwar period. There were around 384 boats and 1903 fishermen in 1933.[1466] Higher catches attracted more boats into the fishery, which led to vessel abundancy and shorter seasons as established quotas were finished earlier. On initiative of the industry vessel owners and organizations, voluntarily programs for lay-ups for certain periods of time in an attempt to reduce fishing time were established.[1467] The basic idea was to prolong the season by a required ten-day *lay-up between trips* for every boat and a *catch limit per boat* depending on the crew size. This is the first example of regulating Canadian Pacific fisheries with *individual quotas* identified in the material studied, but it was based on a form of self-governance within the industry, and not through legislative action from the authorities. The arrangement lasted until 1942. It has been claimed that this was "apparently because of inability to obtain adherence by the small boat

[1464] These developments are more detailed in Gough (2007) page 157–163. The following is based on this overview.

[1465] Gough (2007) page 162. Gough refers to Norwegian influence in an expedition in the Gulf of St. Lawrence led by the Norwegian scientists Johan Hjort, as one example of how the Biological Board was accumulating fundamental knowledge on important marine species.

[1466] Gough (2007) page 217.

[1467] This arrangement is described in detail in Crutchfield (1982) page 23–25 that the following builds on. See also Gough (2007) page 217.

fleet."[1468] The arrangement was later re-established in 1956 and lasted until 1977, also this time because of lack of adherence from new and part-time fishermen pushing the full-time fishermen to "abandon the program to maintain their share in the fishery."[1469] Interestingly, fishermen unions had pushed for an incorporation of the arrangement in regulations in the IPHC, but this was rejected "on the ground that no authority for such action was provided in the enabling legislation of either country."[1470] This could imply that the Minister could not set licence conditions of this character under the authority in the *Fisheries Act* at that time. As will be demonstrated in more detail below in chapter 10.5, the Minister can establish licence conditions under an absolute discretion under the current regime.

Due to a critical situation in the salmon fisheries in this time period, fishermen were drawn to the herring fisheries which by 1914 had become the third main fishery in BC after salmon and halibut.[1471] Landings and participation fluctuated in interwar period, with an increase in the years leading up to 1940. This led to an introduction of catch quotas in the herring fisheries that would last until the 1950s. It did not, however, prove to be an effective management tool as DFO, after pressure from the industry, extended quotas. Generally, the time period between 1914 and 1945 has been regarded as bad and reactive when it came to management of fisheries in Canada, but the Pacific fisheries performed better than the Atlantic fisheries.[1472] The policies in the following years would at the same time not change the negative trend.

[1468] Crutchfield (1982) page 24

[1469] Crutchfield (1982) page 25.

[1470] Crutchfield (1982) page 25. Crutchfield has pointed out that the commission later introduced a practice of staggering opening dates, which had similar effect as the lay-ups, and that was pushed forward by the vessel owners. Still, however, this would not represent a similar self-governance of the fisheries.

[1471] Gough (2007) page 217 outlines the developments in the period after 1914 that the following is based on.

[1472] Gough (2007) page 218–219. Gough pointed out that BC fishermen and industry made more money, were better organized and, on the processor side, had more influence on the management. Although DFO were national, there could be different regional circumstances that produced different management approaches.

10.4.4 World War II and up to our days

10.4.4.1 Postwar development through government support

During WWII conservation and over-capacity matters in many Canadian fisheries became neglected as the government pushed for fleet modernisation (efficiency increase) as an element in providing food supplies to soldiers in the war.[1473] Several government support programs were introduced during the war, and this development continued into the 1950s and 1960s, not different to the post-WWII trends in Norwegian fisheries policies. Several programs involved assistance to purchase fishing vessels through financial support, loans, affordable insurances and tax benefits. Although the Atlantic fisheries were in most demand for government support, the Pacific fleet also got expanded capacity, which was threatening some of the stocks and undermining the economic performance.[1474] One of the core political challenges for the government, then as now, was the question of *who* should own the boats and processing plants.[1475] Important scientific advancements and international fisheries law developments, would, however, soon provide the government with new regulatory tools and justifications to address the challenges of excess capacity in the fishing fleet.

10.4.4.2 The rise of fisheries economics in a Canadian context

Use of biological knowledge and economic justifications as part of regulatory policies had, as seen several places in the thesis, occurred prior to WWII. In the decades to come post-WWII, however, there would be substantial theoretical developments in the fields of biology, stock assessment methodology and economics, combined with a shift in the government mindset and international law, which would impact the regulatory evolution of many coastal nations.[1476] There was, as seen, also an increased concern of overfishing worldwide after collapses of several important fish stocks. In the Pacific there was , for example, a parallel to the Norwegian herring collapse in the 60s, with a Pacific halibut

[1473] See more on these developments in Swenerton (1993) page 33–34.

[1474] Gough (2007) page 286–287; Swenerton (1993) page 34.

[1475] Gough (2007) page 286.

[1476] This change is described in Gough (2007) page 227–244; Swenerton (1993) page 40–45. See part II for the Norwegian case and chapter 4 for a more thoroughly theoretical description of these advancements.

collapse in 1965, and a herring collapse in 1967, that pushed forward a rethinking of regulatory approaches.[1477]

The Canadian economist H. Scott Gordon was highly influential in giving theoretical expression and recognition of the economic consequences of overfishing (lost economic returns) with his paramount article on the economic theory of the fishery as a common property resource.[1478] The impact of Canadian scholars has been highlighted in Canadian literature. As pointed out by Gough: "Gordon's ideas eventually became common currency in fishery management circles. Canadians led the way in spreading the new thinking and eventually in its practical application."[1479] Swenerton saw the work of Gordon and subsequent advancements as ground-breaking as it "heralded an absolute shift in fisheries policy, giving expression to something that had been an implicit desire of regulators for years."[1480]

The issue of licence limitations was in 1960 addressed in a royal commission with economist Sol Sinclair appointed as commissioner. Sinclair recommended a five-year moratorium on new licences, followed by competitive auction for the existing licences, building on ideas of Gordon that economic returns dissipate with *unrestricted entry*.[1481] The recommendations were, however, controversial and not all labour unions and industry organizations were in favour of licence limitations and auctions as envisaged in the Sinclair report, among others to protect the fisheries from actors that had no real stake in it (that were not active or *bona fide* harvesters).[1482] These were, as seen, similar concerns that Norwegian fishermen had up through the 1900s. No action was therefore taken by the Minister in the following years.

[1477] Gough (2007) page 285 .

[1478] Gordon (1954).

[1479] Gough (2007) page 230.

[1480] Swenerton (1993) page 44.

[1481] Swenerton (1993) page 47.

[1482] Swenerton (1993) page 48.

10.4.4.3 The Davis plan and introduction of modern limited entry (in salmon and herring fisheries) and international fisheries law developments

The appointment of a trained economist named Jack Davis as Minister of Fisheries in 1968 has by some been seen as an important catalyst in the fundamental shift in fisheries policy that was to come.[1483] In his first year he announced an extensive plan for reforming salmon fisheries into a more profitable and effective management regime by controlling entry of vessels into the fishery.[1484] This Davis plan consisted of four phases, which can be summarized as: 1) freeze the fleet by licencing only those who could demonstrate dependence on the salmon fishery, 2) reduce the fleet gradually by buying out excess capacity, 3) improve vessel standards and product quality and 4) introduce economic regulation to improve fishing effort for the reduced fleet.[1485] The main essence of these stages can as seen in part II be identified in regulatory action in various forms in a Norwegian context in the developments from the 1970s and onwards.

In phase one, it was historical catches over a certain amount that proved dependency, with a classification of an A licence (permanent and could be replaced) and a B licence (to be phased out), in which the A category were transferable, and vessels could be replaced. As seen in chapter 7.4, this was also the approach in Norwegian coastal cod fisheries. Similar to the Norwegian case the subject of licencing was also the vessel, and not the person (which was the option the labour unions advocated). There was at the same time no *owner-operator rule*, which meant an activity requirement to fish for the owner, which had emerged in Atlantic fisheries, and as seen became a basic requirement in Norwegian commercial fisheries. Although there was a fleet reduction at the outset of this phase, relaxation of requirements and an increase in the physical capacity made the plan less effective. The move over to the second phase of government-funded buy-back programs was also not as effective in reducing capacity as the government had hoped for. One reason pointed out in literature was that licences for various reasons had become so valuable that the government could not

[1483] Swenerton (1993) page 52.

[1484] Gough (2007) page 362; Swenerton (1993) page 52.

[1485] The following builds on the overview in Swenerton (1993) page 53–56; Gough (2007) page 362–367.

pay for them.[1486] The third phase was the implementation of rules on vessel standards in 1973. A committee with broad stakeholder participation was in 1972 tasked with assessing economic regulations in a phase four, but the recommendation by the majority of the report were seen as too politically sensitive and not pursued.

As seen in the Norwegian case in part II, these were eventful years at many levels setting the stage for the modern fisheries management, which cannot all be emphasized here.[1487] In 1976, DFO launched its first comprehensive written statement of policy for the commercial fleet, which as seen also had a Norwegian equivalent in St.meld. nr. 18 (1977–78). The DFO policy set out an ambitious policy of how to obtain "the best use of society's resources" including economic ambitions and a principled commitment to limited entry in commercial fisheries, but it did not operationalize how the targets were to be achieved.[1488] Furthermore, licencing was introduced in the roe-herring fishery in 1974.[1489] In contrast to the salmon licences following the Davis plan, these were *non-transferable* licences attached to the person, rather than the vessel, and an *owner-operator rule* was applied for the first years. In 1979 the owner-operator rule was removed as it was challenging to effectively enforce, whereas transferability restrictions were circumvented by using long-term leases that increased the legal, enforcement and administrative costs. Lastly, in 1981 an area licencing system was introduced, where each licence had to be chosen for fishing in one out of three geographical areas. This was an effort to spread the fishing effort and to limit vessels for the different openings of herring fisheries.

For the halibut fisheries the developments in international fisheries law and extension of national jurisdictions to 200 miles towards the end of the 1970s were highly influential. US fishermen were excluded from fishing within Canadian waters in 1979 and Canadian

[1486] Swenerton (1993) page 54

[1487] See Gough (2007) page 289–315 for an overview of broader national and international influences.

[1488] Cook and Copes (1987) page 57; Swenerton (1993) page 57.

[1489] The following builds on Swenerton (1993) page 64–65

fishermen phased out of the fishery in Alaska by 1980.[1490] This impacted the Canadian fishermen negatively, in addition to the previous decline of the stock in the late 1960s and early 1970s.[1491] From 1979 quotas were specified and divided between Canada and US, and due to the dramatic reduction in catch available to the Canadian fleet the government introduced a licencing scheme in the halibut fishery from 1979.[1492] Similar to the salmon scheme, a new halibut (category "L") licence was issued to vessels that met an established historical landing qualification and it was made transferable, but with size rules when vessels were replaced.[1493] Many part-time fishermen didn't meet the eligibility criteria and the restrictions were relaxed so that by 1981 there were about 422 licenced vessels.[1494] Although the capacity was reduced, the halibut fishery started the 1980s with a quota 5–6 times lower than 15 years earlier, and the situation was critical.[1495] To remedy the situation the government appointed economist Peter Pearse as a commissioner to review most of the Pacific fisheries policy in 1981.

10.4.4.4 The Pearse report

Pearse saw the Pacific fisheries as being at a crisis point at the outset of the new decade. In 1982, he submitted his extensive report on a variety of topics, often referred to as *the Pearse Report*, after a broad process including two rounds of hearings of an interim report, 193 written submissions, specialist input and informal meetings in smaller communities. At the same time, it was a one-man inquiry, in contrast to a task force for the Atlantic fisheries working about the same time, which was a multidisciplinary, multisector group with both industry and government representatives that was more of a collective effort (often referred to as *the Kirby report*), more in line with the Norwegian commission tradition of stakeholder participation.[1496]

1490 TURNING THE TIDE. A New Policy For Canada's Pacific Fisheries. The Commission on Pacific Fisheries Policy (*The Pearse Report*) page 122.

1491 *The Pearse Report* page 122–123.

1492 *The Pearse Report* page 123; Cook and Copes (1987) page 47.

1493 *The Pearse Report* page 123.

1494 *The Pearse Report* page 123.

1495 *The Pearse Report* page 123.

1496 Gough (2007) page 373

The Pearse report included factual overviews of the state of the fisheries, analysis of policy and a broad set of recommendations in different areas of the regulatory system, and for various fisheries more specifically. The following emphasizes the issue of limited entry schemes. Overall, the need for a policy reform was stressed, with reasons including that there was a lack of "cohesive, consistent and forward-looking policies and programs,"[1497] that much of the regulatory framework was designed for Atlantic and interior fisheries, that regulations were complex, unpredictable and inconsistent and that government responses to problems in the Pacific had come in a "piecemeal fashion"[1498] without clear policy guidance. The main controversy of the report was the proposal on substantial fleet reduction as a response to the over-expansion and poor economic performance.[1499] A new policy framework for modern commercial fisheries had to be aimed at:

> keeping fishing capacity in balance with the resources available, encouraging the fleet's structure to develop efficiently, providing security for fishermen and vessel owners, enabling the government to adjust privileges as conditions change, recovering for the public returns from resources in excess of reasonable returns to fishermen and vessel owners, and simplifying administration.[1500]

This is a relevant quote to render as it echoes the language used in the White papers on structural policies the Norwegian Parliament referred to in chapter 8. For all commercial fisheries other than salmon and roe-herring a limited entry licencing scheme authorizing harvest of a specific quantity of fish of the TAC of the fishery (referred to as *quota licences*) was proposed.[1501] Some of the proposed conditions were that licences were fixed for a 10-year term and reallocated periodically through competitive bidding, and that licence fees and landing royalties had to be paid to the government. Furthermore, Pearse saw no

[1497] *The Pearse Report* page 3.

[1498] *The Pearse Report* page 3.

[1499] *The Pearse Report* page 260.

[1500] *The Pearse Report* page 260.

[1501] See *The Pearse Report* page 80–98 for all the details in the proposed licensing regime.

justifications to restrict ownership in the form of owner-operator rules.[1502] He acknowledged that the transferability issue was controversial as it pointed to potential sources of controversy, including private actors benefiting from a public resource, the encouragement of overcapitalization and monopoly control of the fleet and speculations that could cause fluctuations in value of licences.[1503] In a response to this he generally pointed out that it was important to recognise that any exclusiveness of access to fisheries in remunerative fisheries made licences valuable and that prohibiting transfers would be extremely difficult as experience demonstrated that actors found ways to circumvent such limitations through legal manoeuvres such as change company shareholders, leases, trusts and so on.[1504] He argued that introducing licence fees and landing fees would provide benefit to the public (which a prohibition on transfers would not), and that the concern on speculation impact on licence values appeared exaggerated. Pearse concluded that objections were weak and benefits substantial, but he saw a risk of monopoly control as a valid point that could be remedied by fixing limits of privileges a person or company could hold.[1505]

10.4.4.5 Follow-up of the Pearse report and introduction of individual transferable quotas (ITQs) in commercial halibut fisheries

The responses to the proposed licencing policies in the report were polarized and included industry skepticism and opposition, and the recommendations were not pursued in the following years.[1506] Other parts of the recommendations brought on reforms, including changing the consultation and fisheries advisory processes to *increase the stakeholder impact*. As with the developments in Norway, the shift into quota management created *new enforcement tasks* and misreporting became a problem along with general problems with

[1502] The *Pearse Report* page 88.

[1503] The *Pearse Report* page 91.

[1504] The *Pearse Report* page 91–92.

[1505] The *Pearse Report* page 91–92.

[1506] The political follow-up was complex and naturally many factors were involved in why it proved difficult to implement the licensing policies in the following years, see more in Gough (2007) page 369-370; Swenerton (1993) page 74–76.

compliance.[1507] Pearse reported of mistrust about the DFO performance in enforcing the laws and pointed out several factors complicating fisheries enforcement, including the enormous areas for policing, that the economic incentive to harvest illegally had risen dramatically, that the capacity of the fishing fleet had expanded and that the regulatory framework was a myriad of regulations that presented "a complex and unwieldy basis for enforcement."[1508] Pearse also acknowledged that an ITQ system had disadvantages in relation to ensuring compliance with the quota, and obtaining reliable landing information, and challenges with regards to multi-species fisheries.[1509] Some action was taken to remedy the situation in the 1990s, including channeling fishery officers more rigidly into enforcement tasks, hiring fishery officers into full-time employment as the general practice (in contrast to widespread practices of hiring seasonal officers), introducing fishermen-funded dockside monitoring and monitoring at sea by mandatory at-sea observers in some fisheries.[1510]

In the years to come, the course of action on licencing policy took different avenues for the many and diverse fisheries in Pacific Canada. The emphasis in the following is on hook and line fishing of halibut as this is the case study of chapter 11. The state of the halibut fishery continued to be critical towards the end of the 1980s, with increasing competition for catches at the expense of conservation of the stock and the safety of participating vessels. This led to an increasing industry support for the introduction of individual quotas and the start of a consultation process.[1511] This consultative process is described in detail in *Carpenter Fishing Corp*,[1512] which the following brief builds on. The process included the preparation of a discussions paper by DFO proposing a scheme of *individual quotas* to all licence holders (building on recommendations by industry representatives), meetings, a questionnaire, voting on a revised proposal and the formation of the Halibut Advisory

[1507] Gough (2007) page 388–389.

[1508] The *Pearse Report* page 205–206.

[1509] The *Pearse Report* page 84.

[1510] Gough (2007) page 388–390.

[1511] Gough (2007) page 463; Swenerton (1993) page 84.

[1512] See full citation in footnote 1293 above.

Committee with industry representatives (including a few representatives from crew members and the processing industry) in December 1989.[1513] After a year of consultation the Minister announced the introduction of a two-year trial program of individual quotas and the establishment of an appeal board for those disagreeing with their quota allocation on November 1, 1990. Quotas were not to be transferred during the trial period as the Halibut Advisory Committee would study the consequences of stacking.[1514]

After the two-year trial period was over, more than 90 % of the licence holders voted to continue the program, and subsequent ministers have adopted the same policy. The main characteristics of the program were a formula of quota allocation where 30 % attributed to the vessel length, and 70 % attributed to the historical performance of the current owner (best catch year back in time of ownership of the licence), as well as a requirement that the industry pay for the hiring of an observer company and a team of halibut officers to monitor and enforce the program.[1515] Limited transferability was allowed in 1993, in which the initial allocation of a vessel could be split up in two equally sized units, and a holder could lease out, or lease in, up to two units from others (which meant a maximum aggregation of four units).[1516] By this, an ITQ system had been introduced in a design based on industry input and support, but there was also, and as will be demonstrated later still is, industry opposition to the scheme.[1517] The quota allocation formula that was adopted by the Minister was shortly after challenged legally in *Carpenter Fishing Corp.*[1518] The Federal Court ruled in disfavour of the respondents as it found no evidence of bad faith, or that the decision was based on irrelevant purposes. As it was considered a decision that was not administrative in nature, see chapter 10.3.4, the natural law of procedural fairness didn't apply to the decision-making process (but there had still been industry consultations). The court also drew attention to the scope of executive discretion, and if a policy is good or bad, when it set out:

[1513] Referred to as the Halibut Advisory Board in Casey et al. (1995).

[1514] Casey et al. (1995) page 216.

[1515] Casey et al. (1995) page 215.

[1516] Casey et al. (1995) page 216.

[1517] Casey et al. (1995) page 215–216; Pinkerton and Edwards (2009) page 708; Turris (2010) page 432–433; Pinkerton and Edwards (2010) page 1112.

[1518] As seen in chapter 10.3.4 this is also a case relevant in administrative law case law.

> Perhaps the formula adopted is not the best one, or the wisest one or the most logical one, but the Minister is not bound to pick the best, wisest or the most logical one and it is certainly not the function of the courts to question his judgment as to whether a quota policy is good or bad.

This quote, and the case itself, draws attention to the delicate balance between law and policy, and also points more generally to what level of detail should be under the authority of the executive, and what should be under the authority of the legislature, to regulate in politically contentious matters. These are some of the issues that will be further reflected on in part IV. As to the halibut fishery, there were many events that followed the introduction of the individual transferable quota (ITQ) system following this case, but the principal fundament of the system was laid through these processes. Other features that became, and still are, elements of the specific regulatory regime, are addressed in more detail in chapter 11 after an introduction of the current overall legislative framework under the *Fisheries Act* that applies to the Pacific halibut fisheries.

10.5 The *Fisheries Act*

10.5.1 Purpose, application and management considerations

The *Fisheries Act* is the federal statute that provides the framework for the management of fisheries and aquaculture, and marine habitat protection, in Canada. Several of the principles laid down in the *Fisheries Act 1868* can still be found in the current version, although in modernized forms.[1519] This chapter will run through the parts and provisions of the statute that are most relevant to the *regulation of commercial ocean fisheries*, with some emphasis on ocean management. The *Oceans Act*[1520] is therefore also relevant in a fisheries governance context, but as the emphasis is on rules for commercial fisheries under national jurisdiction, issues related to maritime borders and ocean management more broadly is not addressed in this outline. Similarly, the regulation of activities by foreign

[1519] Several of the DFO respondents highlighted the long tradition and somewhat anachronistic nature of the statute.

[1520] *Oceans Act, SC 1996, c 31 (Oceans Act).*

vessels in Canadian fisheries waters under the *Coastal Fisheries Protection Act*[1521] is not addressed. This sub-chapter starts with an introduction to the purpose clause, application and considerations for the decision-making under the Act. It is followed by rules on the authorization of fishery licences and executive regulatory authorities in chapter 10.5.2, while the issue of ownership of the resources is addressed in chapter 10.5.3. Chapter 10.5.4 goes into the more general rules on what can be fished and where and how fishing takes place, followed by rules on the enforcement and sanction system in chapters 10.5.5 and 10.5.6.

The statute recently underwent an extensive law revision that is relevant to highlight at the outset.[1522] The revision was initiated by Prime Minister Justin Trudeau, who in 2015 tasked his Minister of Fisheries and Oceans, and the Canadian Coast Guard with improving the protection of fish and fish habitat,[1523] and introduceing modern safeguards into ocean and fisheries governance, in the statute through instructions in a mandate letter that was made public.[1524] Several of the DFO respondents in my field research expressed that the mandate also gave a new opportunity to review other issues that were a priority of the government.[1525] DFO respondent 5 expressed that it was new that mandate letters were *made public* and that previous letters, in his experience, were not even seen by bureaucrats. The mandate later was followed-up by Bill C-68, which passed in the Parliament and received Royal Assent and became law on June 21, 2019.

1521 *Coastal Fisheries Protection Act, RSC 1985, c C-33 (Coastal Fisheries Protection Act).*

1522 DFO respondent 1 expressed that if the bill passed it would be the "most significant changes ever made to the Fisheries Act," but that they were not the most dramatic changes proposed (interview was conduced in in Ottawa April 29, 2019). DFO respondent 2 referred to a Bill C-45 tabled in 2007 that was a complete rewrite of the Act that was voted down by the Parliament two times.

1523 See an empirical analysis of the, at that time, current (and recent) approach to the Fish Habitat Protection Laws in Olszynski (2015).The habitat protection provisions under Canadian fisheries legislation are not addressed in this thesis as they are not elements of Norwegian fisheries legislation and not directly relevant to the topics of the thesis.

1524 Office of the Prime Minister: Minister of Fisheries, Oceand and the Canadian Coast Guard Mandate Letter of November 12, 2015 (Trudeau Mandate letter 2015).

1525 DFO respondent 4, for example, expressed that since a revision was open "there was kind of a wish list that went around within the department, because it's so rare that we get an opportunity to address things in the Fisheries Act."

A new purpose clause in section 2 sets out that the Act provides a framework for the "a) proper management and control of fisheries; and b) the conservation and protection of fish and fish habitat, including by preventing pollution." A new provision for territorial application is adopted in section 2.2(1), which sets out that the Act applies to all of Canada, and to Canadian fisheries waters (as defined under section 2(1)). Already acknowledged rights of indigenous peoples of Canada were codified in sections 2.2 and 2.4 of the Act. The latter sets out a duty for the Minister when making decisions under the Act to "consider any adverse effects that the decision may have on the rights of the Indigenous peoples of Canada as recognized and affirmed by section 35 of the *Constitution Act, 1982*." This was a codification of already existing obligations developed in case law.

The new section 2.5 sets out nine non-exhaustive considerations that the Minister *may* consider when making decisions under the act, including a precautionary and ecosystem approach (a), the sustainability of fisheries (b), scientific information (c), indigenous knowledge (d), community knowledge (e), social, economic and cultural factors (f) and the "preservation or promotion of the independence of licence holders in commercial inshore fisheries" (h).[1526] The discretion of the Minister, see more below, is not limited by these considerations, but this was a more explicit articulation of considerations than the previous state of law. DFO respondent 2 expressed that:

> Section 2.5 are just things he may consider, so it doesn't limit his discretion, but it is the first time in the Fisheries Act we've articulated things that stakeholders are interested in seeing him consider, and how. I think we are going to get a lot of expectations around demonstrating how these things have been considered.

Several respondents similarly expressed that there are high expectations to the amendments by the industry and public more generally, which is also underscored by the publicity of the mandate latter. It was also expressed by some respondents that the changes are fairly ambitious. Some of the other amendments will be reflected in the following chapters, but

[1526] DFO respondent 2 informed that (h) came in after stakeholder feedback.

suffice to say for now that these considerations have much resemblance to the management considerations of section 7 of the Marine Resources Act in the Norwegian context.[1527] This is not surprising as these are provisions that largely enshrine international law obligations, with perhaps the exception of the more social and cultural dimension articulated. The Norwegian considerations are mandatory as importance "shall be attached to" the considerations, whereas the Canadian Minister can choose which considerations to consider in his/her decision-making, unless otherwise specified in the Act.

10.5.2 Fishery licences and power to adopt regulations

Fishery licences play a *paramount legal role* in the Canadian regulatory system. The authority to issue licences is conferred to the Minister through section 7(1) of the Act, which sets out that:

> … the Minister may, in his absolute discretion, wherever the exclusive right does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on.

By this, the executive branch of the government is conferred a broad authority to regulate commercial fisheries in Canada. The *absolute discretion* of the Minister is also something that several of the respondents saw as a main characteristic in the Canadian legislative framework. It is also an important provision for the understanding how many of the rights and duties of harvesters in commercial fisheries are made legally binding through licence conditions, which will be further reflected in the comparative case in chapter 11. *Who* can be issued a commercial licence is as seen in chapter 10.4.4 above a result of the historical

[1527] See chapter 3.5.1 and 8.2.

evolution and can vary from fishery to fishery, and from coast to coast.[1528] All Canadian fisheries are similarly to most commercial fisheries Norwegian today, limited by nature, so that no new licences are being issued.[1529] Normally licences are issued for one year at the time, but section 7(2) authorizes the issuing of licences and leases for up to nine years. Only the Governor in Council can issue for terms longer than nine years. Section 8 authorizes the Governor in Council to prescribe fees charged for fishery or fishing licences and fishing quotas, whereas the Minister can suspend or cancel a licence pursuant to section 9(1) if any provision of the lease or licence is not complied with, or the licence holder has entered into an agreement that contravenes any of the provisions in the Act or regulations. The Minister can only suspend or cancel if no proceedings have been commenced with respect to the non-compliance or contravention.[1530]

A wide power to lay down more specific regulations to carry out "purposes and provisions of this Act" by the Governor in Council is set out in section 43. A long list of matters that the Governor in Council "may" regulate is subsequently set out. Several of the matters were revised in passing Bill C-68, with a stronger emphasis on social, economic and cultural purposes and conservation and the rebuilding of fish stocks. Under this authority *Fishery (General) Regulations*[1531] and several local regulations, including the *Pacific Fishery Regulations 1993*[1532] relevant to the case study in chapter 11, further specify formal requirements and operational rules for the fishery. Some of the operational rules for the harvest are further outlined in chapter 10.5.4 below.

[1528] The diversity of Canadian fisheries was also a point made by some of the respondents in DFO in describing characteristics of Canadian fisheries legislation culture. DFO respondent 3 expressed: "So it's about three oceans and also inland waters that, fisheries inland waters, that Canada manages. So that makes it very challenging, because the geographical area is huge. The range of stakeholders in fisheries, they're heterogeneous in Canada. Not like Australia where it's quite homogeneous. The nature of fishing regions. There are the eastern federal waters where fisheries are all managed similarly. Here we got inshore, midshore, offshore fisheries, small-scale, large scale, offshore international fisheries. And then the stakeholder groups. Whole range here in Canada that align with those different fishing types and vessels. And, you know, starting with indigenous groups, again, they're not homogeneous."

[1529] This was confirmed by DFO respondent 1.

[1530] *Fisheries Act* section 9(2).

[1531] *Fishery (General) Regulations, SOR/93-53 (Fishery (General) Regulations)* Fishery (General) Regulations.

[1532] *Pacific Fishery Regulations, 1993, SOR/93-54 (Pacific Fishery Regulations).*

As will be demonstrated in practice in the case study in chapter 11, a lot of the duties and rights of the licence holder when participating in a specific fishery are made legally binding as licence conditions. The *Fishery (General) Regulations* section 22(1) sets out a non-exhaustive list of matters the Minister may specify in a licence, but any condition can be specified as long as not inconsistent with the *Fishery (General) Regulations,* or regulations listed in section 3(4) of the *Fishery (General) Regulations.* Furthermore, licence conditions must not violate the Constitution and must be consistent to natural justice, which means they must be based on relevant considerations, cannot be arbitrary and must be made in good faith.[1533] Licence conditions can be amended pursuant under section 22(1) of the *Fishery (General) Regulations* for the "purposes of the conservation and protection of fish." The only procedural requirements that applies if a condition is to be amended, is that a notice of amendment is sent either by mail or personal delivery,[1534] and is effective from the time the licence holder has received this notice.[1535] There are more procedural requirements concerning suspending or cancelling a licence pursuant to section 9 of the *Fisheries Act*.[1536] There are many differences with the Norwegian and Canadian use of licences. These are better illuminated when the use or licence condition in practice has been studied in the cases in in chapter 11. The question of ownership of the resources and legal status of fishery licences are, however, more of a general nature across fisheries that is addressed in the following.

10.5.3 Ownership of resources and legal status of licences

Canada's fisheries are regarded as a "'common property resource[,]' belonging to all the people of Canada," in which licencing is "a tool in the arsenal of powers available to the Minister under the Fisheries Act to manage fisheries."[1537] Although referring to the resources as a "common property," this articulation has significant similarity to the social

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[1533] See for example statements on natural justice under the analysis in *Comeau's Sea Foods Ltd. v. Canada,* 1997 CanLII 399 (SCC), [1997] 1 SCR 1 [*Comeau's Sea Foods Ltd.*]. Natural justice applies to all part of a Minister's decision, not just the licence conditions.

[1534] *Fishery (General) Regulations section* 22(3).

[1535] *Fishery (General) Regulations* section 22(4).

[1536] See more on these requirements in *Fishery (General) Regulations* sections 24 and 25.

[1537] *Comeaus's Sea Foods Ltd.* para 37.

belongingness of the resources in a Norwegian context, see chapters 3.5.1 and 8.2. Licences in the Canadian context are furthermore seen as a "privilege" and are in most cases granted for one year at a time (renewed annually) by DFO. A fishing licence is a property of the Crown, and it is not transferable.[1538] At the same time it has been clarified in *Saulnier v. Royal Bank of Canada*[1539] that a fishing licence is more than:

> merely a permission to do which would otherwise be unlawful. The holder acquires the right to engage in an exclusive fishery under conditions imposed by the licence and, what is of prime importance, a proprietary right in the wild fish harvested thereunder, and the earnings from their sale.[1540]

The Supreme Court of Canada therefore sees that a licence holder is granted an exclusive *right to access* a fishery coupled with a *proprietary interest* in fish harvested according to the terms of the licence and regulations.[1541] It also clarifies that the aforementioned property right of the Crown is to the document, as opposed to the licence,[1542] and as to the stability in renewal of licences expresses that the reality is:

> that the commercial market operates justifiably on the assumption that licences can be transferred on application to the Minister, with the consent of the existing licence holder, that licences will be renewed from year to year, and that the Minister's policy will not be changed to the detriment of the existing licence holders.[1543]

It is not obvious what this sentiment expresses in relation to the legal status of the licence, which is also not for this thesis to analyze *de lege lata*, but it points to similar questions raised in Norwegian law on the limits of the *regulatory scope* of the authorities in relation to

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1538 *Fishery (General) Regulations* sections 2 and 16(1).

1539 2008 SCC 58 (CanLII), [2008] 3 SCR 166 [*Saulnier*].

1540 *Saulnier* para 43.

1541 *Saulnier* para 46.

1542 *Saulnier* para 45.

1543 Saulnier para 24.

licence holders.[1544] The regulatory scope is further reflected on in the case study in chapter 11, as one paramount case in *Malcolm v. Canada (Fisheries and Oceans)*[1545] concerns commercial halibut fisheries in the Pacific, but an approach with interpreting the meaning of licences in different legal contexts in Canadian law merits further attention in this chapter. What the court did in *Saulnier* was to acknowledge the elusiveness of property rights concepts and that they takes their meaning from the context.[1546] It has been acknowledged in literature that the legal nature of fishing licences also often depends on whether the case at bare is a dispute between the licence holder and the government, or between private individuals.[1547] The Supreme Court of Canada did see licences as a "property" in a common law sense, but in the case at bar fishing licences met the definition of "property" of the *Bankruptcy and Insolvency Act*,[1548] and of "personal property" within the meaning of section 2 of the *Personal Property Security Act*[1549] In the reasoning it was highlighted that licences are major commercial assets and instruments that "should be interpreted in a way best suited to enable them to accomplish their respective commercial purposes."[1550]

This case has similarities to a judgment in the Norwegian Court of Appeal, not submitted to the Supreme Court of Norway in 2002, that established that the value difference between the price of the physical vessel and the sales price was a value that represented the *value of the licence,* and thereby an intellectual property (intangible property) pursuant to the Taxation Act.[1551] The decisive factor was consideration to "commercial realities."[1552]At the same time the Court acknowledged that there was *no formal sale* of a licence, and that the

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[1544] See above on the judgment in Rt. 2013 s. 1345 in a Norwegian context in chapters 8.3.1 and 9.2.4.

[1545] 2014 FCA 130 (CanLII) [*Malcolm*].

[1546] *Saulnier* para 16.

[1547] Caldwell (2011) 3.

[1548] *Bankrupcy and Insolvency Act, RSC 1985, c B-3 (Bankrupcy and Insolvency Act)*

[1549] *Personal Property and Security Act, RSO 1990, c P.10 (Personal Property and Security Act)*

[1550] *Saulnier* para 42, also referred to in *Anglehart v. Canada*, 2018 FCA 115 (CanLII), [2019] 1 FCR 504 [*Anglehart*] para 18. See also Soliman (2014b) 261–262.

[1551] LH-2001-308 ; HR-2002-482.

[1552] LH-2001-308 page 7. See more on the history of the administrative practices among the tax authorities concerning sales of fish- and aquaculture rights in Thue (2002).

new issuing of a licence by the authorities was a condition for the buyer to be in a position to fish.[1553] Commercial and economic realities were also laid down as arguments in another Norwegian case concerning a transfer of a commercial licence that was in violation of rules on distribution of dividends pursuant to the Securities Act, as the purpose of the transfer was to prevent a bankruptcy estate to acquire the value of the licences.[1554] In 2009, the Supreme Court of Norway clarified the legal status of licences in relation to mortgaged property in a bankruptcy case.[1555] The question was whether the security a bank had in a fishing vessel also included the value of the licences (and not just the value of the physical vessel). The Court concluded that a licence was so connected to the physical vessel that it had to be considered a part of the security, and therefore not an asset pursuant to the Mortgage Act.[1556] The Court emphasized the arrangements in *fisheries legislation*, the high credit values and *need for securing capital* to a modern fishing fleet, and *industry practices* when it reached the conclusion it did.[1557]

Also, later case law in Canada has undertaken analysis of property in specific legal contexts. In *Angleheart* the question was whether the appellants were entitled to compensation for a loss they incurred as a result of a reduction of their individual quotas. The Federal Court of Appeal, however, found that the decisions in *Saulnier* and *Canada v. Haché*[1558] "were rendered to give effect to Parliament's intention in a specific legislative context that cannot be compared to this case"[1559] Through analysis of the fisheries legislation, the Court found

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1553 LH-2001-308 page 7. A similar reasoning was used in four different cases in the Court of Appeal in 2013, where the courts articulated more explicitly than the former judgement a distinction between assessment pursuant to *fisheries law rules*, and assessment pursuant to *taxation, accounting* and *securities law*. See page 9 in LG-2012-81908 - LG-2012-88309 - LG-2012-88328 - LG-2012-88346 - UTV-2013-1230.

1554 LH-2005-74236. The appeals were not submitted to the Supreme Court of Norway, see HR-2006-992-U; HR-2006-993-U.

1555 Rt. 2009 s. 1502.

1556 Rt. 2009 s. 1502 para 62–63.

1557 Rt. 2009 s. 1502 para 69 and 70. Whether this conclusion would hold after amendments of the Participation Act in 2015 has, however, been problematized in theory, see Arntzen (2019).

1558 2011 FCA 104 (CanLII) [Haché].

1559 *Anglehart* para 23.

that expropriation law did not apply to the appellants. As to the argument that "commercial interest could be affected," the Court set out that the discretion of the Minister:

> is with regard to the allocation of fishery resources and while in the fishing industry there is a commercial reality – in which DFO does not participate - The Minister's duty under the Fisheries Act is not to manage commercial interest but rather fishery resources, resources that are not infinite.[1560]

By this, we see that the judiciary perhaps more explicitly in Norway established that the main responsibility of DFO is resource management and not involvement with the commercial dispositions of the industry. It is at the same time important to underline that the judge added that:

> Of course, the Minister can consider certain social, economic and commercial factors in managing the fisheries … but it is not obligated to do so … The Minister's colossal task of managing, developing and conserving the fisheries for all Canadians requires him to make strategic decisions that will inevitably have an impact on competing commercial interests. The Minister must react to varied concerns and occasionally make necessary adjustments to respond to new imposed realities.[1561]

This quote echoes some of the essence of fisheries governance, both in a Norwegian and Canadian context, which is further reflected on in part IV. Although not clarifying all aspects of licence arrangement and dispositions, the above case law give grounds for concluding that the courts in both countries so far have applied what could be seen as a *pragmatic approach* to *practical challenges* and *commercial realities* that arise from the nature of the fishing activity with cases involving the day-to-day business of the fisheries. It can also be identified that specific analysis of the meanings of different statutory language

[1560] *Anglehart* para 46.

[1561] *Anglehart* para 47.

under consideration, in other words qualified forms of property for a specific purpose, is a feature in jurisprudence in both Norway and Canada.[1562]

10.5.4 Statutory duties and regulatory powers related to harvest operations

Although a lot of the rules of conduct of the fisheries are set out in licence conditions, there are also important statutory duties and legal instruments concerning what can be fished, where fishing can take place and how the harvest is to be conducted. As noted, the passing of Bill C-68 incorporated new environmental safeguards. In a new section 6.1 there is a duty for the Minister to implement measures to maintain fish stocks over a certain sustainability level, or set a *limit reference point*[1563] and maintain the stock above that level if the former is not feasible or there are cultural reasons or socio-economic impacts that call for it.[1564] Furthermore, section 6.2(1) sets out a duty for the Minister to develop a rebuilding plan if the stock has declined to or below its limit reference point. By this the discretion of the Minister has been somewhat circumscribed.[1565] DFO respondent 5 raised concerns about challenges wit exercising these provisions in practice:

[1562] Similar court reasoning is found in jurisprudence in the US. See more in Macinko and Bromley (2004).

[1563] See more on the use of biological reference points in fish stock assessment methodology in chapter 4.3.2.

[1564] Prior to this, it was ruled in *Western Canada Wilderness Committee v. Canada (Fisheries and Oceans),* 2014 FC 148 (CanLII) that DFO had acted unlawfully in failing to post proposed recovery strategies for some marine species within statutory timelines set out in the *Species at Risk Act, SC 2002, c 29 (Species at Risk Act)*. The case must at least have drawn attention to the issue of rebuilding threatened marine species. As indicated by the case, DFO also has management responsibilities under the *Species at Risk Act*, and up until the last revisions there were no provisions that explicitly addressed rebuilding in the *Fisheries Act*. Having duties under two sets of legislation is similar to the situation in Norway in which the Nature Diversity Act supplements the instruments laid down in the Marine Resources Act when it comes to recovery of threatened species A further overview of the legislative structure in Norway and Canada in relation to fisheries rebuilding is given in OECD (2012) page 81, 84–85.

[1565] Confirmed by DFO respondent 1.

> I think that the legislative objective is to try to provide some more empowering tools to better enable the government to get some of these more challenging issues, like stock rebuilding. But as you drill down into a more specific issue, like stock rebuilding, you realize that … that greater specificity in legislative direction doesn't necessarily result in easier decisions. It doesn't make your trade-offs clearer necessarily. So that's why I would say it could be a bit ambiguous. Because when you say the department shall manage the fishery at a sustainable level, what does that mean to you. There is no single definition of sustainable, right.

The provisions and this quote point to some of the legislative dilemmas when designing fisheries legislation in how to balance environmental, cultural and economic concerns, but also the question of what level of detail should be specified in legislation and the fact that vague statutory language delegates difficult decision-making to the executive branch. The same respondent also expressed that it could take time for the bureaucracy to adapt to these new legal tools as he saw the Canadian bureaucracy as "pretty risk averse." As seen in chapter 3, there is no explicit duty under the Marine Resources Act to establish a rebuilding plan, but a duty to emphasize a precautionary approach and principles in international fisheries law, within the overall purpose of ensuring a sustainable management of the resources.

Quite similar to the Norwegian approach, the Minister may, under section 43.3(1) for "the purposes of the conservation and protection of marine biodiversity" lay down regulations to prohibit fishing of species, use of gear types and vessels to be used. Whereas fisheries can be closed due to different conservation purposes pursuant to the *Fisheries Act*, it is under the *Oceans Act* that marine protected areas (MPAs) can be designated by DFO. It is the Governor in Council, on recommendation of the Minister, who may make regulations that designate MPAs, delineate zones within the MPAs, prohibit classes of activities within the MPAs and that are in respect to any other matter consistent with the purpose of the designation.[1566]

The *Fishery (General) Regulations* also set out rules for the harvest. One important tool is the use of Variation Order (VO). Under section 6(1) of the regulations it is set out that "any close time, fishing quota or limit on the size or weight of fish" that is fixed in any of the areas listed in section 3(4) may be varied by orders (VOs) of the Regional Director General, whereas a fishery officer under the authority of section 6(2) may by order vary (VOs) a close time or fishing quota for herring or salmon fishing in the Pacific fisheries. There are also other VO authorizations set out in section 6, and procedural requirements in section 7(1), which are limited to notifying the affected by one or more methods, including broadcasting over radio, transmitting the notice electronically and more. There are many other rules of conduct set out in the regulations, but particularly important in a comparative context is section 33 on release of incidental catch and section 34 on dumping and wasting of fish. In contrast to the general duty to land all catches in Norway, various *illegal* catches are to be replaced where they are taken from (in the least harmful manner if alive), unless the retention of it is expressively authorized in any of the regional regulations listed under section 3(4) (including *Pacific Fishery Regulations*). Section 34(2), on the other hand, prohibits dumping of fish caught under the authority of a commercial licence when caught according to the Fisheries Act or regulations under the Act. The general rule is therefore that *legal* catches of fish cannot be discarded, but as will be demonstrated in the case study in chapter 11, also legally caught fish can be released back at sea depending on how a fishery is set out in practice.

A new regulatory instrument that was introduced with the passing of Bill C-68 was Fisheries Management Orders laid down in a new section 9.1(1). This is a tool that authorizes the Minister to order regulatory measures to any fisheries in Canadian waters if "required to address a threat to the proper management and control of fisheries and the conservation and protection of fish." Measures can include prohibition of fishing one or more species, regulating the use of fish gear and basically "imposing any requirements with respect to

[1566] *Oceans Act section* 35(3).

fishing."[1567] The order can be in effect for a maximum of 90 days.[1568] In other words, the Minister can basically do whatever is considered necessary in any fishery for a time period of 90 days, as long as it is within the purpose of the provision and limits of natural justice. On the background and intention for the new tool, DFO respondent 4 expressed that there could occur situations that needed urgent responses, for example if whales are getting entangled in a fishing net. In the previous state of law, DFO would either have to amend licence conditions, or act within the scope of the VOs. As the formal requirements to amend licence conditions could take several days, and the VOs are limited to what's scheduled in regulations, the respondent expressed:

[1567] *Fisheries Act* sections 9.1.(1) (a) – (d). Several DFO respondents pointed out that the popular term of it was "emergency orders" and that it was an amusing coincidence that section 9.1.(1) resembled the emergency phone number 911.

[1568] *Fisheries Act* sections 9.3(1) and (2).

> So, that's not quick enough, right. The whales are tangled right now, like people need to lift their gear within the next five hours, not in the next five days … So, we wanted to combine both [licence conditions and VOs], and it became the fisheries management order. So basically, for 90 days, because two times 45 days, the Minister has like carte blanche to amend to, you know, to respond to an emergency situation.

This above combination of legal instruments makes the executive branch equipped to respond quickly to changes in circumstances and emergencies that might necessitate urgent responses. As seen in the Norwegian case in chapters 3.5.2 and 3.5.3, rules on what to fish, where to fish and how to fish are areas all regulated through regulations that, as will be demonstrated in further detail in the case study in chapter 11, can be changed with immediate effect under simplified procedural requirements under chapter VII of the Public Administration Act. It must at the same time be within the enabling provisions in statutes, and does not provide a similar general authority to implement any temporary measure for management purposes.

10.5.5 Enforcement and powers of fishery officers

Fishery officers play an important operational role in the enforcement of Canadian fisheries. Section 5(1) of the *Fisheries Act* authorizes the Minister to designate fishery officers or fishery guardians, while sections 49 to 56 set out the powers of the officers or guardians. I acknowledge the complexity of these areas of governance and that there different authorized personnel in the form of *fishery officers*, *conservation officers* employed by the province for land-related enforcement and *fishery guardians*. The thesis emphasizes the role of fishery officers in the enforcement of the marine commercial fishery, which can be regarded as the police force in the marine resources management. [1569] When carrying out duties under the *Fisheries Act* a fishery officer is considered a "peace officer" under the *Criminal Code*. [1570]

[1569] DFO respondent 1 referred to the officers as a police force by the statement "we have whole police force that is mandated with enforcing the Fisheries Act an all of its regulations and requirements." The training to become an officer is 16 weeks in a classroom, and a total of 34 weeks of training.

[1570] See definition of peace officer in (e) under section 2 of the *Criminal Code*.

Fishery officers are also equipped with firearms when performing their duties.[1571] In contrast to Norway, the Coast Guard do not have a material role in the enforcement system, but provide a platform for the fishery officers and also for scientific activities.[1572]

First of all, fishery officers are authorized to *inspect* any place, premises, vessels/vehicles in which the officers on reasonable grounds believe something relevant under the Act is taking place for the purposes of ensuring compliance to the Act and regulations.[1573] This is a wide authority to examine containers and fish, conduct tests or analyses, require access to documents. The owner or person in charge of the inspected place also has a duty to assist the officers.[1574] To enter premises, vessels or vehicles that is a dwelling house a warrant is required and can be issued by a justice of the peace.[1575] For *searches* of any place, vessel or vehicle, if there are reasonable grounds to believe illegal activities have taken place in contravention of the Act or the regulations, a warrant issued by a justice of the peace is required, unless "the conditions for the warrant exist but by reason of exigent circumstances it would not be practical to obtain the warrant."[1576] An authority to *arrest* any person that an officer or guardian on reasonable grounds believes has committed an offence, without warrant, is laid down in section 50. An officer or guardian may also *seize* any "fishing vessel, vehicle or other things" believed to have been obtained or used in the commission of an offence under the Act, including any fish that was "caught, killed, processed, purchased, sold or possessed in contravention of this Act or the regulations."[1577] Fishery officers and guardians keep in custody and *retain* fish or other things seized under the Act until the

[1571] This was confirmed by DFO respondent 4.

[1572] Information provided by DFO respondent 1 on questions related to the role of the Coast Guard in enforcement, by the statement: "They provide what they've called platforms, which our conservation protection officers would use from time to time, although our fisheries officers do have their own fleet of vessels as well. And Coast Guard also provide platforms for scientific activity."

[1573] *Fisheries Act* section 49(1).

[1574] *Fisheries Act* section 49(1.2).

[1575] *Fisheries Act* sections 49(2) and (3).

[1576] *Fisheries Act* sections 49.1(1), (2), and (4).

[1577] *Fisheries Act* section 51.

"thing or proceeds are forfeited or proceedings relating to the fish or thing are finally concluded."[1578]

The role of the fisheries officers is therefore of a similar character to the ones of the Coast Guard in Norway, and therefore much wider than the authorities of the Directorate and fish sales organization, which are mostly limited to inspection. As to the inspections in practice, DFO respondent 4 expressed that a classical example is an inspection of a landing of lobster where the officers will start to measure lobsters and do everything on their check list of inspections. If , at the end, they find a certain amount of undersized lobster they will:

> go see the captain and say, 'Listen, we've inspected you,' 'I found so many undersized lobsters,' or maybe there's something in the logbook as well, 'that's wrong.' So, you find some infringements … They'll put them under arrest, but not physically. They'll give them their rights, and usually that's about it, right. You just document everything they need to document. Just make sure the situation is contained and then let the person go. And they follow up. So, if they don't have enough, they'll ask the person to come back and provide them with a written statement or have them interviewed.

The role of the fishery officers, similar to the Coast Guard in a Norwegian context, also switches over from an inspection mode, into an investigation mode, with legal implications not studied in detail as these are complex issues under criminal law and procedure.[1579] The corresponding duties of fishermen, buyers/processors, traders, exporters and any employees of any of these in the enforcement system is first and foremost *to provide information* and *keep books.*[1580] Sections 62 and 63 regulate situations of obstruction of the work of the fishery officers, guardians or inspectors and cases of false statements.

[1578] *Fisheries Act* sections 70(1) and 71(1).

[1579] See more in chapter 10.5.6.

[1580] See further specifications in *Fisheries Act* sections 61 and 61.1. Se also more of the duties of the industry actors to assist persons engaged in enforcement or the administration of the Act in part VI of the *Fishery (General) Regulations.*

Another important element in the Canadian fisheries enforcement system is the use of private actors and technology in the monitoring and control of the operations, including the use of observers at sea, electronic monitoring (EM) on vessels and dock-side monitoring programs. The *Fisheries Act* does not explicitly lay down a rule on the designation of observers, but section 43(1)(e.2) authorizes the Minister to make regulations "respecting the designation of persons as observers, their duties and their carriage on board a fishing vessel." The *Fishery (General) Regulation* sections 39(1) – (2) delegates to the Regional Director General to designate a qualified and trained *individual* as observer to perform monitoring activities on vessels and landing of fish and biological examination and sampling of fish.[1581] The *Fishery (General) Regulation* section 39.1(1) authorizes the Regional Director General to designate a *company* as an observer on the basis of specific requirements listed in *Fishery (General) Regulation* sections 39.1(1)(a) – (c).[1582] The case study in chapter 11 will go further into the control and enforcement practices, and use of private actors and technology, in one licencing scheme more specifically.

10.5.6 Sanctions and punishment

When a fishery officer, also by inspecting documentation provided by observers, finds enough evidence to prove an infringement, the officer can either issue a ticket pursuant to ticketing procedures established by the *Contraventions Act*,[1583] which was substantially expanded for fishery offences in 2021, or pursue charges by finishing a paper file and submit the case to the Federal Crown prosecutor for a decision on whether to proceed with prosecution. Approximately 400 offences were designated as contraventions in the amendments of the *Contraventions Regulations*[1584] in 2021 to provide a mechanisms to enforce minor offences without having to appear in court.[1585] It is justified by being a more reasonable and efficient approach for the less serious infractions, and opens up for fines that

[1581] See more on the duties and revoking of designation in the *Fishery (General) Regulations* sections 39(2.1) – (6).

[1582] The designation may be revoked by the Regional Director General under section 39.1(3).

[1583] *Contraventions Act, SC 1992, c 47 (Contraventions Act).*

[1584] *Contravention Regulations, SOR/96-313 (Contraventions Regulations).*

[1585] Canada Gazette, Part 1, Volume 155, Number 1: Regulations Amending the Fishery (General) Regulations. Regulatory Impact Analysis Statement (*RIA Statement 2021*).

are proportionate to the seriousness of the offences in the range between 100 to 750 CAD.[1586] Failing to comply with any terms or conditions of a licence under *Fisheries Act* section 43.4(1) can therefore, under the new regime result in a ticket of 750 CAD. It is also an alternative to a summary conviction, which reflects the distinction between criminal and regulatory offences, see above in chapter 10.3.5, and that spares offenders from the legal ramifications of a *Criminal Code* conviction.[1587] As to the use of administrative sanctions, the minister has as mentioned above in chapter 10.5.2, the authority to suspend or cancel licences, but revoking licences for violating licence conditions as a penalty, for which prosecution is otherwise provided for in the Act, is beyond the authority of section 7 of the *Fisheries Act*.[1588] This differs to the Norwegian system, which authorises the executive to revoke licences permanently or temporarily for similar offences of certain seriousness and gravity, see chapter 3.6.2.

For the serious infringements submitted to the Crown prosecutor, the decision whether to lay down charges or not is made on the discretion of the prosecutor. Section 78(a) in the *Fisheries Act* sets out that a person who contravenes the Act is guilty of an offence punishable on *summary conviction* for fines up to 100 000 CAD for a first offence, and imprisonment for up to one year or fines up to 100 000 CAD (or both) for any subsequent offence.[1589] Section 78(b) sets out that a person who contravenes the Act is guilty of an *indictable offence* for a fine up to 500 000 CAD for a first offence, and to imprisonment for up to two years or a fine up to 500 000 (or both) for any subsequent offence. Once the Crown has proved that the prohibited act has occurred for strict liability offences, the relevant

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1586 *RIA Statement 2021.*

1587 *RIA Statement 2021.*

1588 That the authority to suspend or cancel licences is limited was also confirmed by DFO respondent 2. In a case related to not renewing a snow crab licence in *Matthews v. Canada (Attorney General)* 1996 CanLII 4090 (FC), [1997] 1 FC 206 the court found that section 7 did not give the Minister jurisdiction to impose a penalty for the violations of fishing licence conditions. The case is also referred to in FAO (2003). See also *Kelly v. Canada (Attorney General)* 1997 CanLII 5468 (FC).

1589 Put simply, summary offences are those of a less serious nature and subject to lesser penalty, to be distinguished from indictable offences, or a hybrid of the two. Summary offences are tried by justices or provincial court judges with normally quicker proceedings than in a trial by judge or jury. Coughlan, Yogis and Cotter (2013) page 164 and 326.

offender is presumed guilty unless a due diligence defence is proved or it is proved that the accused believed in the existence of facts that would render the conduct innocent.[1590] The principles of sentencing that a court must apply are set out in the *Criminal Code* section 718, including that the sentence must be *proportionate* to the gravity of the offence and the *degree of responsibility* by the offender, as well as the *ability for the offender to pay*.

Most fisheries offences were, up until the new ticketing regime, laid down as summary convictions.[1591] DFO respondent 4 expressed that imprisonment for fishery offences is rare, but there are examples in case law, which are further reflected in the case study in chapter 11. The more specific conviction procedures are set out in the *Criminal Code*. There are also other provisions in the *Fisheries Act* regulating continuing offences, offences by corporate officers, employers and licence holders.[1592] In addition to sentencing fines, the court can, and must in some cases, order forfeiture of fish and any thing seized under the Act.[1593] Under section 79, a court can also order an additional fine to a person convicted for an offence under the Act if the courts find that the person acquired monetary benefit from the offence. The fine amounts to what the courts estimate of the monetary benefit. The court can also order a cancellation or suspension of leases or licences pursuant to section 79.1, and there is also a long list of other orders a court can make when considering the nature of the offence and surrounding circumstances, including prohibiting a person from engaging in certain activities,[1594] requiring them to perform community service[1595] and to pay money for the promotion of fisheries management.[1596]

Enforcement, sanctions and punishment under the Norwegian system are, as seen in chapters 3.9 and 3.10, organized differently and a superficial comparison of two intricate systems within the field of criminal law and procedure is challenging, but some brief

[1590] Fisheries Act section 78.6. See also in chapter 10.5.6.

[1591] Confirmed by DFO respondent 4.

[1592] *Fisheries Act* sections 78.1–78.4.

[1593] *Fisheries Act* Section 72.

[1594] *Fisheries Act* Section 79.2(a).

[1595] *Fisheries Act* Section 79.2(e).

[1596] *Fisheries Act* Section 79.2(f).

observations can be made. The shift over to increased use of ticketing in the Canadian context is justified by the same rationale for moving over to increased use of administrative sanctions in Norwegian law. There are at the same time, however, major differences to the two approaches. One difference is the explicit distinction between regulatory offences and criminal offences, which also the adoption of the *Contraventions Act* in 1992 was an effort to further clarify.[1597] What this distinction means principally and practically from a comparative perspective merits further investigation. The time of the triggering of different procedural rights for the accused in the criminal prosecutorial path are complex matters not emphasized in this inquiry. The Norwegian model does include certain rights in the administrative prosecutorial path pursuant to the Public Administration Act, including an appeal mechanism, which is not the case for the Canadian ticketing regime, which must be challenged in courts if not paid voluntarily, similar to tickets issued by the police in Norway in the criminal procedural path. At the same time, the new ticketing regime in Canada offers a new tool for the executive branch to handle offences in commercial fisheries in flexible ways, including use of discretion to find a size of ticketing that resonates with the gravity and seriousness of each offence, in addition to warnings. Some of these questions are addressed more specifically for Pacific fisheries in the comparative case in the following chapter 11.

11 Comparative analysis of two commercial fisheries

11.1 Introduction and chapter outline

The previous chapter has provided the overall legal context for fisheries governance in a Canadian context comparative to Norway. This chapter compares two fisheries in the jurisdictions in more detail pursuant to the methodology and scope presented in chapter 2.3. This also means that the comparison makes a shift into more in-depth analysis of specific rules and trying to reveal how the regulatory system functions in practice. The identification of *legal formants* in the Canadian case is therefore central for revealing some of the key characteristics of the regulatory system from an outsider perspective. The input

[1597] Contraventions Act Evaluation, Final Report: https://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/10/ca-lc/p2.html

provided by the respondents plays an important role throughout the chapter. The legislative context introduced in chapter 10 is at the same time vital as it provides the general framework that applies to all commercial fisheries in Canada. Some of the observations in the previous chapters will therefore also be used actively throughout this chapter. Moreover, examples from jurisprudence or information not concerning the case study specifically by the respondents will be used when pointing to relevant similarities and differences between the two jurisdictions.

The chapter commences with a justification and description of the choice of cases in chapter 11.2, building on insights gained in chapter 10. Chapter 11.3 continues with an overview of the organizational structures, decision-making processes, appeal mechanisms and public attention in the fisheries. Chapter 11.4 moves over to the rules (rights and duties) that apply to fishing operations and landings, the dynamics of the regulatory year and the monitoring of the fisheries. The overall enforcement and use of sanctions and punishment is addressed lastly in chapter 11.5. The comparative inquiry is summarized in chapter 12 before moving over to the overall synthesis in part IV.

11.2 The choice of the cases

Canada is by far a larger and more diverse country, with vast geographical areas and oceans, than Norway. To simplify a comparison of rules for a specific fishery in action, I have chosen to use the Pacific fisheries as general context, with the directed commercial halibut fishery (Category L licence) as the case. I have chosen this fishery as it has been regarded as a fairly successful transformation of an open access fishery into a rights-based fishery, with the use of individual transferable quotas (ITQs) to improve economic performance and ensure a sustainable harvest.[1598] It is also a case in which there exists research from various disciplines and public attention. However, there are still challenges with respect to social performance that was recently addressed in the Canadian Parliament, see more in chapter 11.3.5. Historical context to the halibut fishery is given in chapter 10.4. Category L licences were established in 1979, transitioned into an individual quota fishery in 1991 and into an

[1598] See for example Casey et al. (1995); Munro et al. (2009)

individual transferable quota (ITQ) fishery in 1993. All the 435 licences that were established in 1979 are existing today.[1599] The number of active vessels, however, is much lower due to the nature of the ITQs and the use of leasing. In 2017 only 167 vessels were active.[1600] This is primarily a fishery using hook and line as gear.

The Norwegian case is the coastal fishery for northeast arctic cod with traditional gear types such as line, nets and Danish seine in coastal areas in northern Norway. By the end of 2018 there was a total of 1729 annual permits for all length groups in this fishery.[1601] Although there are far more licence holders and fishermen, more diverse gear types and it is a substantively larger fishery in quantities than the Pacific halibut fishery, it still can function as an illustrative case.[1602] As already mentioned, the vast set of rules that apply to all coastal fisheries in Norway would be highlighted regardless of which case is chosen. It is also a case that can contribute to the thesis's purposes of identifying key features of the regulatory system comparatively. As will be seen below, there is also, similar to the Pacific halibut fishery, public attention on this fishery, and various research conducted in different disciplines.

11.3 Organizational structures, decision-making processes and public attention

11.3.1 Basic institutional and organizational structure

At the outset it is important to address how the overarching institutional design impacts the function of the two fisheries. As outlined in chapter 10, the *Fisheries Act* sets up the framework in Canada, whereas many of the same functions are set out in three statutes in Norway. One observation to be made from chapters 3 and 10 is that key difference in the

[1599] DFO webpage on Pacific halibut: https://www.dfo-mpo.gc.ca/fisheries-peches/sustainable-durable/fisheries-peches/halibut-fletan-eng.html

[1600] DFO: Pacific Region Integrated Fisheries Managment Plan Groundfish (*IFMP 2019*) page 30. See more below on appendixes.

[1601] Statistics are found at: www.fiskeridiraktoratet.no. The actual number of vessels can be a bit lower as some of the vessels under 11 meters can make use of a collaborative arrangement for quota sharing.

[1602] The cod quota for the coastal vessels in 2019 was for example 161 245 tonnes of cod. Section 4 of the Cod Regulations 2019. In contrast the commercial quota of Pacific halibut was 2286,54 tonnes in 2019. *IFMP 2019* appendix 5 page 5.

overall legal framework is that much of the rules that apply to Canadian fisheries are set out in licence conditions, whereas the majority of rules are laid down in regulations in Norway.[1603] This means that the rules that apply from *fishery to fishery* can vary substantially in Canada, whereas there generally speaking are more cross-cutting rules laid down in regulations that apply to *all fisheries* in Norway.

As outlined in various places, the Minister and DFO represent the executive branch of the Canadian government that specifies and sets out the fisheries legislation in practice. The Minister and national headquarters sits in Ottawa, with various offices located throughout Canada in the different regions. The Pacific region is the relevant region to the case study, with the Regional Director General located in the regional headquarters in Vancouver. The role of the various officials within DFO, including regional staff, researchers and fishery officers is addressed when relevant throughout the case study. The organizational structure is therefore different than Norway as most of the roles and responsibilities are organized within DFO, whereas the Norwegian structure situates the Ministry as the administrative apparatus for the Minister at the top, with the Directorate and the Institute of Marine Research (IMR) as important subordinate agencies. The Directorate functions as main advisor and executing agency with regional offices that administrate and enforce the fisheries day-to-day in the field, whereas the IMR conducts the relevant marine research and stock assessment surveys. At the same time, both forms of organization represent a hierarchical structure with a Minister at the top and use of conferred authorities to subordinates.

11.3.2 Coastal state negotiations and initial quota allocation

Both cases represent a fishery on a shared stock with another coastal state. The Canadian TAC on Pacific halibut is managed in collaboration with USA through the IPHC framework, see chapter 10.4.3 for the legal historical context. The TAC on the cod is agreed in coastal state negotiations between Norway and Russia in the Joint Norwegian-Russian

[1603] As of the groundfish fisheries more specifically, the DFP respondent 5 expressed that: "But I would say that our conditions are probably, in terms of day-to-day management, our key management tool."

Fisheries Commission.[1604] These are central and complex processes that will not be emphasized here. The main point is that biomass estimates and harvest advice, formed on the background of surveys and research conducted annually in the context of IPHC and ICES (see chapter 4.3 on these processes in ICES), forms the basis for negotiations that results in an agreement of national TACs and other harvest and control rules.

The allocation of the national TAC in the Pacific halibut fishery has evolved historically into an established allocation key that gives the commercial group its share of the TAC. The allocation was for a long time 12 % to the recreational fishery and 88 % to the commercial fishery, but in 2012 the Minister decided to reallocate 3 % of the commercial share to the recreational fishery. As will be seen in chapter 11.7, this decision was challenged in the judicial system, but was dismissed.[1605] The share is therefore 15 % to the recreational fishery and 85 % to the commercial fisheries. For the cod fisheries in Norway, the main controversy is related to the allocation between the coastal and offshore fisheries. As seen in chapter 7.5, there have been established allocation keys between vessel groups that the industry has negotiated internally among vessel groups. It was, however, recently decided that the dynamic trawl ladder is to be replaced with a fixed allocation of 32 % to the offshore fleet, and 68 % to the coastal fleet (and offshore long-liners).[1606] The more specific allocations and regulatory processes are addressed in the following, starting with the decision-making for both fisheries in chapter 11.3.3.1 and the issuing of licences in chapter 11.3.3.2.

11.3.3 The regulatory process and stakeholder influence

11.3.3.1 Pacific Canada IFMP and regulatory meetings and hearings in Norway

The Pacific halibut fishery goes thorough an annual consultation phase to establish the domestic regulatory scheme when the Canadian TAC is agreed.[1607] Before going into this

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[1604] See more in chapter 7.

[1605] *Malcolm v. Canada,* see footnote 1547 above. The judgement also gives a historical overview of the allocation.

[1606] See more on these changes in Meld. St. 32 (2018–2019); Innst. S. 243 S (2019–2020).

[1607] As the fishery does not start until March, the TAC is not adopted by the IPHC until after the annual meeting in the beginning of the year. It must be emphasized that Canadian stakeholders also provide input and influence the IPHC processes as they not only determine the quotas, but also other rules.

process, it is important to point out that the Pacific halibut is managed as a part of an integrated groundfish management that is set out in the annual groundfish *Integrated Fisheries Management Plan (IFMP).* Put simply, halibut is managed with six other groundfish sectors (groundfish trawl, sablefish, inside rockfish, outside rockfish, lingcod and dogfish fisheries) and there is an interfleet/licences reallocation system. This means that quotas can be transferred across sectors under specified rules. If a vessel, for example, has a large by-catch of lingcod during a targeted halibut fishery, quotas of lingcod can be purchased to account for this by-catch.[1608] The IFMP sets out the various aspects of the management framework from year to year.[1609] It is, however, not a legal instrument, but rather a *reference document* or *guidance document.*[1610] Broadly speaking, the IFMP consists of a general part that is fairly stable and provides an overview of the fisheries, history, stock assessment snapshots, allocation and measures, and resource management goals. For the specific fisheries, however, it is the appendixes that set out the operational frameworks. For halibut specifically, however, the annual *Halibut Commercial Harvest Plan* and the *Commercial Hook* (Referred to as *IFMP 2019* appendix 6 in the following) and *Line/Trap Monitoring Requirements (At-Sea and Dockside), Mortality Rates, and Size Limits* (Referred to as *IFMP 2019* appendix 2 in the following) that are most relevant.[1611]

[1608] The use of the IFMP was introduced in 2006, see more in Davis (2008). The Norwegian cod regulations also include rules and quotas of haddock, saithe and by-catch of other species, but it is not a system that currently allows for transfers of quotas in the same way, and cross-sectorial, as the IFMP system does. As noted in chapter 8.3.3, however, a new system of quota exchange in Norway that might have more similarities to this system is currently under planning.

[1609] The overall plans are subject to review every two years after input from interested parties. The purpose, set out in the foreword of the *IFMP 2019* plan, is to "identify the main objectives and requirements for the Groundfish fishery in the Pacific Region, as well as the management measures that will be used to achieve these objectives."

[1610] DFO respondent 1 referred to it as a reference document. See also Stephenson et al. (2019). DFO respondent 5 said, "That's our document that supports, or at least describes, what all of our decision-making criteria are, the guidebook that we follow in terms of day-to-day management." In the foreword of the *IFMP 2019* it is stated that: "This IFMP is not a legally binding instrument which can form the basis of a legal challenge. The IFMP can be modified at any time and does not fetter the Minister's discretionary powers set out in the *Fisheries Act*, *Species at Risk Act*, and *Oceans Act*. The Minister can, for reasons of conservation or for any other valid reasons, modify any provision of the IFMP in accordance with the powers granted pursuant to the *Fisheries Act*, *Species at Risk Act*, and *Oceans Act*."

[1611] Chapter 11 will largely build on information provided in these documents.

The IFMP system has been developed through, and is an element of, annual stakeholder involvement.[1612] DFO has set out a broad advisory board structure to consult the different stakeholders in the Pacific groundfish fisheries. There is a hierarchy of the cross-sectorial bodies, down to the sector-specific boards. For the halibut fishery there is a Halibut Advisory Board (HAB) that provides a forum between the halibut industry and DFO.[1613] This is a board of elected industry representatives (licence holders), of appointed representatives, unions (labour), environmental NGOs, First Nations, recreational interest and participation from the IPHC and province of BC. At this board it is primarily the halibut specific issues (the harvest plan) that are addressed, and the board provides input to the IFMP processes.[1614] For input to the broader overarching policies, there is a Groundfish Integrated Advisory Board that is multi-sectorial from different fisheries. On the industry side there is also a commercial industry caucus (CIC) with three representatives from each sector specific board and processors that deals with cross-sectorial commercial issues.[1615] The CIC meet regularity and provide advice on changing quota limits or amounts of quota that can be relocated between sectors.

As seen in chapter 7.2.3 a Regulatory Council in a Norwegian fishery context that provided an arena for stakeholder consultations was first formalised in the 1970s. It has up through the years been extended to include other organizations, and with a broader representation of observers (including environmental NGOs and similar). This council was, however, from 2006 replaced with annual regulatory meetings (normally one meeting in June and one in November each year) as the appointment of representatives to the council could not fulfil a requirement of representation of both genders (at least 40 % of both genders) in any committee, board or similar appointed by a public agency.[1616] The meetings are hosted by

[1612] The following largely builds on information provided by the industry respondent.

[1613] Halibut Advisory Board terms of reference: https://www.pac.dfo-mpo.gc.ca/consultation/ground-fond/hab-ccf/tor-man-eng.html

[1614] According to the industry respondent they meet probably 4–5 times a year.

[1615] In addition to the HAB there is a sablefish advisory board, a groundfish trawl advisory board and a hook and line advisory board for rockfish, lingcod and dogfish fisheries.

[1616] Forskrift 20. mai 2005 nr. 441 om endring i forskrift om representasjon av begge kjønn i statlige utvalg, styrer, råd, delegasjoner m.v. – regler om håndheving og rapportering.

the Directorate and are open for relevant industry stakeholders, NGOs and other relevant organizations (not open to the public). Each meeting normally lasts two days and all commercial fisheries are addressed. Prior to the meeting the Directorate publishes summary reports from all the fisheries for the current and previous year, proposals for upcoming annual regulations and written statements provided by stakeholders, which mark the point of departure for the discussions.[1617] As the distribution issues largely are set out in the pre-determined allocation keys, rules more related to the conduct of the fishery and control and enforcement, and rules that more indirectly could affect the quotas in different vessel groups, are discussed at the meeting.[1618]

After the meeting, the Directorate and the Ministry adopts the annual regulations under its responsibility for the next year, in which the cod fisheries annual regulations are set out by the Ministry.[1619] The process thereby replaces examinations and ordinary hearing of regulations under the requirements in the Public Administration Act section 37.[1620] The Norwegian equivalent to the IFMP for Pacific halibut is therefore to some extent the prepared documents for the regulatory meeting, and the annual regulations adopted following the regulatory meeting (which would correspond to licence conditions in the Canadian case, see more below). As will be seen in more detail below, however, the IFMP also includes rules of conduct for the fishery that are set out in permanent regulations that apply to fisheries more broadly in the Norwegian context, for example the Rules of Conduct Regulations and Electronic Monitoring Regulations that are described further below. Rules in these regulations can also be discussed at the regulatory meetings, but they are also subject to change in ordinary hearing procedures for amendments of regulations.

[1617] See also chapter 3.5.

[1618] This can, for example, be the adoption of by-catch limits or quota bonus for delivery of fresh fish in parts of the year in the Cod Regulations.

[1619] This normally happens in December. There, are however, some regulations that are adopted later as the fishery might not start until later in the year. There can also be continued discussions between the authorities and stakeholders after the open meeting in a writing process that could result in amending regulations.

[1620] See chapters 3.3, 3.5.2 and 10.3 for further context.

11.3.3.2 The issuing of licences in a Pacific halibut and Norwegian context

Following input from the advisory boards the IFMP is adopted by the Regional Director General.[1621] The process of transforming the IFMP into licence conditions and issuing licences through a national online licencing system (NOLS) is also done at the regional level. More specifically, each licence holder must apply for a renewal of the licence prior the halibut fisheries every year through the NOLS.[1622] Category L licences are so-called vessel-based licences, which means that a licence is issued "in respect of a vessel." This means that the licence eligibility must be attached to a vessel. Vessels can be replaced permanently or temporarily under certain conditions, including length limitations. The applicant must furthermore meet the eligibility criteria, in which there is no nationality or activity requirement as there is in Norwegian commercial fisheries. This is also in contrast to the *owner operator* and *fleet separation* policies in the Atlantic Canada inshore fisheries.[1623] As in Norway, this is a policy designed to ensure that the value creation from the fishery resources return to the fishing communities by requiring that licences and quotas are held by independent fishermen, and prohibiting the processing sector or other corporate interest from owning or controlling fishing licences. A Pacific halibut commercial licence must be renewed, and the annual fee paid by February 20, or the licence will cease. Drafting of the condition of the licence is done at a management unit in the regional office at DFO, and then submitted to a regulatory group for ensuring that the conditions are "accurate, enforceable, going to achieve the outcomes that we are looking for."[1624] Lastly, the

[1621] According to DFO respondent 5, on question of whether the decision is made by the Regional Director General on behalf of the minister: "Correct, that's where we often get that signed off. Now, there's still obviously ministerial engagement, and there's other approval processes we go through internally to make certain that the minister supports the decision, but yeah, for implementation, allocation between the different sectors, commercial etc., that is largely driven by the region."

[1622] The following description is if not specified based on the Pacific Region Commercial Fisheries Licencing Policies as of March 2019 (*Licencing Policies 2019*), IFPM 2019 appendix 6 and information provided by DFO respondent 5.

[1623] The Atlantic Canada policies is set out in the Policy for Preserving the Independence of the Inshore Fleet in Canada's Atlantic Fisheries (PIICAF), se more on the specifics here:
http://www.dfo-mpo.gc.ca/reports-rapports/regs/piifcaf-policy-politique-pifpcca-eng.htm

[1624] DFO respondent 5.

conditions go to the licencing unit that does the final processing and uploads the licences in NOLS.

The licences are therefore processed at the regional level and decided on the regional level on behalf of the Minister.[1625] The halibut licence document is extensive with chapters addressing different aspects of the fishing operations, including a long list of sections under each chapter. It has many similarities to Norwegian regulations, and it is, according to the industry respondent that were interviewed in the field work of the thesis, fairly standardized for each sector. As of today, licence holders are not consulted individually, but through the aforementioned advisory processes.[1626] The Norwegian licencing practices are different, as the operational rules of the harvest is not connected to the licence conditions in the same way as in the halibut fishery. As described in chapter 3.6.3, a basic commercial permit and annual permit is necessary to participate in the fishery, but the issuing of licences happens independently of the annual regulations, and is more of the day-to-day dispositions of vessel owners and licence holders concerning replacement of vessels, transfer of licences and structural quotas and similar through standardized applications to the Directorate under the rules in the Commercial Permit Regulations chapter IV. Individual vessel quotas (IVQs) are, as seen in chapter 3.5.2, allocated to different vessel groups through the annual regulations pursuant to the Marine Resources Act. For the cod fishery, the IVQ of each vessel is at the same time determined by *the share* the relevant annual permit and structural quotas have of *the group quota*. This is a share that, as seen in chapters 3.6.3 and 7.4, is a result of the closing of the fishery in 1990 and the vessel length when the fishery was closed (which was a cut-off date).

[1625] If there were judicial review of that decision, however, it would be a review of a ministerial decision. This is an implication of the *Carltona principle* in common law. This is a principle that expresses that acts of a subordinate are synonymous with acts of the Minister in charge of that department. This was information provided by DFO respondent 2. If, however, legislation authorizes a Regional Director General to make a decision, this would be a decision under their own authority.

[1626] According to DFO respondent 5 the industry input in the IFMP process rarely goes into details of licence conditions and that "they actually don't care about the nitty gritty of the regulatory language, they talk more about the objective in kind of the IFMP language. And then it would be my team's responsibility to say 'Okay, you said x should be reflected in the IFMP.' How do we define that in regulatory speak in the condition of licence."

11.3.4 Appeal and review of administrative decisions and scope of executive discretion

When any form of licencing decision is made by DFO, there are different routes to challenge it, see chapter 10.3.4 for the general administrative law context. There is at the same time no administrative tribunal in which decisions can be challenged independently of DFO or the judicial system. An administrative mechanism to appeal licencing decisions made by DFO is at the same time found in the Pacific Region Licence Appeal Board (PRLAB), which was established in 1979.[1627] The mandate of the PRLAB is to be "at arm's length from DFO" and determine if appellants are "treated fairly with DFO licencing policies, practices and procedure" and if "extenuating circumstances exist for deviation" from these policies and practices and "provide full rationale with any recommendations" when exceptions have been made to policies and practices in recommendations in individual cases.[1628] The PRLAB furthermore makes written recommendations to the Minister, who makes the final decisions after the appeal process, which can involve a hearing.[1629] The PRLAB can additionally, upon request, provide advice to the Minister on changes to licencing practises and procedures.

The appellate mechanism in the PRLAB (and the AFLAB) differs to Norwegian system of appeals in several respects. It is not a statutory arrangement, with similar statutory procedural rights that apply to any individual decision under the Public Administration Act chapter VI in a Norwegian context. It is, on the other hand, indented to be at an "arm's length" from DFO, with appointed members outside DFO, which results in advice produced independent of the administration, which is not the case with appeals in the Norwegian system, which are processed within the hierarchy of the executive branch. It could perhaps be seen as a hybrid of the industry advisory board under the Participation Act 1972 and

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1627 Terms of reference Atlantic fisheries and Pacific Region licence appeal boards, last modified March 10, 2019 (*Appeal Board Terms of reference 2019*): https://www.pac.dfo-mpo.gc.ca/fm-gp/licence-permis/appeal-terms-eng.html
A similar board was established for the Atlantic fisheries in 1986 through the Atlantic Fisheries Licence Appeal Board (AFLAB) in 1986.

1628 *Appeal Board Terms of Reference 2019.*

1629 Se more on the process in *Appeal Board Terms of Reference 2019.*

Trawler Act 1951, see chapters 7.1s and 6.3.1, in its function at a general level, whereas it resonates with some of the appeal principles under Norwegian administrative law at an individual level. Ultimately, however, both arrangements in the two jurisdictions lead to decisions based on executive discretion.

DFO respondent 5 had experience with providing input to the PRLAB on consequences of changes to licence conditions, but this did not happen frequently. The industry and fisherman respondents were acquainted with the board, but had no experience with its practices. This also differs to the Norwegian case where there is widespread use of administrative appeals under the Public Administration Act. From case law, *Jada Fishing Co. Ltd. v. Canada (Minister of Fisheries and Oceans)* [1630] illustrates some of the role of the PRLAB. This was an application for judicial review of the allocation of IVQ to a vessel in groundfish fisheries in 1997 based on a combination of the vessel length and catch history between 1982–1987. Due to external circumstances, the appellate vessel had not been able to participate in the full qualification program and got a lower quota. The PRLAB had recommended to credit the vessel with two years, but the applicants asked for a quota based on the full five-year catch history. The case was dismissed in the Federal Court of Appeal as it was not found unreasonable or that the panel breached the requirements of procedural fairness. It also clarified that the PRLAB is "without statutory authority" and only makes recommendations that the Minister can accept or reject, and that it is the Minister's decision that is up for judicial review. [1631] In other words, the review is of the discretion of the Minister, whether the decisions builds on the PRLAB or not. On the Atlantic coast, there is more recent case law of the AFLAB practices, in which processing of requirements of owner-operator and fleet separation policies appear to give rise to a more frequent use of administrative appeals and applications for judicial review. [1632]

[1630] 2002 FCA 103 (CanLII) [*Jada Fishing Co. Ltd.*]

[1631] *Jada Fishing Co. Ltd.* para 12.

[1632] Two recent cases are *Elson v. Canada*, 2019 FCA 27 (CanLII); *Doucette v. Canada*, 2015 FC 734 (CanLII).

There is also other halibut fisheries relevant jurisprudence that sheds light on judicial review as a resort of appeal and on the scope of the executive discretion in a Canadian context.[1633] *Carpenter Fishing Corp.* was referred to more generally under chapter 10.3.4.2, as it addressed how the nature of a decision determines the procedural fairness awarded in specific cases. As to the substantive review under the case, socio-economic and employment considerations were found to be relevant considerations in the exercise of the ministerial discretion. A similar decision from the cod fisheries in Norway, although in the offshore vessel group, is Rt. 1993 s. 578, where employment and rural policies were found to be relevant considerations in reallocation of cod quotas between trawler groups. Had the considerations been found irrelevant, the Supreme Court of Norway may have found the decision invalid, similar to an unreasonable decision in a Canadian context.

Malcolm[1634] is a more recent landmark case in the halibut fisheries. A ministerial decision to reduce the TAC for the commercial fishery sector by 3 %, with a corresponding increase of 3 % to the recreational sector, without applying a market-based mechanism or another form of compensation to the commercial sector, was challenged by the industry. The Federal Court of Appeal found that the decision was reasonable, and that neither the *doctrine of legitimate expectations*[1635] or *promissory estoppel*[1636] applied to it. As seen in chapters 3.7 and 8.3.1, the scope of the regulating authority has also been addressed in Norwegian jurisprudence. These are complex questions that are difficult to reflect on comparatively at a general level, but brief observations can be made. The doctrine of promissory estoppel seems to have similarities to the issue of whether there can be grounds

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1633 See Caldwell (2011) for an overview of case law in a Canadian fisheries context more generally.

1634 See full citation above in footnote 1547.

1635 The doctrine of legitimate expectations in Canadian law is limited to procedural relief and is to be seen as an extension to the rules of natural justice and procedural fairness, see more in *Malcolm* para 47–50.

1636 See further elaborations below. The principles of promissory estoppel are well settled in Canadian private law. It was set out in *Maracle v. Travellers Indemnity Co. of Canada*, 1991 CanLII 58 (SCC), [1991] 2 SCR 50 page 57, which is rendered in *Mount Sinai Hospital Center v. Quebec*, 2001 SCC 41 (CanLII), [2001] 2 SCR 281 that "The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position … the promise must be unambiguous but could be inferred from circumstances."

for making promises that are binding for the future exercise of administrative authority in a Norwegian context, which is a question the Supreme Court of Norway finds difficult to answer generally, but for which it cannot find any decisive reasons not to allow under certain circumstances.[1637] This was discussed in relation to Rt. 2013 s. 1345, where the Supreme Court of Norway found that the factual circumstances in the case at hand constituted mutual assumption and coordinated action between the state and the private party that established a legal position that could be protected by Article 97 of the Norwegian Constitution. The majority of the Court, at the same time, emphasized that a prohibition on fishing was not interfering with any constitutionally protected right, neither would generally a change of relative shares of the individual actors.[1638]

In *Malcolm* the Federal Court of Appeal emphasised that the doctrine of promissory estoppel may be available against a public authority, but that its application is narrow.[1639] With reference to *Canada (Attorney General) v. Arsenault*[1640] the court underscored that the Minister is not bound by policy decisions of predecessors, so that although a Minister may compensate fishermen in cases of reallocation of TAC justified by public interest considerations from one fishery to another:

> the Minister may also determine that the public interest does not require such compensation mechanisms. It is therefore for the Minister to determine what weight, if any, is to be given in the public interest, to providing compensation in the form of market-based mechanisms or direct subsidies.[1641]

The case was therefore dismissed, and it was highlighted by the court that the Minister has a broad authority "to manage the fisheries in the public interests."[1642] To a question on how

[1637] See more on in Rt. 1992 s. 1235 page 1240.

[1638] Rt. 2013 s. 1345 para 70, with reference to Rt. 1961 s. 554.

[1639] *Malcolm* para 38. Reference in that regard is made to *Mount Sinai Hospital Center v. Quebec* para 47.

[1640] 2009 FCA 300 (CanLII).

[1641] *Malcolm* para 43.

[1642] *Malcolm* para 52.

the ministerial discretion is perceived by the industry, the industry respondent interviewed in the field work highlighted that it was important that decisions by the Minister were properly informed and evidence-based, and that they do not makes changes that affect the stability of the industry. The respondent highlighted that decisions made by the Minister on the Atlantic coast, for example reallocations of quotas between vessel groups, could also impact financial institutions' willingness to invest in the Pacific fisheries. The respondent generally was concerned with the importance of predictability and to secure access to the resources (certainty of their share of the TAC) for the economic actors.

11.3.5 Some recent public attention to the quota systems in both cases

Upon which considerations the executive should place the most weigh when making decisions with allocative impact is a topic for recurring controversy in a Canadian and Norwegian context. Both the Pacific halibut fishery and the Norwegian cod fishery (and fisheries more generally) are under a current, and more *principled attention* for a lack of a *social performance* of the fisheries law in action, that should be noted before the more operational rules of the fisheries are addressed in the next chapters. Some of the critique in the halibut context is that there has been a lack of transparency on ownership, that the number of owner-operators (independent fishermen) is low and with a decreasing share of the licences and quotas.[1643] There is research that indicates that many of the actual harvesters lease licences from licence holders, and it has been asserted that this leads to an inequitable distribution of the risks and benefits from the fishery as the lessee sits with all the operational costs (including the monitoring costs) and risks, but only a small portion of the revenue that goes to the lessor. This leasing of licences to harvesters is also referred to as "armchair fishing."[1644]

These were issues addressed in the Canadian Parliament in 2019, which came up with a set of recommendations that is under follow-up by the Minister and DFO. Some of the

[1643] See more on this in Report of the Standing Committee on Fisheries and Oceans: West Coast Fisheries: Sharing Risks and Benefits, 42nd Parliament, 1st session, May 2019 (Parliament Report 2019). Edwards and Pinkerton (2019); Edwards and Pinkerton (2020) address in more depth issues related to ownership, economic performance and investor issues.

[1644] See for example Soliman (2014b).

recommendations aim for limiting foreign ownership, increased transparency on ownership and quota transactions and establish an independent commission that will look into *inter alia* limiting the amounts of quotas or number of licences that can be owned by an individual or entity and prepare a concept that could transition the Pacific fisheries into an owner-operator model. As seen, this resonates with some of the principles that are elements of the legal frameworks in Norway and policies for inshore fisheries in Atlantic Canada. The industry respondent did at the same time highlight that the picture is more nuanced and that not all facts were presented to the Parliament. The respondent also pointed to the contextual differences between Pacific and Atlantic fisheries that makes the Atlantic fisheries policy not necessarily fit to the Pacific context. This is also why an independent commission is to consult with the industry to find a design for the Pacific fisheries.[1645] These are sentiments that also points to one of the main tenets of the thesis that legislative context must be accounted for when introducing a certain legal instrument, whether from international best-practice, a legal transplant from another jurisdiction or a model from theory.

This is a discussion with similarities to the recent critique by the Auditor General of Norway, see introduction in chapter 1.2. The Auditor General also pointed to an increasing share of foreign and non-fisherman ownership and to a reduction of fishery activities in many fishery dependent communities. There was also attention to the fact that the prices of licences have made it hard for younger fishermen to become licences holders. The Norwegian Parliament, similar to the Canadian Parliament, has addressed the issues and tasked the Ministry to follow-up the recommendations by the Auditor General.[1646] As seen in chapter 8.3.3, there is an ongoing revision of the Norwegian quota system. The recent critique by the Auditor General and follow-up must also be seen in relation to these processes. These are issues to be further reflected on in the synthesis in part IV. The case study will now continue with some of the practical insights on the fishery and monitoring

[1645] Recommendation 15 in Parliament Report 2019 page 4 and 43–44.

[1646] Innst. 80 S (2020–2021) page 14.

operations, with an emphasis on the role of independent third parties and the industry actors (including reporting duties) and enforcement and prosecution practices.

11.4 Harvest operations, monitoring of the activities and regulatory dynamics

11.4.1 The use of an independent third-party in monitoring activities

As seen in chapters 3.9.1 and 10.5.5, the regulatory framework in Norway and Canada opens up for the use of third-party observers as a part of the monitoring operations. The use of individual at-sea observers on vessels in Norway has been limited.[1647] In Canada, at-sea observers are used in many fisheries to fulfil monitoring requirements set out by DFO. Companies can also be designated to provide different types of monitoring services in Canadian fisheries, including electronic monitoring and data collection at sea, dockside controls and subsequent audit of the data. As will be further outlined in the following chapters, this is the chosen model in the Pacific halibut fishery and the company Archipelago Marine Research Ltd. (Archipelago) was (and still is) the service provider for all these elements at the time of the data collection of the thesis.[1648] There are general requirements related to the designation of service provider companies in the *Fisheries Act* sections 39.1(1) (a) – (c) and *Fishery (General) regulations* Part V. The *IFMP 2019* and licence conditions set out additional requirements for the groundfish fisheries more specifically. Fishery specific designs and implementation of control programs are furthermore guided by a *Strategic Framework for Fisheries Monitoring and Catch Reporting in the Pacific Fisheries* adopted by DFO in 2012. The industry must pay for all of the monitoring services by the third-party, but the industry respondent interviewed pointed out that there had been a long process to find the most cost-efficient ways of fulfilling the monitoring requirements after an initial co-funding by DFO. The respondent also sees this model as a delegation of the monitoring responsibilities to the industry as they can choose

[1647] It is only in use in the limited Norwegian fishery for blue fin tuna. See rules in forskrift 5. mars 2019 nr. 612 om regulering av fisket etter makrellstørje (Thunnus thynnus) in 2021. Norway has obligations adopted in the International Commission for the Conservation of Atlantic Tunas (ICCAT), including an observer requirement. Only certified ICCAT Fisheries Observers through the ICCAT Regional Observer Programme for Bluefin Tuna (ROP-BFT) can be used on vessels.

[1648] I will use the terms "service provider," "designated company" and" independent third-party" interchangeably when referring to the role of an independent third-party in the monitoring activities.

the independent third-party to work with (as long as it is a government certified service provider) and on the contractual arrangements, thereby representing a form of co-management. The respondent did at the same time believe that there could be a potential for increased industry involvement in the management. In Norway there is no tradition for the use of an independent third-party in the monitoring of harvest operations and the audit of data, but as seen in chapter 3.9.1, and elaborated below, the industry is involved in the monitoring of landings through the responsibilities of the sales organizations. The following chapters will go more specifically into the different phases of the fishery operations, the regulatory dynamics and the monitoring activities.

11.4.2 Opening of the fishery and dynamics during the regulatory year

The opening of the Pacific halibut fishery is regulated through regulations and a general closure time is set out in the *Pacific Fishery Regulation*s section 74(1) between October 31 and March 1. These are permanent regulations, but openings and closures can be amended by a Regional Director General through VOs authorized under section 6 of the *Fishery (General) Regulations.*[1649] In Norway the annual cod regulations sets out when the regulations enter into force. The Cod Regulation 2019 sets out in section 37 that the regulations are in force from January 1, 2019, until December 31, 2019. Vessels that fulfil the requirements in the Participation Regulations 2019 can therefore start up the fishery whenever they want to within this time period.[1650] The fishery might at the same time, however, not be open until December 31. Under the Cod Regulations 2019 section 34(1), the Directorate is authorized to stop a fishery when TACs or group quotas are calculated fished up. It can also reallocate quantities between vessel groups, or make other amendments to the regulations found necessary to promote a rational and expedient fishery. These are amendments of regulations that can come to effect instantly, and in that regard they are equivalent to VOs in the Canadian context. These are also amendments that are exempted from the requirements of advance notifications (and hearing procedures)

[1649] See more in chapter 10.5.4. According to DFO respondent 5, the VOs are "pretty straightforward. There isn't a lot of change from year to year. And we pick a date. March 30 instead of March 31, what have you. And maybe adjust the size limit a bit here and there."

[1650] Forskrift 13. desember 2018 nr. 1911 om adgang til å delta i kystfartøygruppens fiske og enkelte andre fiskerier for 2019 (Participation Regulations 2019)

under section 37 of the Public Administration Act as these requirements may "impair its [amendment of regulations] effectiveness" and can be seen as "obviously unnecessary."[1651]

A major difference between the jurisdictions at the outset of the fishery is that licence holders in the halibut fishery need to send in a *request for amending a licence* to actually be allocated quota of halibut and other species that can be targeted directly or non-directly before proceeding with harvesting. This is a key feature of the individual transferable quota (ITQ) system in the halibut fishery, as pounds of different fish species are more or less traded permanently throughout the years within a sector, or cross-sectorial. There is a licencing unit in Pacific region in DFO that does the quota accounting in close collaboration with a designated company that does independent monitoring of the fishery, see more descriptions below in chapter 11.5. Licences are therefore continuously amended from trip to trip, and from reallocation to reallocation, on the basis of requests for licence amendments throughout the year. Quota reallocations must, however, be done within caps that are in force at various times.[1652] A minimum quantity of 0,011494% of the commercial halibut TAC must be permanently held by a vessel. There is also a general maximum quantity of 1 % of the season's TAC that can be held by one vessel. As with the quota ceilings limiting the resource base in Norway, see chapter 8.1., there are therefore also limits to what each licence holder can be allocated of difference species which prevents larger concentrations of quota in one year in the halibut fishery.[1653]

As noted in chapter 3.5.2, the allocation of quotas in the Norwegian context is done through regulations. The regulations set out tables with different length groups, and the corresponding quota factor to this length, and each licence holder can calculate what

[1651] Public Administration Act section 37(3).

[1652] See more on caps for 2019 in *IFMP 2019* appendix 6 chapter 6.

[1653] But for both Norway and the Canadian case there are no restrictions on how many vessels (and licences) a person can own. As seen in chapter 11.3.5, there has been recent scrutiny on ownership concentration in the Norwegian and the Canadian Parliament. There is at the time of the thesis submission a proposal to restrict ownership in coastal fisheries for consideration in the Directorate, following a hearing proposal in Fiskeridirektoratet: Høringsbrev 16. juli 2021 med forslag om innføring av eierkonsentrasjonsregler i kystfiskeflåten (Ownership Hearing 2021).

quantity they are entitled to of cod, saithe and haddock under the annual regulations, but it is also possible to enter the name of a specific in the public Vessel registry online and find the quota factor and structural quotas to a specific vessel, in addition to the allocated quota for the current year and quantities fished at the time for the search.[1654] As seen above, the Directorate can amend regulations when a group quota is calculated fished up. If a vessel has quantities left in its individual vessel quota (IVQ), it can, however, continue its fishery until the quota is reached, and sometimes they can be reallocated more quota later in the year.[1655] It is fishing under other, and more flexible instruments, that can be stopped.[1656] In addition to changes in regulations, transfers of licences and structural quotas and similar dispositions over the regulatory year will impact the resource base of a specific vessel. There is at the same time a general rule that only one quota (IVQ) can be fished by the same vessel within one regulatory year.[1657] To sum up, both fisheries are dynamic and under a state of flux during the regulatory year, but the halibut fishery is the most dynamic. The introduction of a quota exchange system, see chapter 8.3.3, will increase the dynamics of the Norwegian fishery, but the final design of this instruments has not been established yet.

11.4.3 Hail-out and beginning of fishing

For the rules applying to the Pacific halibut fishery in the following, I refer to the conditions set out in Part 1 of a random Category L Licence for 2019/2020 (*Licence Conditions 2019*), unless otherwise specified. Section 7 of this licence sets out the requirement for the hail-out. In contrast to Norway, the notification of hail-out is not to DFO, but to Archipelago as the

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1654 All information on all commercial vessels is publicly accessible in a Vessel Registry online. You can search by vessel name, or get a listing of all vessels in a specific municipality. The database provides owner information, which licences are issued to the vessel, physical vessel information, quotas allocated for the current year and the last registered catches for the current year. See more here:
https://www.fiskeridir.no/Yrkesfiske/Registre-og-skjema/Fartoeyregisteret/fartoyregisteret

1655 As there are frequently amendments in annual regulations due to the developments in the fisheries, the number of regulations in a regulatory year can be numerous. A good database to search for all types of amendments of regulations is:
www.fiskeridir.no/Yrkesfiske/Regelverk-og-reguleringer/J-meldinger

1656 These are complex rules at a very technical and detailed level that I will not elaborate in detail. They can involve rules of by-catches, extra quotas for fishing fresh cod late in a season, flexibility to fish over the assigned quota as there might be vessels that do not fully exploit quotas and more.

1657 See for example Cod Regulations 2019 section 27.

designated third-party responsible for the monitoring at sea, during landing and in the subsequent audit of the collected data. The vessel master must make the hail-out report and obtain a hail-out number by Archipelago not less than 24 hours before leaving the port.[1658] An important element in the information reported by the vessel master is the Quota Status Verification Number (QSVN). This is a number produced after each offload of harvest, and subsequent audit by Archipelago. This is outlined in more detail below. The main point is that the vessel has a quota to fish, and no negative audit score from the previous fishing trip, so that the hail-out number can be issued by Archipelago. If no hail-out number is issued, the vessel cannot leave the port. It is therefore the independent third-party that in practice authorizes vessels to leave the port.

There are also formal requirements before a coastal vessel can leave the port and start fishing for cod in the Norwegian case. Vessels under 15 meter currently have simplified requirements, but all vessels are to be included in the same electronic monitoring and reporting regime by July 1, 2023.[1659] I will therefore only highlight the current duties for vessels above 15 meters with rules set out in the Electronic Monitoring Regulations. Prior to hail-out every vessel over 15 meters must submit an *electronic report* of hail-out (referred to as DEP), pursuant to procedures in the regulations, no later than two hours after leaving the harbour, but before the fishery starts.[1660] Furthermore, the vessel must send electronic reports on catches (referred to as DCA) after the DEP is sent, and at least once a day, under the specified procedures in the regulations.[1661] DCA can also be required on demand of the Directorate or Coastal Guard, or during inspections.[1662] All vessels must be equipped with *tracking devices* pursuant to the Monitoring Device Regulations.[1663] The general rule is that vessels over 15 meters must every hour, pursuant to procedures set out in the regulations,

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1658 *Licence conditions 2019* section 7(1).

1659 See more in forskrift 13. januar 2021 nr. 118 om endring i forskrift om posisjonsrapportering og elektronisk rapportering for norske fiske- og fangstfartøy; forskrift 9. september 2021 nr. 2729 om endring i forskrift om posisjonsrapportering og elektronisk rapportering for norske fiske- og fangstfartøy.

1660 Electronic Monitoring Regulations section 11.

1661 Electronic Monitoring Regulations section 12(1).

1662 Electronic Monitoring Regulations sections 12(1)(a) and (b).

1663 Electronic Monitoring Regulations sections 3 and 7.

submit information on the position of the vessel to the Directorate.[1664] If there are any technical problems during any of the electronic reporting pursuant to the regulations, the vessel must register positions manually and e-mail and fax it to the Directorate.[1665] When technical problems occur, the vessel cannot start fishing until the problem is fixed, or by dispensation from the Directorate.[1666]

11.4.4 At-sea monitoring and harvest operations

In Norway, there are no other rules that apply during the actual fishing operations apart from the DCA and position reporting requirements. In the Pacific halibut fishery there is however, at-sea monitoring either through a designated groundfish observer on board, or the use of an approved electronic monitoring system (EM system) onboard the vessel. I will only describe the latter as this is the chosen method in the halibut fishery as it is most cost-effective.[1667] The technical requirements are set out in section 10(1) of the *Licence Conditions 2019*, whereas the video requirements in are 10(2). One central video requirement is that image files "shall capture 100 percent of each catch retrieval event, including a 30 minute run-on after each event." This means that all elements of the harvest operations are video-monitored. Additionally, there is GPS sensor data logged every 10 seconds continuously throughout the fish trip.[1668] The vessel master has furthermore a duty to "ensure that all components of the EM system are fully operational and in use during the entire fishing trip from the time the vessel leaves port until the vessel arrives at port to commence the validation of their catch." In cases of technical problems, the vessel master must immediately contact Archipelago and it must be determined if the EM can be repaired at sea.[1669] If it cannot be repaired at sea, the fishing activities must stop, and the boat must hail-in to port to solve the issue.[1670]

[1664] Electronic Monitoring Regulations sections 7 and 8(1)(a).

[1665] Electronic Monitoring Regulations section 20.

[1666] Electronic Monitoring Regulations section 21.

[1667] Information provided implicitly by industry respondent and the monitoring company respondent.

[1668] *Licence Conditions 2019* section 10(1)(g).

[1669] *Licence Conditions 2019* section 10(4).

[1670] *Licence Conditions 2019* section 10(4).

In relation to the actual fishing operations there are rules that regulate the conduct of the fishery set out in regulations in Norway, and in regulations, VOs or licence conditions in Canada. I will not go any further into any of details on these apart from the actual practicing of discard regulations, see more on these duties in chapter 10.5.4. As mentioned, all fishing activities must be electronically monitored in the halibut fishery. All vessels have two cameras installed to capture the events. When gear is hauled in and the fish is taken over the vessel rail, *every individual halibut* must be measured in front of a measurement grid, so that the camera captures every single measurement. Figure 14 shows the recommended measurement grid that shows the sizes from *IFMP 2019*.[1671] So, if the length is less than the red, the fish is under the minimum size and must be released back to the sea pursuant to section 34 of the *Fisheries Act*.

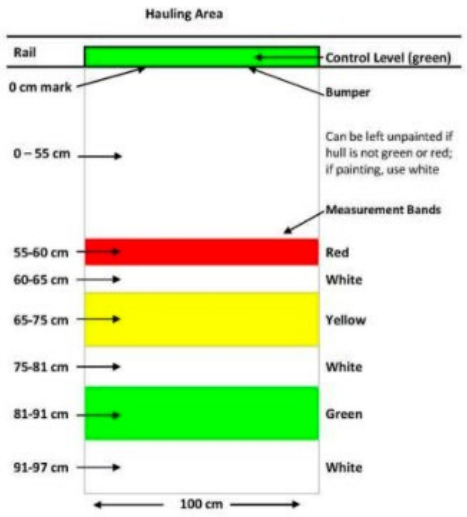

Figure 14 Recommended measurement grid with sizes

Interestingly, vessels can also discard legal/marketable sized fish at-sea, but will then have a deduction of their quotas on the basis of established mortality rates and average weights set out in the IFMP. For halibut the mortality rate is currently 16 % and the average weight is set at 21 pounds, which then would give a deduction of 3,4 pounds of the quota for every

[1671] A copy of the grid found in the *IFMP 2019* appendix 2.

halibut released back at sea (0,16*21 lb. = 3,4 lb.).[1672] No rockfish can, however, be released back to sea.[1673] This is a practice that must be seen in relation to the general prohibition on wasting or dumping legally caught fish in *Fishery (General) Regulations* section 34, and it contrasts the Norwegian general duty to land all catches, see above in chapter 10.5.4. I have, however, not been able to detect where this is legally set out in the licence conditions, but I have only studied a licence where the quotas are not yet reflected. As explained above, the licence is constantly amended throughout a season when quotas of species are added to it.

Similar to the DCA in Norway, the halibut vessel master also has a duty to register all catches on daily basis in an Integrated Groundfish Fishing Log.[1674] In contrast to Norway with mandatory electronic reporting, the responsible party can choose between electronic and manual reporting in a paper journal.[1675] Both in Canadian and Norwegian cases, fishery activities are subject to general enforcement activities by the authorities in the monitoring platforms at sea, with the fishery officers either on vessels or airplanes in the Canadian context, or the Directorate in monitoring vessels or the Coast Guard on vessels or planes in the Norwegian context. In both jurisdictions, *risk-based approaches* are prevailing enforcement strategies.[1676] See more below in chapter 11.6 on the enforcement practices of the authorities in action.

11.4.5 Hail-in and landing

For hail-in and landings there are also reporting duties both in the halibut fishery and the cod fishery. In the Pacific halibut fisheries, a hail-in report must be submitted to the groundfish hail service provider no less than 24 hours before landing.[1677] The time requirement is therefore not as strict as in Norwegian legislation with the two-hour limit,[1678]

[1672] Other species have different mortality rates. See *IFMP 2019* Appendix 6 point 8 on mortality rates.

[1673] *Licence Conditions 2019* section 5.

[1674] More specifications are set out in *Licence conditions 2019* section 16.

[1675] *Licence Conditions 2019* section 16(2).

[1676] See more in DFO: Fishery Monitoring Policy, last modified 2019 in a Canadian context and Fiskeridirektoratet: Nasjonal strategisk risikovurdering (NSRV) 2021 in a Norwegian context.

[1677] *Licence Conditions 2019* section 11(1).

[1678] Electronic Monitoring Regulations section 13(1).

but there are additional rules of *where* to land, and a last time for retention of fish, with no general equivalent in the Norwegian case.[1679] The monitoring of the landing process is much more extensive in the halibut fishery than the cod fishery in Norway, with a 100 % control of all catches. No landing can therefore take place unless there is a *designated groundfish dockside observer* present to authorize the commencement of weight verification.[1680] The weight of all fish must be verified by the dockside observer from Archipelago.[1681] In other words, every single fish from a landing is controlled by the independent third-party. Upon validation, the vessel master is responsible for tagging all caught halibut.[1682] The methods for which weights are to be determined is set out in *Licence conditions 2019* section 15 of the licence conditions, including a list of the conversion factors to be used. Finally, the vessel master has a duty to either submit the completed integrated groundfish fishing log in paper to the dockside observer or by mail to Archipelago within seven days, whereas copies of the completed electronic log are to be sent to Archipelago and the IPHC within seven days of each landing.[1683] The licence holder needs to keep a copy of either the paper log or the electronic log for a minimum period of two years.[1684]

In Norway the vessel must, regardless of whether there is a catch to land, send a notice (referred to as POR) no later than two hours before arriving at the port.[1685] There is an opening to cancel hail-in reports (and hail-out) by sending a new message with a cancellation code, and to correct catch information in the DCA until 12 noon the day after first submitted or prior to hail-in report if the message is acknowledged by the Directorate.[1686] If there are set out no regulations of where catches are to be delivered (see

[1679] See more in section 12 of the *Licence conditions 2019*

[1680] *Licence Conditions 2019* section 13(1).

[1681] *Licence Conditions 2019* section 13(2).

[1682] *Licence Conditions 2019* section 14.

[1683] *Licence Conditions 2019* sections 16(2)(g) and (i).

[1684] *Licence Conditions 2019* sections 16(2)(h) and (j).

[1685] Electronic Monitoring Regulations section 13.

[1686] Electronic Monitoring Regulations sections 28(1) – (2).

chapter 3.8.4), the vessel can sell and deliver its catch at any landing facilities which are registered buyers pursuant to the Fish Buyer Regulations.[1687]

The landing duties are set out in the Landing Regulations, and the responsibilities are in this phase shared between the harvester, receiver and buyer of the catch. First and foremost, there is a general duty to weigh all fish upon landing pursuant to sections 5 and 6 of the Lading Regulations, but with an opportunity for delayed weighing for vessels under 11 meters landing at a site without a registered buyer.[1688] Subsequently, there is a requirement to fill out a *landing note*[1689] when there is no simultaneous sale of a catch upon landing, or a *sales note*[1690] when there is a simultaneous sale, which are prepared by the sales organizations and approved by the Directorate.[1691] For both notes there must be specified information on the one who lands,[1692] the receiver of the catch[1693] and on the catch,[1694] whereas sales notes require additional information on the seller/buyer and the sales.[1695] The general rule is that the documents are signed by the one who lands (the seller) and the receiver/buyer, and notes are signed electronically.[1696] In cases of sales after the landing, a sales note must be produced with reference to the landing note under more specific procedures.[1697]

Both landing and sales notes must immediately after signing be submitted to the relevant fish sales organization under sections 14 and 15 of the Landing Regulations. All fish landed must be kept separately from landings by other vessels until weighing and necessary

[1687] Forskrift 26. november 2010 nr. 1475 om registrering som kjøper av fangst (Fish Buyer Regulations).

[1688] Landing Regulations section 5a.

[1689] In Norwegian this is referred to as "landingsseddel."

[1690] In Norwegian this is referred to as "sluttseddel"

[1691] Landing Regulations sections 7, 8(1) and (2).

[1692] Landing Regulations section 9.

[1693] Landing Regulations sections 10 and 13.

[1694] Landing Regulations section 11.

[1695] Landing Regulations section 13.

[1696] Landing Regulations sections 8(1) and (2) and section 8a.

[1697] Landing Regulations section 8(5).

reporting is done,[1698] and it must be marked by the vessel name until production has started or it is transported away from the facilities.[1699] The one who lands, the receiver and the buyer are all responsible for the information provided in the notes and reports being correct.[1700] The receiver also has a duty to record every catch of fish at the landing facilities, or external storage areas in a journal that must be kept at the facilities for at least five years.[1701] All reporting of quantities of catches must be registered in *round weight*[1702] according to established conversion factors depending on how fish is handled (is it e.g. delivered gutted and head-off).[1703] The next step now is the processing of the submitted data in the different phases by the independent third-party in the Canadian case and the sales organisation in the Norwegian context. These issues are addressed in respectively the following chapters 11.4.6.1 and 11.4.6.2.

11.4.6 Subsequent quota audits by third-party, industry or authorities

11.4.6.1 Third-party audit in Pacific halibut fisheries

Following *every halibut trip*, the EM data is removed from the EM system by Archipelago and there is an audit of the different collected data.[1704] Table 6 summarizes the three separate audits.

[1698] Landing Regulations section 17(1).

[1699] Landing Regulations section 17(2).

[1700] Landing Regulations section 18(1).

[1701] Landing Regulations sections 16 and 19.

[1702] Round weight is an unprocessed fish, i.e. fish in its natural condition. Allocated quotas are given in round weight, so it is important for the quota accounting that the catches represent what is harvested in round weight.

[1703] More specific rules are set out in forskrift 20. mai 2009 nr. 534 om omregningsfaktorer fra produktvekt til rund vekt (Conversion Factor Regulations). The conversion factor for gutted and head-off cod is currently 1,5. So, if 100 kg g gutted and head off cod is weighed and registered on the landing note, the round weight to be deducted from the quota is 150 kg. See more in the Conversion Factor Regulations sections 1 and 2.

[1704] The following largely builds on the information of *IFMP 2019* appendix 2 and information provided by the monitoring company respondent.

Table 6 Audits by independent third-party

Audit 1	Audit 2	Audit 3
Comparison of fish counted on the dock side monitoring to the logbook submitted by the vessel master	Comparison of 10 % of the EM video randomly selected for video review to the logbook submitted by the vessel master	Comparison of EM sensor data (GPS) on start location, time, date and total number of fishing events compared to accuracy of logbook of the corresponding information

After these audits a *triangulation* of all results is conducted to produce a *trip score* ranging from 0 (poor), to 10 (good).[1705] The trip scores are considered cumulatively in determining a vessel's *annual score*. Mean score for the preceding 12 months is therefore also combined with the trip score to determine whether the result is acceptable. Audits that are not within acceptable range fall into three different categories. Category 1 results in a warning, category 2 is a financial penalty in the form of additional audits (some cases involves up to 100 % review of all EM video images) and category 3, which is a failure of the audit. Failures are submitted to DFO for follow-up. If any setting of gear is missed in the sensor data, the audit is also sent for review to DFO. All vessels are sent a copy of the audit, but are not, as far as my investigations goes, involved in the audit process.

After the subsequent audit, Archipelago will reconcile all catch information and analysis and produce a Quota Status Report (QSR). This is therefore the quota accounting following the trip that could take 5–7 days to complete. This is forwarded to the vessel master as soon as possible. This will give the master an indication of what's left of the halibut quota (and other species), and if the is a need to buy more quotas to go on a new trip. In order for a vessel to go out on a new fishing trip, Archipelago must provide the above-mentioned *hail-out number* and a Quota Status Verification Number (QSVN). A hail-out number will *not*

[1705] These procedures are described in chapter 12 of the *IFMP 2019* annex 2.

be issued if a vessel has failed the audit (category 3), has not paid Archipelago for their services and has a quota overage (or no quota left).[1706] In other words, the vessel cannot go out fishing until these issues are resolved. By this, we see that an independent third-party plays a key role in enforcement system of the halibut and Pacific groundfish fishes. As to the role, DFO representative 4 at the same time expressed that "it's not an enforcement service" and that "they're just the eyes" and a "reliable witness" with a "role to flag things."

When speaking generally of the responsibilities of the service providers the monitoring company respondent expressed that the shift over to using independent third-party data collection:

> got the agency [DFO] out of the hot seat where it wasn't in the business of trying to collect the data. I've always thought that the agency is in a better position to talk about the meaning of data when they're not involved in actually trying to deliver it. Because very often the debate about the meaning of the data gets lost in frustrations over the quality service, so it's kind of removed .

The respondent by this points to more general issues of internal legitimacy and implicit indicate that independent involvement in the monitoring can be a way to increase this legitimacy. To a question on the element of discretion in the video review the respondent replied:

[1706] DFO respondent 5 explained that any *overages* of quota at the end of the season will show up as a negative on the licence the next year. If it is a significant negative, the vessel cannot start fishing. The negative will be deducted from the amount of quota purchased or issued in the licence the following year. Similarly, *underages* can be carried over to the following year within certain limits. The respondent explained that to carry over some quantities was a normal practice that provides a bit of buffer and stability to the harvesters.

> [W]e've tried to eliminate the discretion as much as possible. So there are set thresholds for how close the numbers need to agree and those sort of things. So that when you're trying to turn it into an operational system where you have, you know, over the course you might have 20–30 people doing audit on different data sets and stuff like that. You're trying to make it as standard as possible.

The respondent also reflected on potential grey areas in the viewing:

> I would say that the kind of grey element of it comes in where, ehmm. These are vessels that weren't designed initially for EM purpose systems right. Everything we do is opportunistic based on the design and the layout of the vessel and stuff like that. So it's possible that you have viewing situations that are not 100 % ideal, and the viewers are making the best out of what they can … But if the viewer can't identify the species properly, you know, then the audit system breaks down, so.[1707]

The respondent therefore saw a weakness by implementing the technology on vessels that are not originally designed for it, indicating pragmatism in the reviewing and that the system depends on trustworthy data in order to function.

On the more formal aspects of the data processing, the industry and monitoring companies negotiate on the terms and conditions that are not regulated by the authorities. The monitoring company respondent informed that it is the halibut association that negotiates on behalf of the industry. The collected data are retained on servers of the monitoring company, but are owned by the respective vessel owner. DFO can at any time, upon request, access the data. The monitoring company must demonstrate that they have security systems and data management that preserve the integrity, accuracy and confidentiality of the EM data. The *IFMP 2019* appendix 2 refers to section 20(1)(b) of the *Access to Information Act* that prevents DFO from disclosing to a third-party records containing financial,

[1707] DFO respondent 1 expressed the following to a question on the role and consequences of video monitoring more generally "[V]ideo monitoring is not a perfect solution. It depends on the types of data needs you have, cause you know, a human being is looking everywhere, a video camera is only looking in one spot, so."

commercial, scientific or technical information that is confidential information. Moreover, section 20(1)(c) prevents DFO from giving out information that could reasonably be expected to prejudice the competitive position of the licence holder. Video and sensor data must be retained by the service provider responsible for the audit for at least 14 days after the data has been reviewed, and until a quota status report has been issued after an acceptable audit (no failure).[1708] In cases of failure the period is 30 days, or until DFO has provided a written indication that these data can be destroyed. A 7-day notice to DFO must be sent before the 30-day period is up to allow DFO the opportunity to request the data, or to provide permission to destroy the data.

11.4.6.2 The Norwegian audit of catches through sales organizations and administrative confiscation

In the Norwegian context the industry plays a more direct role in the monitoring of the fisheries through the role of the sales organizations in the landing operations. The procedures for landings are introduced above in chapter 11.4.5 and the general powers of the sales organizations in relation to sales and enforcement in chapters 3.8 and 3.9.1. Norges Råfisklag is the main organization for the cod fisheries and used in the following to exemplify some of the control practices. As with the independent monitoring company in the halibut case there is authorization for physical inspections of landings by the sales organizations.[1709] These are, however, only made to a small amount of the landings and not as detailed as the versatile operations of the monitoring company in the Canadian case that weighs every fish. At the same time, the two arrangements resemble in the sense that private actors are the "eyes" of the authorities in the enforcement system, but more directly by the industry itself in the Norwegian model. In 2018 Norges Råfisklag carried out 643 physical controls, in a year where the total amount of landings under its authority was 157 375.[1710]

[1708] See more on this in *IFMP 2019* appendix 2 page 9.

[1709] The main authorization is laid down in Marine Resources Act section 48.

[1710] Fiskeridirektoratet: Fiskeridirektoratets oppfølging av salgslagenes kontrollarbeid - tilsynsrapport 2019 (Fish Sales Organization Audit 2019) page 39 and 44.

The main control activities of the sales organizations are the *quota accounting* and *administrative confiscation* of excess harvest. These two mechanisms differ from the halibut case in three respects. First of all, there is no similar triangulation of the different types of data as in the Canadian case. The collection of harvest and sales data by the sales organization in the cod fishery is only generated through the landing and sales notes, which are all digitalized in the procedures established in Norges Råfisklag. The data is subsequently transferred to the Directorate for technical control, but there is no verification or linkage to the data collected through the electronic monitoring and reporting under the Electronic Monitoring Regulations, see above in chapter 11.4.4.[1711] The lack of analysis and processing of data, and the large degree of manual and non-verifiable documentation of the resource outtake (and different practices in the sales organizations) is pointed out by the policy advisory commission in NOU 2019:2, but there are also ongoing improvements in the form of the establishment of a unified system (SAGA) to gather and present data to different agencies that needs further development.[1712]

Second, the use of administrative confiscation is the way overfishing of quotas is pursued in the cod fishery, whereas vessels are not allowed to go fishing until they have resolved the issue by purchasing more quotas in the market in the halibut case. Third, the sales organization can issue a reaction in the form of confiscation decisions, whereas the independent monitoring company in Canada does not issue the *hail-out number* and a QSVN until overfishing issues are resolved. Norges Råfisklag is responsible for the sales of cod in the north and provides a safety net for the harvesters (sellers) by providing them the payment of the sales within 14 days (guaranteed payment), and it also collects, or claims, the payment from the buyer. This practice allows Norges Råfisklag to deduct confiscated harvests directly from the payment to the harvesters.[1713] The sales organizations are also authorized to deduct values of a previous forfeiture decisions on later payments to the same harvester.[1714] There is no use of formal advance notification of the confiscation decision

[1711] NOU 2019: 21 page 110.

[1712] NOU 2019: 21 page 110.

[1713] Fish Sales Organization Audit 2019 page 40.

[1714] Marine Resources Act section 54(3). See also more in chapter 3.10.3.

pursuant to the Public Administration Act section 37(2), but there is a quota accounting program that calculates remaining quotas once every 24 hours and a vessel is notified through e-mail/sms when there is less than 10 % left of the quota.[1715] Upon every landing forfeiture is calculated, but formal decisions are submitted to the addressees on a weekly basis.[1716] Decisions can be appealed as any other individual decisions under the Public Administration Act, and the Directorate is the appellate instance. The public responsibilities of the industry in the enforcement system of the Norwegian case therefore become clear in these practices. The next chapter goes further into the overall enforcement and prosecution of cases in practice, starting with the Canadian case in chapter 11.5.1, before moving over to reflections on the Norwegian case in chapter 11.5.2.

11.5 Overall enforcement, sanctions and punishment in practice

11.5.1 Enforcement system in practice in the Canadian case

11.5.1.1 Overall enforcement practices and the role of the fishery officers

As to the overall enforcement system and how cases are pursued when violations are revealed, the general rules and mechanisms introduced in chapter 10.5.6 apply to the halibut fishery. This sub-chapter addresses some of the overall enforcement practices and role of the fishery officers, while chapter 11.5.1.2 provides some examples of prosecution of cases in practice. The fishery officers, regardless of the use of third parties in the Canadian case, still play a crucial role in the overall system and conduct additional inspections on fishing grounds, through patrol vessels, airplanes and lastly by use of drones. Furthermore, fishery officers assess offences and decide whether to pursue charges and file the case to the Crown prosecutor for a final decision on whether to proceed with prosecution. The industry and fisherman respondents were both of the opinion that the halibut fishery, and fisheries generally, were well managed and monitored in the enforcement system. The regulation of the Pacific halibut fisheries were by DFO respondent 3 seen as the "gold standard" of well monitored fisheries in Canada. On activities of the fishery officers, the fisherman pointed out that there are fewer onboard inspections now:

[1715] Fish Sales Organization Audit 2019 page 40 and 46.

[1716] Fish Sales Organization Audit 2019 page 46.

> Because I think that part is covered up in town and with your cameras. You can't cook the books anymore, like the old paper logs, you could put down whatever you wanted, but not any more because the cameras got the same information you put in the logbook, and they review that.

This quote highlights how the approach in the case resembles approaches that in theory are referred to as situational crime prevention and compliance by design, in which the opportunities for the actors to violate the rules have been limited. Both the industry and fisherman respondents saw monitoring as an important element of the enforcement system, and that the industry generally did not have a problem with it, although there had been resistance to it in the beginning. The industry respondent expressed that the industry representatives involved in designing the system:

> had to spend a lot of time explaining why we're doing this, but they showed leadership and they were able to arrive at something that allows the fishery to keep operation, but still meeting these conservation and ecological objectives.

The industry respondent also expressed that it was important that the industry was given the opportunity to develop the monitoring system in collaboration with service providers, to design a system that would work for the industry, and be cost effective, but still meet the government requirements and rules:

> Commercial fishermen, they're among the smartest people you've ever gonna meet. They're brilliant at solving problems, so if you get them in a room, then you say this is what we're trying to do, they can come up with a solution … So yeah, DFO has been very good, they've said look, you have to meet these rules and we know you can meet these rules by having an at sea observer onboard, but if you come up with something else that meets these rules, meets the requirements, then that's fine.

Both of the above quotes point to the importance of stakeholder involvement and collaboration between industry and the authorities to find solutions that are found legitimate and can work in practice. Even though the transformation of the enforcement system has led to people leaving the industry because of the costs or difficulties to operate under the rules, the industry respondent was of the option that people didn't want to go back to the former system:

> Because by having this data, it's hard, if somebody tries to criticize the fisheries, it won't hang on now, we got 100 % monitoring of the fisheries, we know exactly what's being caught and what's being released and all the releases, the mortality associated with it, estimated mortality, is being included within the TAC. So it makes the fisheries more defensible, it makes it more transparent and open.

This quote points to issues of external legitimacy and how the system can contribute to increased trust from the public that the activities are carried out responsibly. The fisherman was of the opinion that the costs should be paid in a different way, because they were high and increasing every year, but he saw the transformation into these monitoring regimes as necessary and what basically had saved the fishery business on the Pacific coast from extinction. DFO respondents 2 and 3 also pointed to the increased economic burden to the

industry and the decreased number of licence holders. The industry respondent expressed that increased costs inevitably led to consolidation of the industry. Another aspect of the system is that it generates a lot of data collection and is technical. DFO respondent 5 referred to this:

> A challenge here is there is so much information, it is often overwhelming. So, if enforcement officers are not familiar with our program, the tool is overwhelming for them. So, something that in one hand is deemed the most important tool, can also seem like a bit of a barrier for some, because how do you deal with this volume of data. Let alone explain it to a judge.

The issue of increased use of digitalization and extensive data collection marks a shift in fisheries governance approaches that has been little explored from a legal point of view. This point made by the DFO respondent is therefore important to note for the final reflections on the regulatory system in part IV.

On the topics of the actual exercise of powers of the fishery, officers the fisherman had limited direct experience, but had heard things through his industry network. For offences he saw as quite minor, for example catching a halibut unintentionally in a salmon fishery and keeping it for dinner as an example, he expressed:

> He better have a receipt to show where he bought that, because he could be charged, you know. So most fisheries officers, unless they're really wanting to show their authority, probably give you a lecture on it and that sort of thing, it's a hell of a lot better than a big fine and off to court and that sort of thing. So, you do hear some of that rumbling and it's understandable … some fishery officers could deal with some of those issues a little differently than the stories I've heard, that's all.

The fisherman therefore called for flexibility from officers when dealing with minor violations, but also expressed that he had experience with officers who handled cases respectfully and demonstrated that they understood the practicalities and difficulties of fisheries, and that not necessary all rules set out by the authorities were expedient. He was at the same time clear that it was a different matter for more serious and repeated offences. He also expressed that fishermen generally respect the work of the officers and that he was not familiar with examples of abuse of authority. DFO respondent 2 also expressed that fishery officers generally were respected, but that being an officer in small communities where typically everybody knows everybody could sometimes be challenging. The same respondent highlighted that one common complaint from the industry was that they were not given feedback from officers in specific cases, or given the data that supported claims, but that this could also be due to ongoing investigations. The industry respondent highlighted that there is a good collaboration between the industry and DFO on enforcement matters.

As to the topic of delegating more self-regulation to the industry, the fisherman responded: "Self-regulation, it's. You know, fishermen don't like pointing fingers out to other guys, and say who's to blame, because you probably done the same thing yourself." When facing someone breaking rules, and potentially deliberately destroying a fish stock, he expressed that for himself: "I will have a discussion. I wouldn't go to the Fisheries [DFO], … but peer pressure can sometimes be more powerful than the legal part of it." The fisherman did at the same time underscore that he felt responsibility for the resources and saw a need for strict regulations. All three of above statements by the fisherman points to the possible existence of some form of informal and social norms of how to deal with unlawful behaviour by fellow fishermen, and for flexible approaches (persuasion approaches, see more in chapter 4.6.7) in the exercise of public authority, but with only one fisherman respondent the validity of the material is low. There is at the same time research from both Canadian and Norwegian fisheries that indicate the existence of similar types of informal norms.[1717]

11.5.1.2 Prosecution and punishment in practice

As noted in chapter 10.5.6, most prosecutions in a Canadian context are pursued as summary convictions that from my understanding are imposed orally and with few written statements available.[1718] On prosecution, penalties and ticketing, both the industry and fisherman respondents were of the opinion that the penalties could be stricter. The association respondent expressed:

> Generally, the industry wants to see penalties that are meaningful. There's no point that the penalty is just a cost of doing business, and then it doesn't deter anybody from doing the activity … Recently there has been some more meaningful penalties …

This points to ideas in the neoclassical approaches of the rational cost-benefit maximising actor in the economics of crime and use of deterrence strategies.[1719] In jurisprudence there are cases that can exemplify some of the sentencing practices by courts. *R v. Steer*[1720] is one of the few cases from commercial halibut fisheries in recent times, but it is an illustrative case that demonstrates how the courts view serious offences in fisheries. It included multiple offences, including offering for sale fish that had not been caught and retained under the authority of a licence and failure to maintain the EM system on the vessel in operational condition. The accused pleaded guilty and was found guilty by the court. The court considered the crimes to be grave because it was calculated and driven by profit at the expense of the vessel owner and crew members, and the accused was sentenced to six months in jail and a 10-year fishing prohibition. The court placed weight on deterrence, both specific and general, as a paramount principle of sentencing in a fishery regulatory context.[1721] In some of the court reasoning the court emphasized that:

[1717] See for example the non-deterrence-based enforcement in Hønneland (1998) and on social, economic and normative compliance motivators in Gezelius (2002a); Gezelius (2004); Gezelius (2007), see also more in chapter 4.

[1718] See for example Caldwell (2005).

[1719] See chapter 4.6.6.

[1720] 2013 BCPC 323 (CanLII).

[1721] *R. v. Steer* para 21.

> It is important that the IPHC be accurately informed of the number and weight of halibut harvested from each area in each year. That is primarily because the health of the halibut population will be critically affected if the total harvest exceeds the sustainable catch … Sustainable yield management is of obvious importance for environmental reasons. It is also critical to the financial success of the industry.[1722]

Both environmental and industry consideration were therefore management objectives highlighted by the court. Another halibut-related case concerning 30 886 pounds of overfishing of halibut quota that resulted in a 60 000 CAD fine is found in *R. v. Dalum*[1723] In *R. v. Thompson*[1724] a commercial halibut fisherman was sentenced a fine of 5000 CAD for fishing illegally in a rockfish conservation area, and 1000 CAD for failure to hail-in not less than 24 hours prior to landing. In the reasoning of *R. v. Le*[1725] concerning illegal commercial crab fishing in BC it was highlighted that "any sentence to be imposed must be more than a simplistic cost of doing business."[1726] This reiterates the point made above by the industry respondent about meaningful penalties, and reference to deterrence and denunciation was also made by the court.

A due diligence defence relying on an "officially-induced error" for fishing without a commercial licence in salmon fishing in BC was not allowed in R. *v. Duncan*.[1727] A due diligence was allowed the accused in a case of incidental catches or bycatches (retention of prohibited species) in *R. v. Emil K. Fishing*,[1728] as the vessel master had taken the required action to prevent such catches. *Regina v. Pasco Seafood Enterprises Inc.*[1729] illustrates that there are examples of creation of false documents by a buyer in relation to landings of fish

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[1722] *R v. Steer* para 11 og 12.

[1723] BCSC 210 (CanLII). This reference represented a judgment that ordered a new trial. The person was later sentenced in a new trial in Nanaimo Provincial court on July 29, 2913, but I haven't found this case.

[1724] 2017 BCPC 351 (CanLII).

[1725] 2019 BCPC 116 (CanLII).

[1726] *R v. Le* para 21.

[1727] 2015 BCPC 176 (CanLII).

[1728] 2008 BCCA 490 (CanLII).

[1729] 2018 BCPC 377 (CanLII).

not caught under the authority of a licence, in this case of salmon fished commercially in BC, with a conclusion of high culpability of the company and a strict sentencing. Although punishment as deterrence is highlighted in the above examples, there are also mechanisms of restorative justice (alternative measures) used in Canadian criminal law. This is an approach that "seeks to repair harm by providing an opportunity for those harmed and those who take responsibility for the harm to communicate and address their needs in the aftermath of a crime."[1730] It is authorized in the *Criminal Code* section 717 and can also be an objective in court sentencing in specific cases. The DFO respondent 5 had good experiences with restorative justice processes outside courts to handle infringements:

> A restorative justice is more ownership of the process both from the accused and from those that have been affected. And like I said, the few restorative justice processes that I've been part of I found to be very constructive, very insightful processes.

The respondent did at the same time acknowledge that restorative justice processes were resource-intensive and not suited for all cases, for example cases of organized crime. He also welcomed an increased use of ticketing and highlighted that an overall challenge in the legal framework is the long and slow legal process, so that consequences are far removed from the actual violations.

11.5.2 Overall enforcement and punishment in practice in Norway

As to the Norwegian case, no formal interviews to uncover perceptions of how the Norwegian system works in practice were conducted as the data collection in a Canadian context was justified by revealing some of the legal formants of the Canadian system from an outsider perspective. Some administrative practice, jurisprudence and other relevant written material and literature can at the same time be illustrative and shed a brief comparative light on the Norwegian practices. The level of fines and forfeiture throughout

[1730] Canadian Intergovernmental Conference Secretariat: Principles and Guidelines for Restorative Practice in the Criminal matters: https://scics.ca/en/product-produit/principles-and-guidelines-for-restorative-justice-practice-in-criminal-matters-2018/

this section is only used to exemplify the sentencing practices, and not to be seen comparatively as this would require further studies of the socio-economic factors in the jurisdictions.

Some differences in the overall enforcement structures have already been highlighted in chapter 10.5.6. The general perceptions of the industry in enforcement matters can to some extent be identified in hearing statements by the main industry organizations in relation to the recommendations by the policy advisory commission in NOU 2019: 21. The feedback was mixed; where some industry organizations called for stricter penalties,[1731] others have highlighted that they prefer the use of administrative sanctions and that penalties must be proportionate and found legitimate and that the risk of detections should increase,[1732] some call for a continued operational role of the sales organizations in landing controls,[1733] and many do not want any additional economic burdens on the industry actors. There is empirical research that indicates that the majority of fishermen find regulations necessary and find that the authorities are doing a satisfactory job.[1734] As seen above, the use of non-deterrence strategies and socially embedded informal norms have also been identified in Norwegian fisheries.[1735] A more recent survey of perceptions among participants in different fleet groups in Norway finds that having experienced controls in the past and perceiving the likelihood of future controls being higher, significantly reduces infringements and that traditional enforcement measures are appreciated, whereas there are more mixed approaches towards modern control activities through cameras, remote monitoring and automated data recordings.[1736] This different input

[1731] Norges Fiskarlag: Høringsuttalelse NOU 2019: 21: https://www.regjeringen.no/no/dokumenter/horing/id2680854/?uid=e7abfbd6-daf2-43c0-addc-ab183cc9cd74

[1732] Fiskebåt: Høringsuttalelse NOU 2021: 21: https://www.regjeringen.no/contentassets/278890d74d914bf083f690ebe6d62ba6/fiskebat.pdf?uid=Fiskeb%C3%A5t

[1733] Norges Kystfiskarlag: Høringsuttalelse NOU 2019: 21: https://www.regjeringen.no/contentassets/278890d74d914bf083f690ebe6d62ba6/kystfiskarlaget.pdf?uid=Kystfiskarlaget

[1734] Aarset (2006).

[1735] See for example chapter 4.6.

[1736] Diekert, Nøstbakken and Richter (2021).

indicates multiple and complex motivations for compliance, including deterrence, persuasion and social embedded norms, but that situational crime prevention and compliance by design, in contrast to the halibut case, represents something new that is not fully embraced by the industry.

As noted, a main procedural difference between the jurisdictions is the choice of the executive to pursue infringements up to a certain level of seriousness in an administrative or a criminal path in the Norwegian case. The use of administrative fines was for a long only used for violation of catch reporting requirements, but in 2015 opened for use on other infringements.[1737] A review of all fines issued in 2016 during the thesis inquiries reveals that all fines were still issued to catch reporting violations, so a transition into an increased use of this new sanctioning tool might take time and should be studied in more detail.[1738] The chosen gradual approach also indicates a gradual transition into a new sanctioning regime. The same material demonstrated issuing of fines to captains in the range of 10 000 NOK up to 20 000 NOK depending on the seriousness and whether they were repeated offences, and many cases are from the cod fisheries. The level of the fines issued to the *company* for the same infringements builds on a practice of using the value of unreported catches for cases of reporting catch estimates electronically prior to landing. The highest fine found was 94 143 NOK, close to the upper limit of 100 000 NOK.[1739] As to the assessment of the fault requirement, practice demonstrates that similar consideration as in the Canadian example above, is given to whether preventative measures or alternative actions have been considered when assessing whether the behaviour of the vessel master has been negligent. In a complaint decision of August 2016, the Directorate for example found that a vessel master had acted negligently as alternative measures had not been taken to reduce the margin of error of the estimate of the harvest reported electronically.[1740]

[1737] Eriksen (2015) page 69.

[1738] A total of 64 individual decisions were briefly reviewed. This number includes complaints decisions in some of the cases. Some of these were decided after 2016.

[1739] Fiskeridirektoratet: Avgjørelse av klage på vedtak om overtredelsesgebyr med hjemmel i havressurslova 11. april 2017 sak 16/7201. See more on the rule in chapter 3.

[1740] Fiskeridirektoratet: Avgjørelse av klage på vedtak om overtredelsesgebyr med hjemmel i havressurslova 23. august 2016 sak 16/2668.

As in Canada, sentencing to prison is rare and fines and criminal forfeiture of value and gear are commonly used. In a Norwegian context, HR-2004-707 (referred to in chapter 3.10.5) represents a strict sentencing of six months imprisonment of the manager of a fish processing plant that had systematically falsified landing documentation and violated landing rules and accounting rules, demonstrating that some fishery offences, and patterns of behaviour over time, are viewed strictly. The Supreme Court placed weight on the importance of landing requirements as central tools of the resource control, that these were offences of rules to protect the fishery resources and that the offences were serious and repeated over time. The importance of reporting requirements to ensure efficient resource management is highlighted in Rt. 2014 s. 996, in which the captain was sentenced a fine of 36 000 NOK, and the company a forfeiture of 150 000 NOK of the catch revenue.[1741] These two sentences therefore build on a court reasoning with similarities to Canadian case law, in which the reliable catch information is seen as crucial for a responsible management system. In a more recent case from a lower court, fishing in a prohibited area resulted in a 24 000 fine to the captain and forfeiture of 300 000 NOK of the catches to the company.[1742] To wrap up this section, despite different legal structures and procedural and substantive rules, similarities can be found in court reasonings, sentencing practices and industry perceptions of the overall enforcement system and use of punishment in the two jurisdictions.

12 Summary and concluding remarks

Chapters 10 and 11 have studied fisheries legislation comparatively between two jurisdictions at different levels of detail. Some of the more general and common characteristics are further reflected on in the synthesis below in part IV, but some remarks can be made on the main findings. The material has revealed that both legal frameworks are products of societal evolution, and that fisheries have played an important role as livelihood for the coastal population. Although the Canadian legal historical inquiry is not as detailed (or as far back in time) as the Norwegian inquiry in part II, it demonstrates at a general level how external factors influence the emergence of various regulatory instruments in the legal

[1741] Rt. 2014 s. 996.

[1742] TNHER-2020-5245.

frameworks. This is especially apparent for the transformation to the international fisheries law regime centered on the quantification of fish and establishment of quotas post WWII.

Another general observation is how the broad administrative discretion and opaque technical rules and terminology are core components in both jurisdictions, and how the fisheries legislation is nested within the overarching and complex legal structures in which constitutional law, administrative law and criminal law permeates the exercising and enforcement practices of fisheries legislation. In 1983, legal scholar David VanderZwaag referred to the Canadian system as "somewhat like a ghost ship" that everyone knows "exists but it often lies veiled under a mysterious mist of flexibility and informality."[1743] To me, this quote is striking and still represents an apt characterization of the legislative frameworks in both jurisdictions in a contemporary context. For both cases this represents a democratic challenge and makes it difficult to engage broader attention and critical reflection on the design and content of the legislative frameworks.

The case study in chapter 11 reveals more detailed insights of the law in action in specific fisheries in the two jurisdictions. At a more principal and overarching level, both cases first of all demonstrate how the balancing and weighing of different (and in some cases conflicting) objectives is challenging, and that in the last few years there has been indicated a lack of social performance of the legislation that has received public attention. These matters also underscores how the definition of *public interest* is a key aspect of the legislating activities at different levels of the regulatory system, and that the interface between law and politics as a consequence of the vague use of statutory language can be difficult to distinguish. Second, the cases demonstrates how many rules of similar content at a practical level are set out in two different legal instruments. The licence conditions play a pivotal role in the halibut fishery, whereas many of the same rules are set out in eight[1744] different

[1743] VanderZwaag (1983) page 172.

[1744] For 2019 these were: Cod Regulations 2019; Participation Regulations 2019, Coastal SQA Regulations, Rules of Conduct Regulations, Electronic Monitoring Regulations, Monitoring Device Regulations; Landing Regulations, Conversion Factor Regulations. Other regulations also apply to the cod fisheries, but these eight address the main topics of the conditions of the halibut licences reviewed in chapter 11.

regulations for the cod fisheries. This makes it more challenging for a harvester to navigate under the rules that apply to the fishery in the Norwegian context, but from a public perspective the rules are more accessible and transparent in Norway as they are published in regulations that are open to everyone at all times. That being said, the licence conditions in the Canadian case largely reflects what is set out in the publicly available IFMPs, and licence information can be requested under the *Access to Information Act*.

In the monitoring and enforcement of the harvest operations there are other paramount differences between the cases. First and foremost is the use of technology and an independent third-party to monitor the halibut fishery 100 %, a contrast to the Norwegian model with its emphasis on risk-based approaches and shared responsibilities with the Coast Guard, the Directorate, sales organizations and self-reporting by the actors. Although risk-based approaches and self-reporting also play a part in the DFO strategies, the 100% monitoring of the halibut fishery by the industry (through an independent third-party) is noticeable and considered a gold standard by some. This does not necessarily mean that this model should be a blueprint for the diverse cod fisheries where some gear types and size of the vessels can represent much larger quantities of fish handled onboard the vessels in contrast to the halibut fisheries, and with thousands of landings over a short period of time spread out along the coast, where time is of the essence. That being said, this does not mean that similar strategies should not be explored also for the cod fisheries (and other fisheries).

The monitoring systems also point to two other differences between the cases. The first is how overfishing of quotas is handled with dynamic sales of quotas (up to certain limits) in the Canadian individual transferable quota (ITQ) system throughout the year, whereas administrative forfeiture of excess harvest is used in the Norwegian approach. The Norwegian approach can therefore be seen as more rigid, but as noted there is under implementation a new system of quota exchange. Details of this new arrangement are yet to be determined, but it must be expected to increase the flexibility of the actors during the annual fisheries. Second, the industry is in both cases given a central role in the overall enforcement system. In the halibut case this is represented by the industry paying an independent monitoring company to do the quota accounting, oversee the fisheries and flag

deviations and violations. The Norwegian equivalent is the sales organizations similarly doing the the quota accounting, but with additional inspection responsibilities and authority to issue orders of confiscation of excess harvest.

Lastly, the overall enforcement practices and use of sanctions and punishment include both similarities and differences. Generally, the use of risk-based approaches, and a mix of both deterrence strategies and persuasion are elements of the enforcement system in both jurisdictions. The use of prosecutions in an administrative path in the Norwegian case, which includes an administrative right of appeal of decisions, however, marks an important difference although the Canadian system is moving over to increased use of ticketing to avoid resource-intensive court proceedings. The component of situational crime prevention, compliance by design and smart regulation approaches in the halibut case is also a central difference as the Norwegian system is still characterized by a low amount of controls, a low risk of detection of infringements and the occurrence of IUU-fishing. As seen, however, to move over to increased use of automatization to document what is harvested has been singled out by a policy advisory commission as a core element in the future design of the monitoring and enforcement system in Norwegian fisheries.

This study has provided insights on the legislative context and on the legislation as a set of rules, consisting of sub-systems that mutually interact in different ways for two jurisdictions. All of the above are observations that invite more in-depth analysis of the procedural and substantive rules in the legal framework in both jurisdictions separately, and comparatively. A further identification of how we legislate fisheries, and some of the main legal questions and limits for change, will be reflected critically in more detail for the Norwegian case in part IV below. The findings of this case study will at the same time also form the basis for general reflections and discussion of common characteristics across fisheries legislation.

PART IV SYNTHESIS AND DISCUSSION: WHAT DO WE DO AND HOW CAN WE IMPROVE IT?

13 Revisiting the point of departure of fisheries legislator approach (FLA)

After the above inquiring of the legal framework for Norwegian commercial fisheries comparatively and from a legal historical perspective, it is time to synthesise and draw conclusions from the broad material studied. I will start at a *broad-gauging* level in this chapter by returning to the conceptual point of departure in chapter 2.4. This chapter will synoptically discuss how the categories of *nature*, *science, society* and *institutions* have influenced the current regulatory framework, whilst also pointing out to some of the instruments developed for and used from the legislator toolbox. Chapter 14 follows with the more detailed synthesis of the key features of the Norwegian system identified in chapter 9.2, including reflections on possible common features across jurisdictions.

Figure 15 extends the ideas conveyed in figure 2 by adding the historical dimension to the conceptualization. Building on the theoretical base in chapter 1.3.1, it illustrates a model in which the legislative outcome of today in the form of fisheries legislation, regulations and practice, is the product of decisions and institutions of the past. This is visualized in the figure with arrows from decisions in the past throughout the timeline, which moves up to the legislative context of tomorrow. Previous legislative practice by that becomes an element of the institutions in the current state of law. The timeline is structured through the time periods used in the headlines of the chapters in the legal historical inquiry in part II. These are time periods chosen as the material has revealed that they marked institutional shifts of particular significance.

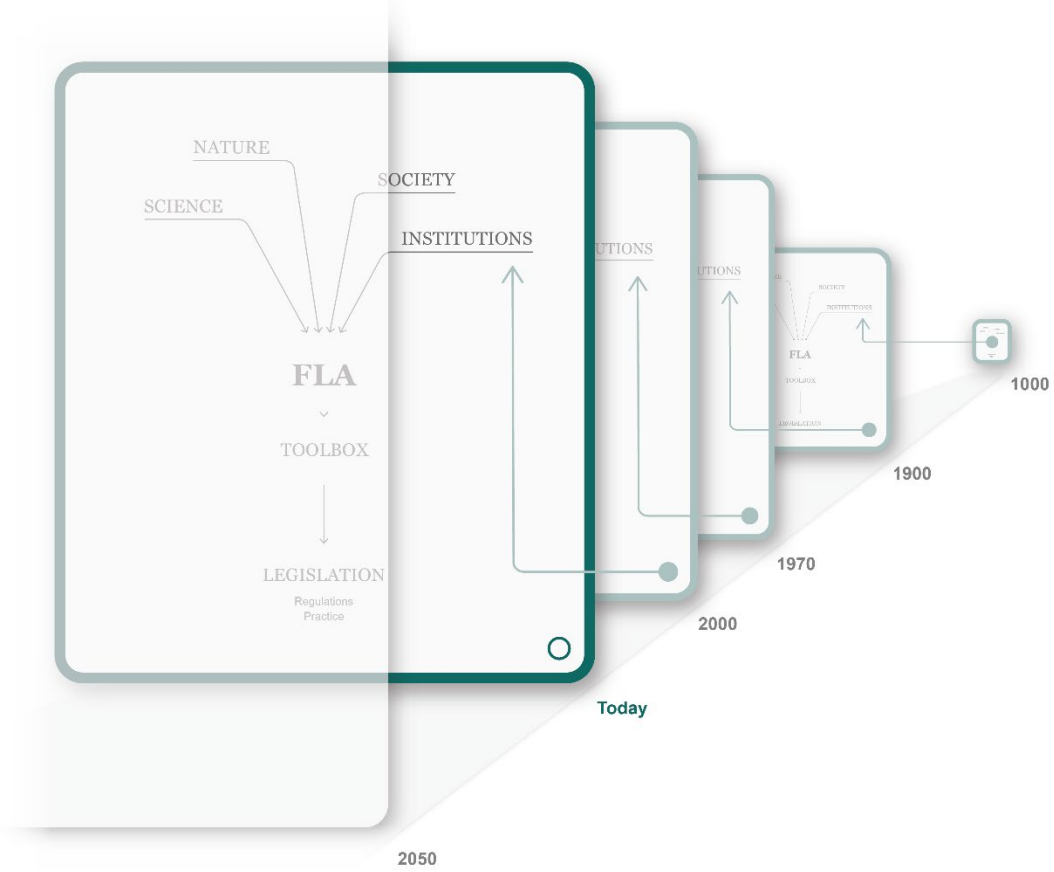

Figure 15 Fisheries legislator approach (FLA) in a legal historical perspective

The Norwegian legal historical inquiry started in the time period around years 1000–1300 and demonstrates how rules to *secure order* on the fish grounds and *protect the fishing commons* evolved, with an intensification from the 1700s, and the establishment of more organized fisheries administration by the year 1900. Especially the last two centuries of the time period were central to the foundation of the main structures of the current fisheries legislation with developments of *regulatory tools* in the form of *rules of conduct* for fisheries activities, conferred authorities for subordinate rule-making and *adaptive governance*, establishment of *public enforcement* and *co-management approaches* to enforcement and decision-making. Building on the observations from the Norwegian case, this time period also demonstrated how technological development and macro-economic crises have played an important part of the evolution and pushed for regulatory action to remedy conflicts on the fish grounds with increased competition of effective and capital-intensive gear types. At

the same time, the *limits of nature* became increasingly acknowledged and scientific research on marine ecosystems increased during the 1800s. As summarized in chapter 9.2.1, and further reflected on below in chapter 14, the strong and interventionist role of the state is a key feature in the Norwegian FLA. The inquiry demonstrates how this role was manifested during the 1800s, but also how *economic liberal ideas* gained influence and pushed for less state intervention, and thereby signalling some of the difficult balancing of considerations that similarly characterizes the Norwegian FLA.

The next time period set from 1900 to 1970 was eventful in many respects. First and foremost, it marked the breakthrough for motorized vessels, gear technology and fish-finding technology in the form of the echo sounder which locates the resources, which made the harvesting industry more mobile and effective. As already established, the increasing trawling activities outside the county of Finnmark by British trawlers, spurred the prohibition on trawling within the territorial waters in 1908. In the wake of these events a *licencing regime* was adopted for Norwegian trawlers from 1936, which was the first use of *harvest licences* as a regulatory tool in Norwegian fisheries legislation. International fisheries law perspectives are not studied in detail in this thesis, but these are also elements of the legislative context for a fisheries legislator that became increasingly influential in this time period. As demonstrated, many of the biologically justified rules in different statutes that were consolidated in the Saltwater Fisheries Act 1955 originated from international agreements. This was also a time period highly influenced by two world wars and economic crises that pushed forward *social legal innovations* in the form of the *legal monopoly of the sales of fish* and protection of ownership of fishing vessels (predecessor to the *activity requirement*).

The 1970s marked a new era for economic and environmental considerations aligned with the establishment of an international fisheries law regime through the adoption of UNCLOS and national EEZs. As seen, these developments were aligned with progress in *stock assessment methodology* and *economic theory,* in which the quantification and division of the fish into quotas laid the foundations for limited entry regimes and a shift into more specialized *rights-based fisheries* and the first forms of *market-based instruments* for

reduction and adjustment of harvest capacity. As seen, various collapses in fish stocks triggered government action to restrict harvest in the Norwegian case. There was at the same time attention to social issues, and it was particularly the use of *delivery duties* in licence conditions for new owners of trawlers and processing plants in the 1980s and 1990s that represented socially justified legal innovations in this time period.

The beginning of a new millennium has been similarly eventful and started with the widespread introduction of *market-based instruments* to reduce overcapacity in Norwegian commercial fisheries through the structural quota arrangements (SQAs). It also marked a time when important *environmental law principles* in international fisheries law obligations were enshrined in the Marine Resources Act with increased attention to the ecosystem-based approach. It is also the beginning of a time period where digitalization and new forms of electronic monitoring and portable devices such as smart-phones runs through all aspects of life, including fisheries governance. As seen in the comparative inquiry, the use of electronic logbooks and electronic monitoring of fishing vessels with the increased amount of data collected are already in use to monitor harvest activities, with a potential for increased use. As seen in chapter 8.4.4, a policy advisory commission *inter alia* recommends that the Norwegian authorities should move over to automatic systems for the resource control through collection and handling of digital data. This recommendation reflects an increasing recognition of the regulatory opportunities in fisheries governance through the use of artificial intelligence (AI).

The evolution, impetuses and regulatory trends identified are simplifications of processes and interactions in a complex reality. The broad thesis material has at the same time demonstrated how the law plays a role in the planning of society, and that legal historical evolution has formed and plays a role in the legislative framework for commercial fisheries today. The material has furthermore revealed examples of introduced rules that didn't work as intended, see for example the trial-and-error evolution of the legislation for the Lofoten fisheries between 1786 and 1897,[1745] which supports the idea that there can be norms that

[1745] See chapter 5.

are deeper structured in the regulatory culture that can prevent the effective introduction of new rules. On the other hand, there are examples of crises that have pushed forward substantial shifts of a state of law in a short time period that proved to last, e.g., the legal monopoly of sales of fish (after economic crisis) and the closing of the coastal fisheries (after a biological crisis), which are represented through the other categories in the legislative context the legislator navigates within. This supports the point made by Williamson on "defining moments" that can produce sharp breaks from established rules.[1746]

This is not to say that major shifts of legislation can only be made *gradually* or as *emergency responses*, as the above reflections might suggest. One example of an amendment that has been adopted more independently of any particular event, and without extensive principled debate, was the introduction of administrative fines in the fisheries legislation from the mid 2000s. There is seemingly little controversy related to the implementation and use of administrative fines in the first years after its introduction, but there is an ongoing discussion over the use of administrative confiscation that might be related to the attention on administrative sanctions more generally in Norwegian law. The tenet of this thesis, nevertheless, is that the existing institutions, and the other categories of the legislative context, are all elements that should be subject to careful consideration by a legislator who aspires for change. The identification of a Norwegian FLA on the basis of the findings of the thesis is, as noted in chapter 2.4, a tool intended to assist the legislator to see clearer the maneuvering room and set the course for the fisheries legislation vessel. This is further reflected on below in chapter 14.

To conclude this conceptualization with theoretical reflections, the Norwegian legislation has evolved as a combination of facing practical challenges, learning from experiences and responding to crises, whether biological or macro-economic, and the development of a wide arsenal of regulatory tools. Attention can in this respect be drawn to the ideas of *adaptive efficiency* in North (1990), which Driesen (2012) builds on, and further conceptualizes as an *economic dynamic approach* (EDA) to legislation. What characterizes EDA is that it

[1746] See chapter 1.3.1.

emphasizes how law aims to *influence the future,* and therefore needs to address surprise, change and uncertainty. Some of the more contemporary theories advanced in environmental law and empirical research on fisheries governance (see chapter 4.6) seem to converge with the features of EDA. These are ideas that merit further exploration in legal theory, especially for specific jurisdictions, and regulatory areas, in future research.

14 Synthesis of Norwegian fisheries legislator approach (FLA) and cross-jurisdictional characteristics

14.1 Introduction

This chapter continues with a synthesis of the preliminary reflections of *six key features* in the legislative framework for Norwegian fisheries singled out in chapter 9.2. This chapter is therefore a more targeted analysis of the legislative characteristics, and limits and opportunities for change, in a country specific Norwegian fisheries legislator approach (FLA). It will at the same time reflect on possible cross-jurisdictional characteristics based on the comparative outlook and relevant theory. It starts with further reflections on the strong and interventionist role of the state in chapter 14.2, both with regards to the legislative dilemmas (14.2.1), and the principle of common shared resources (14.2.2). Chapter 14.3 moves on to use of conferred authorities and adaptive governance, and chapter 14.4 addresses collaborative legislative processes. Limited entry regimes with a strong market orientation is the topic of chapter 14.5. Chapter 14.6 reflects further on mixed enforcement strategies, followed by a separate sub-chapter on the role of technology and relevant legal questions in chapter 14.7. To conclude, chapter 14.8 makes an overall synthesis of all components of FLA and discusses some of the limits and opportunities for change.

14.2 Strong role of the state to achieve continuously evolving objectives

14.2.1 Legislative dilemmas with conflicting and continuously evolving objectives

Both the empirical investigations in part II and III have revealed the strong and interventionist role of the state in the legislating of Norwegian and Canadian commercial

fisheries, historically and today.[1747] This feature can be seen as an *overarching perspective* in the Norwegian FLA by setting out the overall purposes for the management of the wild-living marine resources, making it an area for *constant attention* for a legislator, but also an area of *continuous controversy* as the nature of the management inevitably can represent various *degrees of incompatibility* of political goals. The material furthermore demonstrates how the priorities of the legislator have changed as society progress and changes, but also how crises have been an important driving force for legal responses at different levels of the government.[1748] To ensure that the coastal population can make a livelihood from fisheries has at the same time been a high priority at all times in Norwegian fisheries governance. There are good reasons to believe that this is a common feature of legislating fisheries more generally,[1749] but the empirical material has revealed how there can be *different strategies* between, and even within jurisdictions, to address the social dimension of securing employment and settlement in coastal communities that points to the importance of cultural and economic context when implementing fisheries policies in domestic law.

In the Norwegian case, the *legal monopoly to sales of fish* and the roles of the fish sales organizations is the first of two landmark examples of a socially justified legal constructs for commercial harvesters that has lasted up to today, more than 80 years after its adoption, and that is not found in any form in the Canadian case study. No cross-jurisdictional commonality is therefore identified in the material, but it seems to be a legal construct deeply rooted in the Norwegian fisheries legislation triggered by the difficult economic years following WWI. The rationale was primarily to secure the harvester better, more reasonable prices, to provide them a safety net in the sales operations and strengthening their position over a traditionally strong buyer industry on land. The second example is the emergence of the *activity requirement* and *nationality requirement* to participate in commercial fisheries in Norway that was justified by a desire to maintain a local and Norwegian fleet owned by

[1747] In a Norwegian context this is not something sector specific, as the Norwegian government traditionally has had an interventionist role. See Løding (2017) on how the hydropower resources were subject to government intervention and regulations as these resources were ascribed societal values.

[1748] See also Holand (2016) that studies how new problems and needs are driving forces for legal change in a Norwegian fisheries context.

[1749] See for example FAO (1995); FAO (2009b)

the harvesters and preventing larger capital investments that would turn fishermen into a "proletariat." These are principles that are not elements in the Canadian Pacific fisheries, but that resembles the *owner-operator and fleet separation policies* in the inshore fisheries in Atlantic Canada. These are at the same time no statutory requirements as in the Norwegian case, but depending on executive discretion. The long-lasting codification of these requirements in the Norwegian context therefore points to the strong position of these principles in Norwegian law.

These two examples demonstrate that the main *legislative dilemma* identified in a Norwegian context up until the 1970s was to protect the fishing commoners from the competition and exploitation that strong capital interest could represent, and at the same time provide for increased productivity and innovation that could improve the poor economic performance in the sector. This was, until 1900, primarily a question of how to ensure the fishing commoners' access to the fish grounds, whilst still embracing the emergence of new gear types. The emergence of a trawler industry up through the 1900s perhaps best illustrates this dilemma in a more recent context. This involved permitting a restricted fishery in 1936, followed by liberalisations post-WWII as an element in rebuilding northern Norway, on the conviction that it was a necessary modernisation and rationalization of the fisheries.

As shown, this would all change through two important impetuses. The fist was the establishment of an international quota regime from the 1970s, in conjunction with the emergence of stock assessment methodology and economic theory that turned the resources into a quantifiable entity that could be allocated and where efficiency considerations became increasingly influential.[1750] The second is how globalisation and macroeconomic forces changed the competitiveness of fisheries in a more connected world, with the Norwegian entering the EEA from 1994 as an important single event (which catalysed a phasing out of

[1750] As demonstrated in chapter 7. These transformations have as seen in chapter 4 been widely studied and explained from various social disciplines in a Norwegian fisheries context. See chapter 2 in Holand (2016) for an overview of some the developments and further references.

fisheries subsidies).[1751] As seen in the comparative inquiry, the establishment of the quota regime also pushed for reform of the Pacific Canada fisheries, and the halibut case specifically, in a strikingly similar way to the Norwegian cod fishery case. This suggests that the shift into some form of rights-based regimes with harvest limitations rooted in a public permit represents a common characteristic of commercial fisheries legislation, but it has at the same time been advocated in influential fisheries management theory for a long time.[1752]

What this shift meant in practice to the legislator were *new dilemmas* to handle, the articulation of economic objectives and more explicit environmental sustainability justifications addressing overfishing. These articulations were first enshrined in policy documents (White papers), which were followed by adoption of the purpose clauses in the Participation Act from 2000 and Marine Resources Act from 2009 with the balancing of environmental, economic and social considerations.[1753] One important aspect of this shift is how harvesters, although with nuances as the fleet still is diverse, were transformed into professionalized holders of an *exclusive* concession or annual permit, with an increasing market orientation and capital-intensive activities in the years to come.[1754] This changed some of the dynamics in the fisheries sector as the number of harvesters (vessels and harvesters) would be reduced significantly following the transition into the new millennium, but how were the social considerations of contributing to employment and settlement to be achieved within these transformations?[1755]

[1751] See chapters 7.4 and 7.7.

[1752] The widespread use of licencing regimes has been highlighted in FAO (2004) page 97, which also points to a transformation on ad-hoc basis in many jurisdictions.

[1753] As introduced in chapters 3.5.1 and 3.6.1.

[1754] See more on these transformation in Holm (2001); Johnsen (2002); Sønvisen (2013); Holm and Nielsen (2007); Johnsen and Jentoft (2018).

[1755] This does not mean that harvesters do not contribute to employment in coastal communities, because there are many fishermen that live in coastal communities and contribute to settlement in rural areas. It must also be pointed out that many people work on fishing vessels as crew members and might not have interest aligned with the interests of a licence holder. This shift has been studied broadly from many disciplines in a Norwegian context. See e.g. Holm and Henriksen (2016); Holm and Henriksen (2014); Holm et al. (2015); Iversen et al. (2016) for some contemporary literature.

From a legal point of view, the thesis has demonstrated how the legislation is characterised by open-ended and vague language that leaves room for interpretation and a weighing of considerations based on political priorities. In the Bill proposition to the Marine Resources Act it is e.g. set out that it is "up to the political authorities to determine how one best can contribute to employment and settlement in the coastal communities within the framework of the Act."[1756] To what extent does that mean addressing conditions that the land industry operates under, interactions between the fleet and the processing industry, or setting a limit to how efficient the harvesting sector can be?[1757] This is something authoritative legal documents give little guidance on, and the objective of socio-economic profitability set out in the Marine Resources Act is ambiguous. As seen in chapter 1.2 and 11.3.5, the Auditor General of Norway has found that there has been an unsatisfactory social performance of the policies over the last 15 years. A performance audit is at the same time *no neutral exercise* as the selection of evaluation criteria and methodology is subject to choices, as is the interpretation of the relevant documents. One recent study on this specific audit demonstrates how the Auditor General *inter alia* has selected the cod fisheries as a case and re-articulated objectives of the legislation when assessing the performance.[1758] When the audit was addressed in the Parliament, a majority of the Control Committee drew attention to the extensive use of wide executive authorities and that some changes of secondary legislation had taken place without involving the Parliament.[1759] Although the committee underscored the constitutional duty of the executive to inform the Parliament (Article 82 of the Norwegian Constitution), and pointed to the lack of impact assessment of the policies prior to implementation pointed out in the audit, it is somewhat a paradox that no mention or consideration was given to the *design choice* of the legislature of conferring a wide

[1756] Ot.prp. nr. 20 (2007–2008) page 177. Norwegian wording: "vil vere opp til dei politiske styresmaktene å avgjere korleis ein best mogleg kan medverke til sysselsetjing og busetjing i kystsamfunna innanfor dei rammene lova set."

[1757] Arntzen (2018) discusses some of the scope of the authorities to contribute to achieve the social objectives through quota allocations and through the delivery duties. See also Gustavsen (2018).

[1758] Engdahl (2021). This is a master thesis rooted in Science and Technology Studies (STS), see more in chapter 4.3.3.

[1759] Innst. 80 S (2020–2021) Inntilling til Stortinget fra kontroll- og konstitusjonskomiteen om Dokument 3:6 (2019–2020) page 14.

authority to the executive as such, neither did the committee contribute to any further specifications of social considerations.[1760] It did at the same time task the Minister to come back to the Parliament with a follow-up of the recommendations by the Auditor General on how the quota system can ensure that all three main objectives of the Marine Resources Act are taken into consideration, and that all actors in the industry find trustworthy.[1761]

The inquiries of the thesis furthermore imply that the transformation into a professionalized fleet and formulation of economic interests happened with meager attention to implications for the social considerations of contributing to settlement and employment in preparatory works or legislative practice at all levels. Relevant articulations in preparatory works were reiterations or modifications of vague policy objectives from the 1970s. [1762] The transformation that has taken place since the 1970s has also lacked a broad and principled discussion of legal implications of the changes with respect to the introduction of limited entry fisheries. The material studied also suggest that the lack of attention to social considerations, or perhaps more precisely an unclear state of what internal coherence of the objectives means in practice today, runs through all levels of the government, and with limited input from jurisprudence to shed further light on the issues.

[1760] Innst. 80 S (2020–2021) page 14–15. It is, however, the case that the four parties in opposition in the Parliament when the Marine Resources Act was adopted in the Parliament in 2008, noted in the Parliament recommendation that it was "unfortunate" with a widespread use of conferred authorities as it would make the statute "incomplete and give little predictability to business actors." Norwegian wording: "ufullstendig og gir liten forutsigbarhet for de næringsdrivende." Innst. O. nr. 45 (2007–2008) page 6.

[1761] Innst. 80 S (2020–2021) page 15.

[1762] The objectives from St.meld. nr. 18 (1977–78) and St.meld nr. 93 (1982–83) are reiterated in the Bill proposition of the Participation Act, including the objective to "maintain the settlement patterns." The Parliament recommendation did at the same time underline that these patterns could not be maintained if the important fisheries did not have profitable or competitive businesses, see Innst. O. nr. 38 (1998–1999) page 5.

All of this point to an underlying problem of lack of making the *difficult trade-offs* and defining the *public interests* in a modern context.[1763]

14.2.2 The principle of common shared resources

Related to the objectives of the legislation is the enacting of what in the thesis has been referred to as a common shared resources principle in section 2 of the Marine Resources Act.[1764] The legal sources underscores that this principle has been a fundamental premise in fisheries policies over time, which is *no property right* in a *legal sense*, in contrast to privately owned resources.[1765] Moreover, it is emphasized in the preparatory works that the principle embodies the management responsibilities of the state to ensure *sustainable stewardship* of the marine ecosystems and resources, and to *prioritize allocation* of the resources, and determine *who* can fish commercially, as there is a need to limit harvest.[1766] It is at the same time highlighted that the provision expresses how the resources have been, and still are, *a basis for settlement, culture and livelihood* in coastal communities, and that harvesters and coastal communities through this benefit from the resources.[1767] These are articulations that, as with the social considerations referred to above, are vague and give little specification on the content of the principle.[1768]

[1763] Relevant in that regard is also the lack of theoretical scrutiny to the normative and significant role of public administration in political theory pointed out by the Canadian philosopher Joseph Heath in Heath (2020). He argues that neither the traditional institution of electoral democracy or direct public engagement can make necessary specification of public interest and proposes the development of normative principles or "commitment to a 'minimal' liberal theory of justice" building on efficiency, equality and liberty and show that "these principles can be used to illuminate some of the most important practices and norms of the public service." Heath (2020) page 345-347.

[1764] See more on this principle in chapters 3.5.1, 3.7 and 8.2.

[1765] Ot.prp. nr. 20 (2007–2008) page178.

[1766] Ot.prp. nr. 20 (2007–2008) page 178.

[1767] Ot.prp. nr. 20 (2007–2008) page 178.

[1768] In the Parliament recommendation in conjunction to the adoption of the Participation Act, there was acknowledgement of the need to limit the harvest and that participation must be limited. Innst. O. nr. 38 (1998–1999) page 5. As seen in chapter 4.5.2.5, Holm (2006) points to how the closing of the commons represented a strengthening of the interest of society. Similar sentiments are expressed in Landmark (2011).

One way to view how legislation has been designed historically is as a form of *social contract* between the coastal population and the state to ensure *internal and external legitimacy.*[1769] As demonstrated in the thesis, the access for the coastal population to the resources has up through the years been protected through legislative action, but the fishing commons also had to respect curtailments to harvest operations and accept competition from new technologies. The adoption of section 2 of the Marine Resources Act could therefore be viewed as the codification of a principle that has been deeply embedded in the fisheries legislation over a long time. In the Canadian state of law, the fishery resources are regarded as a *common property resource*. This is different from the Norwegian model, but concepts of property-rights are at the same time, as seen in chapter 4.5.2, elusive, and theoretically under-developed when it comes to fugitive common pool resources (CPRs) in ownerless areas. Some qualified forms of the meaning of "property" in *different legal contexts* have, as seen in chapter 10.5.3, been clarified in both Canadian and Norwegian case law, which are further reflected in the overall synthesis in chapter 14.8.

A more pertinent analogy to the Norwegian principle is perhaps to view the resources in a form of a trusteeship of the state. These are tenets found in a common law Public Trust Doctrine (PTD), which especially has developed in American law.[1770] With roots back to Roman law the PTD maintains that certain common natural resources must be managed by governments on behalf of their citizens.[1771] In some jurisdictions, it has been suggested that the scope of the doctrine also includes ocean ecosystems and that the beneficiaries of the trust are both current and future citizens.[1772] A core element in the PTD is that some natural resources:

[1769] Similar ideas are suggested in fisheries governance theory, see chapter 4.7.

[1770] Barnes (2011) page 453 points out how the approach in US jurisprudence did not evolve in English common law.

[1771] See for example Wood (2013) page 14.

[1772] Turnipseed et al. (2009).

> remain so vital to public welfare and human survival that they cannot be exclusively exploited through private property ownership and control. Under the public trust doctrine, natural resources such as waters, wildlife and presumably air, remain common property belonging to the people as a whole. Such assets take the form of a perpetual trust for future generations.[1773]

Although property rights language is used in this quote, it also expresses the management principle and responsibilities of the state and a right to the resources for current and future generations. It also echoes core values that are common across jurisdictions. The mobilization of PTD "as an often overlooked legal concept" for ocean stewardship of high seas resources has been proposed in literature.[1774] It is also a concept revisited in a US fishery context with critical reflection of how *distributional equity* can be reconciled in a *modern conceptualization* of the PTD. [1775] In order to make final reflections on the principle on common shared resources in the Norwegian FLA, it must be seen in relation to the other components of the regulatory system that are synthesized in the following, starting with the use of delegated authorities to contribute to adaptive governance justified by biological considerations.

14.3 Conferred authorities and adaptive governance

As the legal historical inquiry in part II has revealed, the use delegated powers to regulate fisheries on the basis of biological considerations has for *almost two centuries* been an element of Norwegian legislation, but also the Canadian material indicates a similar long tradition pointing to some generality that is also reflected in theories on adaptive governance.[1776] The Norwegian management of the major commercial fish stocks has generally been regarded as successful from a biological perspective, and it exhibits several of the characteristics of adaptive governance set out in best practices internationally. There

[1773] Wood (2013) page 14.

[1774] Turnipseed et al. (2013)

[1775] Macinko (1993).

[1776] See chapter 4.6.

are at the same time unresolved issues and challenges in the Norwegian context, for example, how to regulate other species than the main commercial stocks,[1777] and how to fulfil international expectations with respect to marine protected areas.[1778] Another issue is also the question of *compliance with regulations*, which is inextricably linked to a successful management and protection of biodiversity, and addressed in chapters 14.6 and 14.7.

With the various ongoing environmental crises worldwide, including marine management, as a backdrop, many environmental law scholars have criticized regulatory systems such as the Norwegian and Canadian for lack of clear and strict statutory duties, the fragmentation of legislation and the extensive use of wide (and largely unconstrained) administrative discretion as they do not provide strong enough environmental safeguards.[1779] Other scholars, on the other hand, have questioned legal formalist approaches and pointed to the uncertain and unpredictable nature of ecosystems and drawn parallels to emergency legislation, noting how each environmental issue could be seen as an ongoing "emergency in miniature" due to our "inability to distinguish in advance" what could be "catastrophic policy choices."[1780] Bohman has in an EU context drawn attention to social-ecological resilience governance as the best fit to face emergences,[1781] whereas Stacey in a Canadian context has started theorizing on an alternative conceptualization of the rule of law in which a requirement of *public justification* and *institutional experimentation* are elements.[1782] Nordrum similarly addresses procedural aspects of environmental decision-making with emphasis on participatory governance and collaboration as a characteristic of the Nordic

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[1777] One example is that the cod fishery no longer has environmental certification by the Marine Stewardship Council (MSC), due to concern of the management of the coastal cod. See for example: https://www.fiskarlaget.no/component/fabrik/details/5/2440-tap-av-msc-sertifikater

[1778] The Norwegian use of marine protected areas has been criticized in the public for not ensuring adequate protection. See for example: https://www.nrk.no/norge/norge-sier-havet-er-vernet-_-samtidig-pagar-det-utbredt-fiske-1.15442211

[1779] See for example Platjouw (2016); Bugge (2013a); Henriksen (2010); Bankes, Mascher and Olszynski (2014); Bugge (2010); Pardy (2010); Boyd (2003). See also Winge (2013) for a doctrinal analysis of Norwegian planning legislation expressing similar sentiments, but also acknowledging the challenge of rigidity in decision making.

[1780] Stacey (2015) page 994. These are ideas further advanced in Stacey (2018).

[1781] Bohman (2021).

[1782] Stacey (2015); Stacey (2918). See also a discussion between Pardy and Stacey in Pardy (2016); Stacey (2016).

regulatory model that has proved successful, but that has been under criticism for lack of performance of OECD recommendations on regulatory policies building on evidence-based policies rooted in neoclassical cost-benefit analysis.[1783]

The question of how to regulate natural resources inevitably creates a dilemma for a legislator (primarily the legislature in this respect) with how to balance rule of law principles of predictability and a strict protection of ecosystems, with adaptive governance and use of administrative discretion, in the legislative design choices. What can be taken from this component of the Norwegian FLA is that the wide use of delegated powers have been developed to solve specific problems as they evolved, and in close collaboration with experts and stakeholders. The legal structure provides the authorities with a *flexible legal platform* to handle crises and target fishing restrictions to local areas, which can be modified as experience and scientific knowledge grow. It also supports the development of new regulatory tools through practical bottom-up learning by doing. At the same time, this does not mean that the system is incompatible with developing and specifying stricter statutory duties and environmental standards, setting environmental considerations as an overarching priority in legislation, or other measures that could strengthen the possibility of increased judicial and public oversight. However, the abstraction of stricter rules must be done by someone and respond effectively to a specific problem not characterized by a state of flux. These are also issues that are closely connected to the collaborative governance approach in decision-making processes identified as a key feature of the Norwegian FLA.

14.4 Collaborative legislative processes

The thesis has demonstrated the long tradition of broad collaborative legislative process with involvement of stakeholders, experts, the public and local authorities in the Norwegian system. From the material studied in a Pacific Canada context, there are also consultation mechanisms apparent in Pacific fisheries, but with important differences. Both jurisdictions have developed arenas for various stakeholders to meet and provide advice prior to establishing rules for the upcoming fisheries in a contemporary context. A major difference,

[1783] Nordrum (2019).

however, is that there are no *statutory* procedural requirements for stakeholder involvement in the Canadian case as set out in the Public Administration Act in Norway. The use of various forms of advisory commissions also seems widely used in a Pacific Canada context historically. Although not studied in detail, it seems that the Canadian equivalent of royal commissions might not be characterized with a similar broad composition of stakeholders and experts, but structured with one expert who comes up with recommendations after input from stakeholders and the public. Some form of stakeholder involvement is therefore a general feature of fisheries governance, but the degree of influence seems to differ and be dependent on context, regulatory traditions and the procedural measures in the relevant jurisdiction.[1784]

The inquiries of the thesis do at the same time reveal insights on the Norwegian participatory and bottom-up approaches that calls for critical reflection. First and foremost, can the regulatory system be characterized as opaque, with several sets of rules and sub-systems that interact, and with widespread use of exemptions and sector specific terminology. Although the harvest activities are of a multiplex nature that requires expertise knowledge from multiple disciplines and stakeholders, it is at the same time a *democratic challenge* that participating in the discussions requires insights into a detailed level of technicalities. Seemingly small modifications of placement of vessels in size groups can, as an example, have significant allocative impact. Moreover, there is no access to regulatory meetings for the public, and there will inevitably be consultations between the executives and various stakeholders outside of formal participatory arenas. This point must also be seen in relation to the observations in research that the harvesting sector has transformed into a professionalised and distinct sector of fewer harvesters, which no longer represents the main occupation of the population of coastal communities. Questions of who the stakeholders are, and how public participation can be ensured in collaborative legislative processes in the modern context, must therefore also receive attention within a Norwegian FLA.

[1784] Also supported by findings in the comparison between Atlantic Canada and Norway fisheries Gezelius (2002c). Se also Nordrum (2019) on differences in the regulatory traditions in a Norwegian and US context.

A related issue is that the material studied in the thesis has demonstrated how economic theory and economists have become highly influential in the design of fisheries legislation post-WWII, which is also observed in a doctrinal thesis by Siri Hesstvedt on policy advisory commissions more generally in a Norwegian context.[1785] Hesstvedt demonstrates how policy advisory commissions are used strategically, and that the close relationship between politicians and expert creates risk of politicians losing control over policies and that science runs the risk of being politicized when being tasked and applied by politicians. These findings point to the difficult interface between policy, science and how knowledge is produced and employed in public decision-making. The influence of the economists was particularly important in relation to the shift into limited entry regimes, which as seen above was a shift that took place without broad, principled discussion and legal analysis. The access rules represent a sub-system with a lot of detail that merits further inspection, which is done in the next sub-chapter to unpack some of its core features and pressing legal questions before the overall synthesis in chapter 14.8.

14.5 Limited entry regimes with an increasing market orientation

What we can take from part II and III at a general level is that the regulation of Norwegian and Canadian limited entry fisheries are *complex and highly dynamic*, have similar evolutionary paths, and play a *fundamental role* in the regulatory system that takes place under *wide executive authorities* and with a strong *market orientation*. The legal design differs in the way that most rights and duties concerning the harvest are set out in regulations in the Norwegian approach, whereas the Canadian approach is through extensive licence conditions. Although set out in different legal instruments and with major substantive differences, the content of the rights and duties revealed in the case study as a whole expresses quite similar responses to regulatory challenges (albeit fewer restrictions to freedom of business in the Canadian case), and similar legal questions have been triggered in courts, pointing to cross-jurisdictional characteristics of the granting of exclusive *public permits* to harvest marine resources commercially. Economic and cultural context, and the fact that there are different approaches to rights-based fishing, are at the same time

[1785] Hesstvedt (2020) page. 6.

important and also pointed out in literature.[1786] Some of the similarities observed in the case study might resemble common features of the political ideology and economic system rooted in Norway and Canada more generally, but these are only preliminary observations and manifold issues for further examination.[1787]

The complexity of the Norwegian system is so vast that it is hard to synthesise all technicalities under the quota and licence system in the Norwegian FLA apart from general emphasis on two connected issues. The first is the exercise of *executive discretion* connected to specifying requirements and restrictions under the licencing regimes and structural arrangements in *regulations* and granting licences in *individual decisions*. The second is the *regulatory scope* of a legislator at different levels in relation to access regulations.

To start with the former, a lot of the regulations that specify the rules for participation and structural arrangements are set out by the King in Council or the Ministry in regulations, which include rules on ownership concentration, geographical restrictions in transfers of licences, and quota ceilings on structural arrangements, to mention a few. The majority of *individual decisions* are made by the Directorate as an element of day-to-day operations of licence holders. The production of individual decisions have increasingly intensified as fisheries were closed for new entrants and *market-based practices* of purchase and sales of vessels and fishing rights evolved, and structural quota arrangements (SQAs) were introduced. The codifications and loosening of the ties between the physical vessels and fishing rights in the amendment of the Participation Act in 2015 further facilitated for these practices. To be clear, the transfers are not with effect in public law until the Directorate issues the relevant concession/annual permit/structural quota to the new owner and the

[1786] See chapter 4.5.2.

[1787] In a study of the legal character of petroleum licences, however, there seems to be more differences between the approach in Norway and Canada. See more in Sunde and Hunter (2020); Bankes (2020); Nordtveit (2020).

relevant vessel. It is nevertheless an area of large production of individual decisions pointing to the increased role of *commercial aspects* in the quota and licences system.[1788]

The commercialisation of the harvest sector is a result of expressed intentions by the legislature *inter alia* with the introduction of SQAs and the amendments of the Participation Act in 2015, but as noted above the *functioning* of the system *in action* is not necessarily accessible for either the public or politicians. Some of the effects are that the value of the licences and structural quotas have become remarkable high.[1789] The inquiries of thesis also suggest that the controversies and lack of broad political support for the recent amendments of the legislation and the above-mentioned critical review by the Control committee in the Parliament, are consequences of lack of clarity of legislative objectives, coupled with the wide discretion in an impervious regulatory system that has been under little critical legal theoretical scrutiny.

[1788] The legality of the Norwegian practices in which the market de facto determines who are issued various fishing rights when basic conditions are met have been challenged in Trondsen and Ørebech (2012); Kufaas (2020). Sund and Fjørtoft (2018); Saric (2018), on the other hand, find the practices to be legal under current legislation. Trondsen and Ørebech, and Kufaas, argue that the issuing practices constitutes a breach of a duty to exercise discretion through some kind of a mechanical or standardized application of the law, but this literature lacks a broad discussion of relevant case law and administrative law literature. As an example, neither of them draw attention to the analysis of administrative discretion in Moen (2019) in a Norwegian context. Moen analyses jurisprudence and different positions in theory to the standardization of discretion. Standardization is not uncommon in different areas of administrative law for efficiency reasons or to contribute to a decision-making that is not arbitrary. Backer (1986) page 424 ff, rendered in Moen (2019) page 522, articulated a formal position that is often referred to as the *modern position*, that goes far in opening for standardization as long as a general assessment has been conduced in which statutory considerations are accounted for. Graver (2015) page 178 advocates a *substantive requirement* in contrast to a formal position with an underlying presumption that individual assessment is not necessary, but that decisions that appear intrusive call for some individual assessment. With basis in more recent case law, Moen (2019) page 533 finds indications of the *classical position* in which there is a minimum of individual assessment in each individual case as the general presumption. In a final judicial analysis of a specific licencing case, it would probably ultimately fall down to whether all relevant considerations are adequately accounted for in a pre-made standardization as these are not intrusive decisions, but on the contrary processing of application that no applicant has any legal claim of, see for example Prop. 88 L (2014–2015) page 28–29. See more on substantive review in chapter 10.3.4.4.

[1789] See for example Meld. St. 32 (2018–2019) page 53–54.

As to the regulatory scope of the legislating activities, a cardinal topic in administrative and constitutional law, and under human rights obligations, is what a legislator at different levels can do under its powers. In several places in the thesis, a *dualistic nature* of licences is noted in a Norwegian (and Canadian) context. From a public law perspective, they represent a public permit that is subject to extensive regulation to fulfil societal objectives on one hand. On the other hand, however, there can be issuing of licences or similar with contractual elements and a character of a promise that potentially can bind the future exercise of the granting authority, and give the licence holder a stronger protection for changes.[1790] This is a distinction that is especially pertinent as concessions and annual permits in the Norwegian context have become *highly valuable* over the last decade, and with many interests at stake. For some public licences in Norwegian law, the legislature has regulated issues of mortgage, ownership, duration, taxation and similar in statutory law.[1791] As seen in chapter 10.5.3, however, these are issues that are neither regulated in Norwegian, nor Canadian statutory fisheries law, and case law in both jurisdictions has through a similar court reasoning clarified the status of licences as commercial assets (or property in the Canadian context) in relation to tax law and bankruptcy law. These are complex legal questions that this thesis can only reflect on at a general level, but they are at the same time important when discussing the limits for change of a legislator at different levels. Connected to the rights of the licence are also strict duties as elements of an extensive enforcement system. Before synthesizing on these matters in the overall Norwegian FLA, the strategies to ensure compliance to harvest regulations are addressed in the two following sub-chapters.

14.6 Mixed enforcement strategies

Part II reveals that the Norwegian authorities have used mixed enforcement strategies historically and up to today, building on a combination of traditional public enforcement methods of *deterrence strategies* (risk-based control, fines and prosecution), in combination with *empowerment* strategies (co-management in rule-making and enforcement), with the

[1790] As noted in chapter 8.4.1, this dualistic nature is pointed out for the use of licencing more generally in Norwegian legal literature.

[1791] Some examples are section 20 in the Aquaculture Act and sections 3-9 and 6-2 in lov 29. november 1996 nr. 72 om petroleumsvirksomhet (Petroleum Act).

role of the sales organizations as a seemingly unique and fundamental element of the system. The approaches can also be seen as *responsive regulation* with both use of punishment and persuasion.[1792] There has also been, in the last decades, increasing use of administrative penalties, self-reporting and electronic monitoring of the activities. The inquiries, however, have not identified a clear or explicitly articulated enforcement strategy in preparatory works building on theoretical advancements until recently.[1793] The various developments seem to have been more of a continuation and modifications of established practices through the legislative processes.

The comparative study in part III demonstrates that the general enforcement strategies in Canadian fisheries management similarly involves a component of traditional public enforcement in the form of risk-based controls, criminal prosecuting and sentencing of punishment in courts, but with major institutional differences. A common characteristic across the cases, and also probably in many other jurisdictions, is the central role of public agencies in the enforcement system. This has also been advocated in influential economics of crime literature, but with increasingly influential literature on various forms of co-management in a modern context. The difference between the two cases is the use of camera surveillance on every boat, self-reporting and control of all landings through a specific methodology conducted by a government-approved independent third-party selected and paid by the industry in the Canadian case. This is a strategy that resembles a combination of *situational crime prevention* and *compliance by design approaches*, in which the opportunities to violate rules have been minimized, and new forms of *smart-regulation* and *meta-regulation* approaches. As will be further demonstrated in chapter 14.7, it is reasonable to expect increased emphasis of these approaches and technological solutions in the Norwegian enforcement system (and more generally).

[1792] See an overview over prevailing theories in chapter 4.6.

[1793] NOU 2019: 21 chapter 4 is for example the first explicit theoretical overview of enforcement strategies found in official documents in the legislative processes studied in the thesis.

For the time being, however, the traditional methods prevail and seem deeply rooted within the Norwegian FLA, but it is thought-provoking that there are still observations of IUU-fishing in an industry building its activities on *exclusive access* to harvest common shared resources and in an industry that have been characterized by high internal legitimacy and moral support for the regulations. These are issues that need to be addressed in relation to the future design of the quota and licence system, but also with close attention to possible implications of the identified transformation of the harvest sector into fewer and more professionalized actors on the enforcement challenges.[1794]

A last issue for critical reflection is the recent shift into an increased use of administrative sanctions in the Norwegian system. The rationale is to increase efficiency and to de-criminalize less serious fishery offences, which is also a shift observed in EU law more generally, and in fisheries law in some jurisdictions such as the US, pointing to a more general trend.[1795] The Canadian expansion of ticketing echoes a motivation for more effective criminal proceedings. Although the use of administrative forfeiture goes almost 50 years back in time in a Norwegian context, the increasing use of administrative fines is at the same time a new phenomenon that has not yet found its final form in the regulatory system.[1796] There was, as noted above, no external shock or crisis triggering the introduction, but the implementation has been done gradually as few acts and omissions were included when it first went into force. For the industry it might not represent as much of a principled change as for the administration and overall system, as similar offences previously were fined by the police. The recent critical attention to the practices of administrative confiscation in relation to obligations under the ECHR, and what seems to be a lack of clarity and coherence of administrative sanctions in fisheries management in relation to the overall criminal law system in a Norwegian context, are issues that merit

[1794] This is also a point made in NOU 2019: 21 page 39.

[1795] See for example Jansen (2013). FAO (2003) reviews administrative sanction in selected countries and demonstrates that they can be fashioned in many ways to achieve its purposes. It also provides some guidelines for the introduction of administrative sanctions in domestic law. See also Nilsson (2013) on administrative sanctions in the enforcement of environmental responsibilities and implications to the rule of law.

[1796] The same goes for the introduction of administrative fines and forfeiture in Norwegian aquaculture legislation.

further inspection by the legislator.[1797] The limits and opportunities for change in the enforcement system will be discussed in the overall synthesis following some final reflections on the future role of technology in the monitoring of the harvest and landing operations.

14.7 Future role of technology in monitoring of harvest and landing operations

Although development of new technology in different ways has become an element of the enforcement system up to today, it seems to be the case that the enforcement systems in all modern fishery jurisdictions will be at a crossroad regarding the future role of technology, with the ongoing digital revolution, development of AI and other technologies for data collection. By AI in this context, I refer to systems that can apply cognitive functions to perform certain tasks that are typically conducted by a human, which can also include machine learning (computers that can improve their performance without specific programming).[1798]

At a general level, this development concerns the generation, handling and use of digital information. In a Norwegian fishery specific context it is the use of technology that can collect data throughout the value chain from the individual harvest operation to a finished product in the store, the analysis of this data and a communication of the data between those who will use it that has received attention.[1799] The rationale is that new technologies can provide for increased compliance with legislation and correct registration of the outtake of resources, and ensure a documentation of sustainable harvest practices.[1800] The introduction of a system with full automatization of the harvest in line with the above would be a step in the direction of compliance by design strategies where the opportunities for violating regulations of harvest operations and landings are minimized. As seen, this is an

[1797] In that respect, the processes following several court cases concerning administrative sanctions in aquaculture legislation can give guidance. After a working group had inquired the system, amendments of the Aquaculture Act was proposes and adopted, see more on in Prop. 103 L (2012–2013).

[1798] Similar to the definition in Chesterman (2021) page 1.

[1799] This is described in more detail in NOU 2019: 21 chapter 9.

[1800] NOU 2019: 21 page 127.

approach that characterizes the Canadian case with its 100 % monitoring practices at sea and during landings, but the methodology in the Canadian case is quite different than the opportunities with the data collection described above.

A potential shift into a new *technological enforcement paradigm* requires attention from the legislator in many respects that can only be briefly introduced in this thesis. The first concerns the strategic dimension. As seen, there are many approaches in theory and practice on how to achieve compliance. The traditional method, building on a combination of internal legitimacy and risk-based approaches, is not just about what best promotes compliance, but also a question of efficient use of public resources as the use of physical inspections and human resources has a cost limit. Whether a fully automated catch documentation system is the right solution would also be a matter of costs and who pays for it, and the feasibility of automatic systems within the current diverse fleet groups in Norway.

Second, the introduction of a digitalized data collection and use of machines into a legal system designed for the use of humans to monitor, assess data and keep track of the development of the fisheries creates new legal questions that are little explored. One element is the use of camera monitoring and issues of privacy and data protection in relation to surveillance more generally. Another issue is an inclusion of AI and machines more broadly into data collection, analysis and a digital quota accounting that seems to potentially replace many of the human resources used in these phases of enforcement services today. There is still limited research on the field of AI and law, especially with respect to difficulties in regulating AI, and the difficulties that AI systems pose to governance and authorities. [1801]

One of the challenges identified in literature, for example, is the increasing autonomy of the system and how it raises practical difficulties of managing risk, of morality of certain functions being undertaken by machines and the legitimacy gap when a public authority delegates its authority to algorithms. [1802] How can, for example, procedural safeguards such

[1801] Chesterman (2021) page 2–3.

[1802] Chesterman (2021) page 7.

as a right to be notified, heard and be given grounds for a decision in administrative law be accounted for if a quota decision potentially is generated by a machine? Another issue identified in literature is the opacity of AI as 1) non-specialists might be unable to understand the system, 2) companies might build in opacity to protect proprietary interest and 3) machine learning techniques themselves might be difficult to explain in a comprehensible manner to a human. As seen in the case study, one of the DFO respondents in the Canadian case questioned the amount of data collected and emphasized that the system, and data, must be understood by both enforcement agencies and by courts.

For all jurisdictions, these are legal issues that need to be addressed, as the technology seems to be rather limitless in respect to monitoring opportunities. The legal framework must set the boundaries of what the future fisheries management and the enforcement system shall look like. It is also worth noting that running to the best technical quick fix for fisheries governance challenges should be done with caution,[1803] and bear in mind the words by the American writer and biochemist Isaac Asimov: "The saddest aspect of life now is that science gathers knowledge faster than society gathers wisdom."[1804]

14.8 Summarizing synthesis and conclusion: What are the limits and opportunities for change?

14.8.1 Conceptualization of regulatory scope of the legislator

What should be made of the thesis inquiries and synthesized key features on the limits and opportunities for change in Norwegian fisheries legislation? In other words, under which *scope* can the captain in the form of *the legislature*, *the political executive* or an *administrative executive* steer the fisheries legislation vessel on the basis of political ambition and aspirations, best-practices elsewhere, legal transplants or an ideal theory?

[1803] See for example Degnbol et al. (2006).

[1804] As rendered in Linke and Jentoft (2014).

Figure 16 is an attempt to simplify and abstract some of the essentials from the investigations on what legislating commercial fisheries in Norway means in practice.[1805] One purpose of this exercise is to clarify and draw attention to the important substantive questions and dilemmas that must be handled in order to design a robust, coherent and sound legislation for the future. As seen throughout the thesis, fishing licences (as a commercial permit in combination with a concession or annual permit in the current regime) have become a fundamental element of the legal framework by being the instrument for setting out the *rights and duties* under the legislative framework, either through licence conditions, regulations or statutory law. The main fundament of this conceptualization is therefore a fishing licence.

[1805] It must be emphasized that this is not an expression of *de lege lata* analysis of the law, but an image of what I have deciphered as central issues to reflect on from a legal point of view. It is also a non-exhaustive simplification of complex legal constructs and interactions, in which the boundaries and scales does not represent anything else but demonstrating some basic ideas.

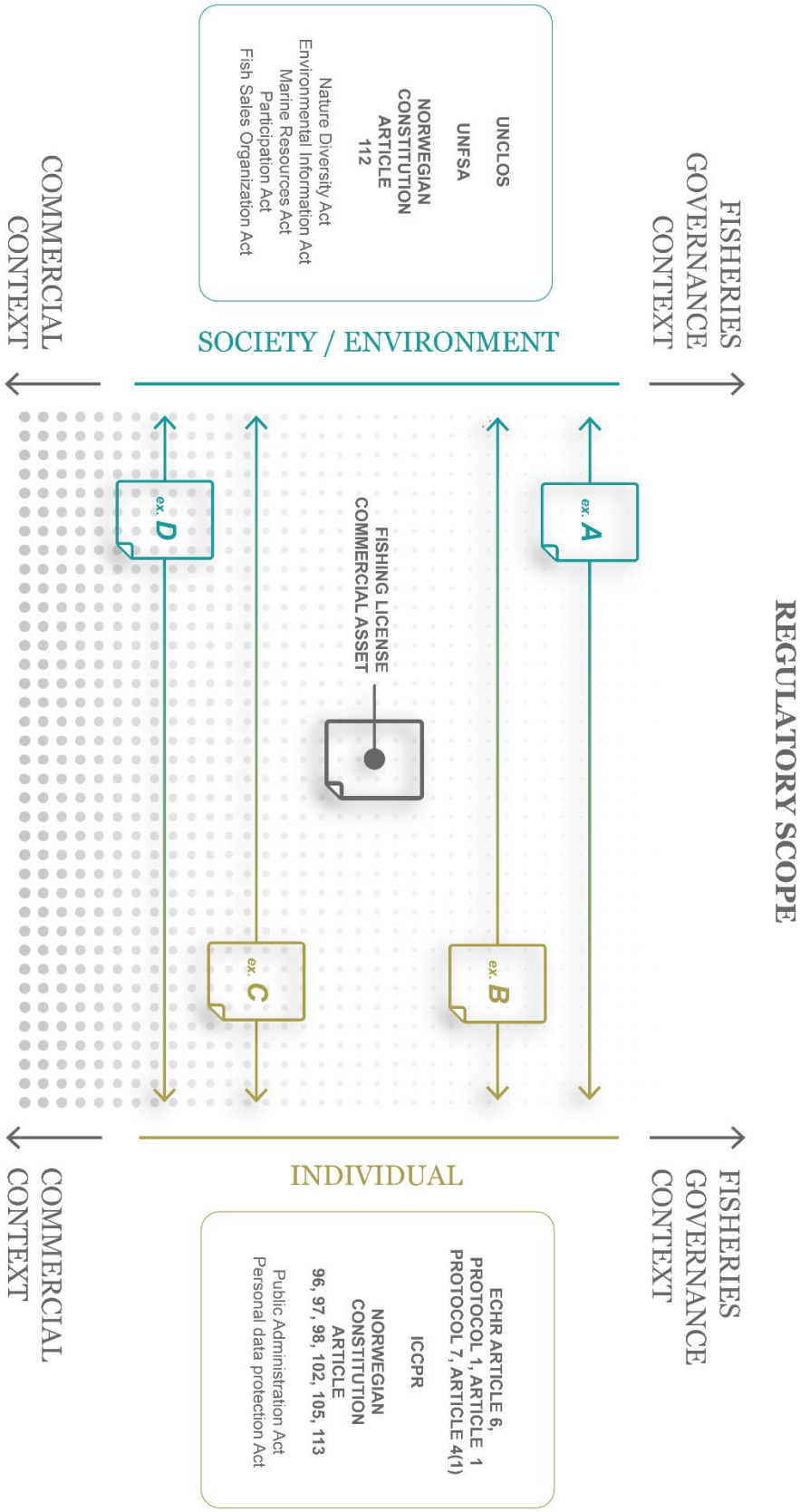

Figure 16 Regulatory scope for the legislator (figure showed in portrait orientation to optimize size)

Moreover, the *dualistic nature* of licences reflected on in chapter 14.5 is central in this model. The figure tries to convey some of this nature by visualizing a document in the middle that is both a fishing licence and a commercial asset. The next important element of the figure is a visualization of two dimensions of the licence. *Horizontally*, the *regulatory scope* for a legislator when making decisions is illustrated with *legal constraints* rooted in consideration to the *environment and society* on the left side and consideration to the *individual on* the right side. The regulatory scope in this conceptualization resonates with the general idea of a fisheries legislator approach (FLA) assisting the legislator to manoeuvre and set the course metaphorically as the captain assisted by a pair of binoculars to steer the vessel. The constraints to the left are obligations for the management of the wild-living marine resources including the obligations under international fisheries law,[1806] Article 112(3) of the Norwegian Constitution, and statutory obligations under the Nature Diversity Act, the Environmental Information Act, the Marine Resources Act, the Participation Act and the Fish Sales Organization Act.[1807] On the right side are the limitations under human rights obligations, including the ECHR, the IPPCR and several provisions under the Norwegian Constitution (Article 96, 97, 98, 102, 105 and 113). Central statutory obligations are section 35 of the Public Administration Act and individual rights under the Personal Data Protection Act.

Moreover, the figure visualizes a *vertical* spectrum of types of decisions labelled under two categories: 1) *fisheries governance context*, and 2) *commercial context*. The first represents typical fisheries management decisions (for example setting a quota) that would be placed in the upper half in the lightly colored area. The second type is concerned with the commercial aspects of the fishing activities (for example introducing SQAs or loosening

[1806] As introduced in chapter 3.2, The Norwegian legal tradition assumes the dualistic principle that requires that international law must be translated into national law to apply as Norwegian law. UNCLOS and UNFSA are not incorporated into Norwegian law as the ECHR and ICCPR are in the Human Rights Act. International fisheries law is still listed here as it conveys international obligations and is an element of the Marine Resources Act section 7(2)(a).

[1807] This is a simplification. As seen in chapter 3.3, there are many other set of rules that apply to fisheries governance, but for simplicity only these are included.

participation restrictions), which is visualized through the *commercial context* towards the more colored bottom area. It is important to stress that many decisions can have characteristics of both aspects and that the categories are not to be seen as distinct. Decisions will to different degrees move up and down on the axis, depending on the more specific content of a decision. This visualization is primarily an analytical tool to make more explicit the characteristics of the decision in question.

A last important point in this conceptualization is that the legislating task can be viewed at two levels: 1) the authority of the executive to make regulations and individual decisions, and 2) the authority of the legislature to adopt primary legislation. Another dimension to this is that the legislature, as in the Norwegian Parliament in this case, is also authorized to amend the Norwegian Constitution. The constraints in the figure do not apply to this level of the decision-making, and it is therefore addressed separately. What this conceptualization means in practice will be exemplified in the following, starting with the executive.

14.8.2 Regulatory scope of the executive

Decision-making by the executive in the form of individual decisions and regulations must be set out within the legal boundaries to the left and the right of the regulatory scope in figure 16.[1808] No decision, for example to amend licences conditions in disfavour of a licence holder, must therefore constitute a retroactive decision that violates section 35 of the Public Administration Act or Article 97 of the Norwegian Constitution, or be based on an exercise of discretion that is unfair or disproportionate differential treatment pursuant to section 98 of the Norwegian Constitution.[1809] The issuing of an administrative fine for the violation of an act or omission that is not clearly articulated in regulations is a decision that pushes towards the limits in ECHR Article 7 and Article 113 of the Constitution. In the figure, this

[1808] To simplify the model executive orders are not included. They would limit the authority of a subordinate executive.

[1809] See more on the authority of the executive to amend its decisions pursuant to administrative law in Tøssebro (2021).

decision is illustrated in the document labelled B, which is placed in the fisheries governance context.

At the other end of the scope, there are examples of liberal annual regulations that have led to overfishing of national total allowable catches (TAC) of fish stocks, which are decisions that pushes towards the limits to the left represented by the purpose clause of the Marine Resources Act, or environmental duty under Article 112(3) of the Norwegian Constitution. This is illustrated as the document labelled A in the fisheries governance context. Of examples in a commercial context, allowing an unlimited *quota ceiling* in structural quota arrangements (SQAs) for coastal fisheries could be a decision pushing towards the left represented by the Marine Resources Act section 2 of common shared resources, or social considerations under the purpose clauses of the legislation, even though the decision fulfils the economic and environmental obligations. This is exemplified with the document labelled D in figure 16. On the other end of the regulatory scope in a commercial context, a decision to restrict sales of structural quotas (for example geographically) can be a decision that pushes towards the legal limits to the right, illustrated in document C.

As observed in the thesis, however, the vagueness of the legislation can make it difficult to know where the boundaries of the powers of the executive are. The judiciary can contribute to clarify the scope. A prohibition on fishing is not seen as an interference to any constitutionally protected right,[1810] and amendments of quota shares between vessel groups justified by consideration to employment and production have been ruled legal within the scope of the regulating authority in case law.[1811] The judgment in Rt. 2013 s. 1345 is a central case in a more contemporary context. Although the majority vote assumed a broad scope to change the framework the licence holders operate under, including changes of quota shares within vessel groups, the judgment also left many unanswered questions as it was a dissenting vote and all three votes acknowledged that the circumstances in the specific case at bar had created a legal position for the licence holder that could be constitutionally

[1810] Rt. 1961 s. 554.

[1811] Rt. 1993 s. 578.

protected.[1812] The Supreme Court also gave no guidance on content or legal significance of the common shared resources principle under the Marine Resources Act section 2. Only the second voting judge referred to it and stated that the content of the principle is "not clear," but that she couldn't see that it contradicts a system of using individual licences to limit access to the fisheries.[1813] Lack of clarity with respect to the statutory and constitutional limits of the executive scope are, however, issues that can be addressed by the legislature.

14.8.3 Regulatory scope of the legislature

The legislator in the form of *the legislature* is authorized to adopt primary legislation under Article 75 the Norwegian Constitution. As seen, the legislature has chosen a legal design with wide executive authorities. The inquiries of the thesis have demonstrated that this in many cases have been rational and expedient due to the complexity and uncertain nature of the management problems at hand. There is at the same time set out many statutory duties for the executive in relation to the management of the resources. The legislature has therefore been active in decision-making under the *fisheries governance context* of the model.

Although there has been an increasing use of instruments that could be placed in the *commercial context* (but that arguably also fits in under a fisheries governance context), the legislature has not regulated all aspects of licences in relation to *commercial realities*. It is therefore primarily the courts that have clarified the meaning of licences as commercial instruments in some legal contexts (tax law and bankruptcy law), in some cases after administrative practices have evolved. As seen, this is the state of law both Norway and Canada. This can be a consequence of deliberative legislative design choices, but I want to draw attention to the issue and encourage more transparency and consideration by the legislator to whether this is a regulatory area that *should be steered actively or not* by the democratically elected branch of the government. This brings us back to the parliamentary

[1812] Arntzen (2016a) and Arntzen (2017) also find that there is lack of clarity on the legal situation following this judgment.

[1813] Rt. 2013 s. 1345 para 177.

discussion in the adoption process of the Raw Fish Act 1938 and the more fundamental questions: What cases should be handled at the administrative level, and at what level of detail should the legislative engage?

If the authorities of the executive are found to be too wide, vague or weak, the legislature can amend the legislation as long as it does not go beyond the limits to the left or right of the regulatory scope. In practice, these are the constraints set out at the constitutional level. If the majority of the Norwegian Parliament for example wanted to make the activity requirement stricter for current licence holders under section 6 of the Participation Act, or reallocate a certain share of the trawler quotas to the coastal fleet, it would have to be assessed in relation to the prohibition on retroactive legislation for existing licence holders under Article 97 of the Constitution. In the wake of the dissenting vote in Rt. 2013 s. 1345, see details in chapter 8.4.1, literature has suggested that the legislator might hesitate to pass legislation with retroactive effect in fear of losing potential lawsuits an amendment could evoke.[1814] It is not for this thesis to assess the state of law *de lege lata*, but the judgment can on the other hand also be seen as a call for strong justifications for regulatory changes regardless of the scope, or whether the constitutional standard of review is that retroactive legislation must not be "unreasonable and unfair" or a "strong public interest" must be demonstrated. The underlying fundamental principles these standards express are considerations a legislator must make regardless of hypothetical risks of losing lawsuits in courts.

The ECHR is as noted in chapter 3.2 incorporated into Norwegian law through the Human Rights Act. Under section 3 of the Act, it prevails other statutory law in cases of conflict. The ECHR therefore has a strong position in Norwegian law, but is not at a constitutional level. Interference with the legal position of a licence holder would fall under the scope of P1-1 if licences are regarded as "possessions" under the ECHR. Case law in the ECtHR demonstrates that public permits which involves economic interest would fall under this

[1814] Arntzen (2016a) page 115 believes there will be a "chilling effect" where the legislator will be reluctant to pass on retroactive legislation.

definition.[1815] The majority vote in Rt. 2013 s. 1345 considered whether the amendments of the regulations constituted an interference with a "legitimate expectation" to continue an activity, but found that the decision was proportionate and not a violation of P1-1. The third voting judge came to the opposite conclusion and emphasized that "there is no doubt that licences for commercial activities, fishing licences and allocated fishing quotas must be regarded as existing rights to property,"[1816] and thereby fall under "existing possessions" under P1-1.[1817] The third voting judge thereby went far in viewing the fishing rights as commercial assets. This thesis will not pursue these complex legal questions further.[1818] The main point here is that any decision made by a legislator that can give a fishing licence (or similar) a stronger character of a commercial asset or binding promise, and thereby potentially strengthen the legal position in relation to the ECHR and provisions under the Constitution, should be well founded and assessed broadly and principally.[1819] A next question for consideration is what actions that would constitute an "intervention" in the context of the ECHR, but the proportionality test in which the authorities "must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights" is nevertheless a guidance for exercising administrative discretion when regulating fisheries.[1820]

[1815] See for example Solheim (2010) chapter 8.2.3.2.

[1816] Rt. 2013 s. 1345 para 234. Norwegian wording: "Det er ikke tvilsomt at ervervstillatelser, fiskekonsesjoner og tildelte fiskekvoter må anses som eksisterende formuesrettigheter."

[1817] Reference is made to the analysis in Solheim (2010) page 218 ff.

[1818] See for example Alvik (2021) for a recent analysis of the protection of economic rights for regulatory interference under Articles 97 and 95 of the Norwegian Constitution and ECHR P1-1. A main conclusion is that the licensee must withstand certain interference, but they cannot be clearly disproportionate. It will also depend on the character of the interference, *inter alia* if it will affect at a general or individual level and what type of right it concerns. Nordtveit (2012) page 359–360 points to the underdeveloped conceptual apparatus for rights to natural resources that are not subject to property rights, and to the extensive discourse on whether the concept "assets" only include tradable rights.

[1819] Arntzen (2017) page 80, for example, concludes that a transformation of annual permits in coastal fisheries into a licence without any predefined time limitation changes their legal character and would give them "a clear character of an asset." Norwegian wording: "et tydelig preg av formuesrettigheter."

[1820] ECtHR *Case Draon v. France*, of October 6, 2005. Also rendered in rendered in Solheim (2010) page 81.

At the other end of the scope, if the legislature, for example, wanted to loosen or remove the activity requirement in section 6 of the Participation Act, this could mark a decision (primarily under a commercial context) pushing towards the boundaries of the principle of common shared resources in the Marine Resources Act section 2, or the purpose clause of the Participation Act. These are at the same time both provisions at the statutory level, and a *hypothetical* potential conflict of norms that would have to be solved through a harmonization of the rules. A simple majority of the legislature could in such a situation decide to amend or repeal section 2 of the Marine Resources Act. The question to ask in relation to FLA would be if the repealing of the principle of common shared resources could come in conflict with informal norms, or a fundamental norm deeply embedded in the regulatory culture. If so, a change in this direction could potentially weaken the external legitimacy to the legislation. The legal implications of amending the Participation Act would be assessed if a proposal was to be pursued, but the point here is that there are linkages that are important for a legislator to acknowledge before moving on with a will to reform in either or the other direction.

As a last example, if the legislature wanted to strengthen the principle of the common shared resources by laying down a statutory provision that set out that 80 % of all fish quotas were reserved for coastal vessels, the decision could be found invalid by courts if it was to be found an interference with a constitutionally protected position of the offshore licence holders. The constitutional protection could under the right circumstances stand in the way for changes in statutory law. These are just hypothetical examples, but the essence of the above is also that the principle of common shared resources does not have a strong explicit legal position in the legal framework, which could potentially be further weakened if the commercial characteristics became more ubiquitous in the system. This is also part of the reason why several parliamentarians in 2016 put forward three different proposals to articulate a common shared resources principle in the Norwegian Constitution.[1821]

[1821] See more in Dokument 12:23 (2015–2016) Grunnlovsforslag 23 om ny § 112 a (om at dei marine ressursane høyrer fellesskapet til) ; Dokument 12:26 (2015–2016) Grunnlovsforslag 26 om ny § 111 (om at de marine ressursene tilhører fellesskapet og skal komme kystsamfunnene til gode) ; Dokument 12:41 (2015–2016) Grunnlovsforslag 41 om ny § 111 første ledd (de marine ressurser).

This points to the authority of the legislature, in the form of the Norwegian Parliament, to amend the Norwegian Constitution under Article 121 of it. The basic procedure under Article 121 is that a proposal has to be put forward on one of the three first sessions[1822] after an election. Following a new election, it is up for a new Parliament to consider and decide whether to adopt any proposals by the previous elected Parliament on one of the first three sessions. It is required that two-thirds of the Parliament supports it, and no proposal must "contradict the principles embodied in this Constitution."[1823] As noted, the boundaries of the regulatory scope in figure 16 does not apply the same way to this authority as all international law obligations have to be implemented in Norwegian law to come into legal effect, and constitutional norms are on the same hierarchical level. A potential conflict between constitutional norms would have to be solved on the basis of basic principles of statutory interpretation in Norwegian law. This is a vast topic that this thesis cannot pursue in detail, but more reflections are given on these issues in part V.

To conclude, I have in this synthesis tried to abstract some of the central legal boundaries for a legislator at different levels when considering regulatory change. These are ideas building on previous theory and practice that address complex matters that must be further examined and refined, but that used in conjunction to the observations in chapter 13, and synthesis of the different components of the legal framework in chapters 14.1–14.7, gives a point of departure for continued research and policy-discussions on design and content of future fisheries legislation. The topic of the following part V of the thesis includes preliminary thoughts of how a fisheries legislator approach (FLA) in the Norwegian case could work in practice.

[1822] In Norwegian this is referred to as "Storting," and it represents the annual session the Parliament is assembled.

[1823] The Norwegian Constitution Article 121(1).

14 SYNTHESIS OF NORWEGIAN FISHERIES LEGISLATOR APPROACH (FLA) AND CROSS-JURISDICTIONAL CHARACTERISTICS

PART V POLICY AND CONCLUSION: WHAT SHOULD WE DO?

15 Testing a Norwegian fisheries legislator approach (FLA) on a research question

15.1 Introduction

The last part of the thesis moves on to reflections on a research question in light of the identified Norwegian fisheries legislator approach (FLA) in part IV. It is therefore a clear shift into *explicit normative assessments* and *recommendations* within the legal framework. The research question is:

- How can the right to the wild living marine resources of Norwegian society as a whole under section 2 of the Marine Resources Act (a principle of common shared resources) be operationalized and strengthened?

The research question is ambiguous and can be approached from many angles. As suggested in chapter 14.2.2, can the principle of common shared resources be seen as the codification of a long-lasting social contract between the state and the coastal population for regulating the terms for exploitation of the resources. This has been a way to ensure *external* and *internal legitimacy* over the course of time, but the thesis has observed that it is not clear what this principle means in a *modern context,* or in light of the objectives set out in the Marine Resources Act, the Participation Act and the Fish Sales Organization Act. The thesis has also identified that the transformation into a modern fisheries governance regime happened with modest attention to implications for settlement and employment, and that the transformation took place without broad and principled discussion and legal analysis. So, although the shift has been found necessary to reduce the harvest capacity and improve the economic performance of the commercial fisheries, it might have weakened the external legitimacy to the regulatory framework.

On this background, I will approach the research question with an intention to address how external legitimacy can be strengthened through legal action in chapter 15.2. Moreover, I have in the synthesis indicated that the principle of common shared resources does not have

a strong explicit legal position in Norwegian law. This despite the fact that this is a principle that is well rooted in the Norwegian fisheries legislation culture, which also resonates to the ideas of a public trust doctrine (PTD) and some fundamental values acknowledged across jurisdictions. Chapter 15.4 therefore welcomes a discussion on the future legal status of a common shared resources principle in Norwegian law.

15.2 Statutory reform

15.2.1 Introduction

In order to remedy some of the weakened external legitimacy, I propose to initiate a broad statutory reform. On basis of the thesis findings, a reform should encompass: 1) discussion of what a modern social contract could mean more specifically in relation to the objectives and the fundamental principles of the legislation (including major legislative design choices, internal coherence and priorities), 2) a clarification the rights and responsibilities of the harvesters and 3) consideration of the structure of the legislation (legal technical issues). These three issues are respectively addressed in chapters 15.2.2, 15.2.3 and 15.2.4.

15.2.2 Revisiting objectives and fundamental principles of the legislation

A statutory reform would provide an opportunity for broad, principal discussion of what fisheries legislation should represent today and for the future. By this I do not mean to appoint another policy advisory commission mandated to assess and make recommendations on the quota policy, specific market-based instruments or quota allocation, but a reform that lifts the gaze above the nitty gritty details and thoroughly examines and considers the fundamental principles of the legal framework. This would also be an opportunity to reconsider the social objectives of employment and settlement in a modern context and in light of the environmental and global challenges we are facing.

There are several institutional questions and legal design choices that should be considered explicitly: 1) *what level of detail* should the legislature set out the objectives of legislation and what are the priorities (constraints of the executive), 2) *who* are to determine the content of the *public interest* and on which terms, 3) to *what degree* should fundamental principles of the framework be maintained in a future regulatory design (rules more deeply

embedded in the legislation identified in the Norwegian FLA) and 4) to what extent should commercial realities of the industry be regulated by statutory law. The thesis has revealed that the statutory framework with respect to these issues can be improved. Relevant political and factual questions for a legislator to ask when assessing objectives are: What kind of a fishing fleet attracts employment now and in future? What kind of employment in fisheries do current and future the future generations of the coastal population envisage more generally? What kind of fish products do important markets and future generations want to eat? How can the fisheries be conducted with the least carbon footprint and impact on the marine ecosystems? Note that a basic premise in the Norwegian FLA is that commercial fisheries operate under the Norwegian market-based economy in which what is considered illegal subsidies under SDG 14 is not allowed.[1824]

Related to these issues is the question of how the "society as a whole" and the coastal communities *could and should* benefit from the resources. Whether a form of resource rent taxation, or other additional tax levied on the first-hand sales, should be introduced (as advocated in fisheries economics theory) has been discussed on several occasions.[1825] In St.meld. nr. 21 (2006–2007) it was concluded that the:

> value creation [from fisheries] should to the extent possible remain in the industry and the coastal communities, as the investment of society in further development of the districts and industry along the coast. The cabinet will therefore not introduce a resource rent taxation in the fisheries.[1826]

[1824] See chapter 2.4.

[1825] See for example. St.meld. nr. 51 (1997–98) page 10; St.meld. nr 21 (2006–2007) chapter 7. See more in chapter 4.2.3 for the theoretical underpinnings of this concept. In the petroleum and hydropower sector, resource rent taxation is levied through special tax arrangement in addition to ordinary company taxes.

[1826] St.meld. nr. 21 (2006–2007) page 125. Norwegian wording: "verdiskapingen i størst mulig grad bør forbli i næringen og i kystsamfunnene, som samfunnets investering i en videre utvikling av distriktene og næringslivet langs kysten. Regjeringen vil derfor ikke innføre en ressursavgift i fiskeriene." This conclusion was endorsed by the majority of the Parliament. Innst. S. nr. 238 (2006–2007) page 28.

In other words, it was found better to leave the value creation within the industry as it would presumably invest in the local communities and employ the population, than a tax scheme that would go to the central authorities.[1827] A resource rent taxation was proposed by a policy advisory commission in NOU 2016: 26 in order to *operationalize* the common shared resources principle. In the following processes the majority of the Parliament asked for a fiscal fee at a fixed number of 100 millions NOK, which now is under implementation, whereas a minority faction wanted to continue and strengthen the role of the fisheries for creating employment in the coastal communities.[1828]

I do not necessarily see these two avenues as incompatible in future fisheries policies, but want draw attention to the role of the core *statutory principles* of the activity requirement in relation to the social objectives of the legislation. Relevant in that regard is the performance audit by the Auditor General from 2020 referred to several places in the thesis.[1829] This is an audit under section 9 of the Auditor General Act that examined how the quota system the last 15 years has accounted for principles for the fisheries policies and the objectives of the Marine Resources Act (including the common shared principle) and the Participation Act.[1830] It is a thorough and important report that reveals factual trends and regulatory effects that needs to be addressed, but there are in my view also shortcomings to it.

First of all, it could have reflected more on the ambiguity of the purpose clauses and elaborated how it came to some of its assessments. One example is that is finds that the principle of a harvester owned fleet *has been challenged* as there is less fisherman ownership now than 15 years ago. In the coastal cod fleet, for example, the Auditor General found that the share of non-registered fisherman in the size group 21–27,99 meters increased from 12,6

[1827] As seen in chapter 4.7, Holm et al. (2015) points out that the question whether the value of fisheries lay in the generalised economic value it brings to national welfare or if it will continue to support social aspects is central to what the social contract of fisheries represents today and that will probably continue to define future debates.

[1828] Innst. 243 S (2019–2020) page 18.

[1829] See chapters 1.2, 11.3.5 and 14.2.1.

[1830] Auditor General Report 2020 chapter 9.

% to 19,3 % between 2008–2018.[1831] This is not a principle set out in the purpose provisions explicitly, but a fundamental element of the system articulated in section 6 of the Participation Act. The statutory requirement is that more than 50 % of the ownership of the vessel must be by an active fisherman (or administrative vessel owners). The Auditor General does not elaborate why the reduction down to 80 % fisherman ownership, which is still high above the minimum requirement, [1832] is seen as a challenge. The Auditor General could therefore have been more explicit on how the audit observations were assessed in relation to the purposes of the legislation, and how the various principles highlighted under the audit criteria relate to the purpose provisions. The point here is not to question the findings of the Auditor General, but to draw attention to the difficulties of defining the public interest under the current legislative framework and that some of the underlying and principled problems observed in this thesis are not addressed in the audit process.[1833]

What can be made from the thesis observations is that the activity requirement has a fundamental position in the Norwegian FLA. Together with the nationality requirement it is one of the few statutory rules that contribute to maintaining more than a formal linkage between the marine resources and coastal communities, by requiring some practical (and physical) connection to the fishing activities by the owners of fishing vessels. Questions of ownership should also be seen in relation to economic performance. There is for example research that suggest that family and local ownership can perform better than other ownership in high margin industries that fisheries can represent.[1834] The Canadian case has also demonstrated that a fishery without a nationality, nor an activity requirement, has raised concerns about unsatisfactory social performance, which has been addressed in the Canadian Parliament and is under follow-up in DFO. [1835]All of these are rationale that calls

[1831] Auditor General Report 2020 page 70. For the size group 15–20,9 meters, the non-fisherman registered share decreased from 13,5 % to 11,9 %. The highest observed increase in the fisheries studied in the audit was in the size group of vessels between 13–20,9 meters the coastal mackerel fisheries

[1832] There might on the other hand be individual differences from vessel to vessel that is not reflected in the audit. Only aggregated numbers are presented.

[1833] See reflections in chapter 14.3.1.

[1834] See for example Randøy, Dibrell and Craig (2009).

[1835] See also Hersoug (2018) with a critical view of the case of New Zealand.

for caution for loosening the activity requirement, and that a stricter requirement could potentially increase external legitimacy, but these are also issues that must be considered in light of the overall purposes of legislation and what the fisheries should be in the future. These are also issues that should be seen in relation to the role of economic performance and the harvesters in a future legal design. External legitimacy to the harvesters could also potentially be strengthened in two other respects: 1) by improved resource control and compliance with regulations, and 2) by enabling the harvester to develop a modern fleet that is environmentally friendly, safe and attracts employment and investments.[1836]

15.2.3 Clarifying responsibilities of the licence holders

As suggested above, fishery licences plays a fundamental role in the Norwegian FLA. At the same time there is a potential to further clarify the role of the licences holders and the connection to the principle of common shared resources. One way of strengthening the principle could be to express more clearly the environmental duties of the actors who are issued rights to harvest on behalf of the society.[1837] Although harvesters in the current system are subject to extensive regulations, a statutory duty or similar could be a way to increase the external legitimacy from the public that should be further investigated.[1838] As seen in the Canadian case, the industry respondent highlighted how the monitoring scheme in the halibut fisheries made it more defensible, transparent and open to the public, suggesting that this could be an element in increasing the external legitimacy.

In conjunction to such an exercise, it would be timely to express the corresponding rights of the licence holders more clearly, and thereby also addressing the commercial realities of

[1836] The role of the processing industry in relation to the activity requirement is not emphasized here, but adds a complicating element to the discussion. It is questionable that the processing industry, which is also closely connected to the activities and creates work in coastal communities, as a general rule cannot own vessels. This must at the same time be seen in relation to Norwegian obligations under the EEA, which is not studied in the thesis.

[1837] Soliman (2014e) proposes a duty of stewardship to existing fisheries governance structures (such as ITQ regimes). In his proposal it would be an obligation to take care of another person's property. In this case, fisheries as a natural resource belonging to the public.

[1838] It could potentially also strengthen environmental performance, but that would be the subject matter of another research question than the one selected for this preliminary analysis.

the industry. There has in literature been calls for formally setting out in fisheries legislation that licences can be transferred between private actors.[1839] This is one of the questions to consider in a clarification of rights of licences holders, but it should at the same time be seen in relation to the other issues considered in a statutory reform and examined carefully in relation to potential implications for the principle of common shared resources and the limits under regulatory scope addressed in chapter 14.8 above. These are also matters that are relevant to address in relation to the idea of articulating the common resources principle as a constitutional norm, see more below.

15.2.4 Structure of legislation and legal technical considerations

Lastly, it would also be natural to reconsider the structure of the legislation and legal technical matters in a statutory form. On several occasions, the question of whether the access regulations (the Participation Act) should be consolidated with the rules of the harvest (the Marine Resources Act) into one statute have come up. A consolidation of the antecedent of the Marine Resources Act in the Saltwater Fishing Act 1983 with the Participation Act was for example raised by a policy advisory commission that assessed the structure of Norwegian legislation generally in 1992.[1840] The proposal by the commission was addressed in the legislative process prior to the adoption of the Participation Act.[1841] The idea was not rejected in the Bill proposition, but it was highlighted that it would postpone the adoption of the Act as a consolidation would require extensive examination and would be considered at a later stage.[1842]

The thesis has demonstrated how intricately connected the rules of *who* can harvest are with *what* can be harvested, that a separation appears artificial and there are no convincing counter-arguments for the current structure found in the material studied. Although a lot of the law is set out in licences in the Canadian context, the enabling provisions of similar

[1839] See for example Sund and Fjørtoft (2018); Saric (2018).

[1840] NOU 1992: 32 Bedre struktur i lovverket.

[1841] Ot.prp. nr 67 (1997–98) page 5.

[1842] The Parliament recommendation also asked the Ministry to consider integrating the Saltwater fishing Act 1983 into a new consolidated statute. Innst. O. nr. 38 (1998–99) page 5.

functions studied in the Norwegian context are all found in one statute (the *Fisheries Act*), which made the navigation of the objectives, the rules of the conduct of the fishery and provisions on enforcement and punishment easier. It would also provide an opportunity to view the purpose clauses in the Marine Resources Act and the Participation Act in conjunction with each other in light of potential outcomes of processes described above in chapters 15.2.2 and 15.2.3. Lastly, a consolidation would provide legal technical simplification that NOU 1992: 32 calls for.

15.3 The idea of a constitutional common shared resources norm

As seen in chapter 14.8.3, there are currently three tabled proposals to articulate a constitutional norm on the common shared resources principle in the Norwegian Constitution that could be adopted if one of them would be supported by two-thirds of the Parliament during the next three Parliament sessions.[1843] The first, Dokument 12:23 (2015–2016) articulates a new Article 112a translated to:

> The wild-living marine resources and the genetic material derived from them are national common property resources.[1844]

The second, Dokument 12:26 (2015–2016) articulates a new Article 111 translated to:

> The wild-living marine resources are national common property resources and shall contribute to employment and settlement in the coastal communities. More specific provision on the management of the marine resources are to be laid down in statute.[1845]

[1843] Including the one at the time of the thesis submission.

[1844] Norwegian wording: "De viltlevende marine ressursene og det tilhørende genetiske materialet eies av det nasjonale fellesskapet."

[1845] Norwegian wording: "De viltlevende marine ressursene eies av det nasjonale fellesskapet og skal bidra til sysselsetting og bosetting i kystsamfunnene. Nærmere bestemmelser om forvaltning av marine ressurser fastsettes ved lov."

The third, Dokument 12:41 (2015–2016) articulates a new Article 111 that sets out:

> The marine resources belongs to the Norwegian society as a whole. No private can own or sell the right to harvest. No one can permanently be excluded from the right to harvest.[1846]

The proposals are tabled in documents that resembles Bill propositions in miniature. Many of the justifications in the preparatory works of these three proposals point to the underlying ideas of a constitutional or "semi-constitutional" nature of the principle building on legal customs, and that it can be an instrument to limit "what the Parliament can decide through legislation, and what the cabinet can enact in regulations."[1847] Interestingly, two of them use property rights language (referring to ownership in the Norwegian version). All three proposals do at the time underscore that a purpose with the enactment would be to prevent a privatization of the resources, but with no specification of what is meant with "privatization." Two of the proposals also consider the practices of sale of vessels and quotas as problematic.

In light of the thesis findings and reflections, I also find it relevant to reflect further on this idea. Although the principle expresses the management responsibilities of the state, the ownership dimension differentiates it from the environmental obligations under Article 112 of the Constitution. The three proposals in the Parliament are in my view premature and it is not clear if any of them can receive the necessary support.[1848] As highlighted several places in the thesis, the use of a property rights language in relation to marine resources is ambiguous and underdeveloped. I therefore believe that the idea of a constitutional norm should be more broadly explored in relation to the above proposed statutory reform, which

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[1846] Norwegian wording: "De marine ressurser tilhører det norske folk i fellesskap. Ingen private kan eie eller selge høstingsretten. Ingen kan for evig og alltid ekskluderes fra høstingsretten."

[1847] Dokument 12:23 (2015–2016) page 2. Norwegian wording: "kva Stortinget kan bestemme i lov, og hva regjeringa kan bestemme i forskrift."

[1848] See for example the recommendation by the Control Committee in the Parliament in Innst. 285 S (2018–2019) Innstilling til Stortinget fra kontroll- og konstitusjonskomiteen. Dokument 12:13 (2015-2016), Dokument 12:26 (2015-2016), Dokument 12: 41 (2015-2016)

would be an opportunity to clarify management objectives and rights and duties of the private actors in the overall framework, and to develop better concepts on the legal character of the resources. In that regard, the idea of a Public Trust Doctrine (PTD) could provide useful inspiration. It would also be an opportunity to carefully consider legal implications and harmonization with other provisions of the Constitution.[1849] With those last reflections and a call for continued research and discussion, I will end the preliminary analysis and make a few points of critical self-reflection on the proposed approach before the thesis is concluded.

16 Discussion and conclusion

16.1.1 Critical reflection of the proposed approach

The development of the fisheries legislator approach (FLA) with Norwegian fisheries legislation as a case is a novel undertaking primarily driven by a motivation to increase our understanding of the role of domestic fisheries legislation, to reveal areas for future legal research and to support decision-making concerning domestic fisheries legislation. It is done by building on certain theoretical advancements, and the simplified understanding of the legislative context under FLA (in figure 2 in chapter 2.4) can, for example, interact with the levels in the model in other ways than assumed in the conceptualization or important details might be missing.

The theoretical influences also have their limitations. Williamson himself, for example, acknowledged that ideas of social embeddedness were underdeveloped,[1850] and shortcomings to the work of North on institutional path dependency has been highlighted in literature.[1851] The ideas of the multi-layered law by Tuori has as another example been criticized in Norwegian legal theory.[1852] Furthermore, public choice theorists that assume that decision-makers are biased or pursues their own interest will find that the approach

[1849] One faction of the Control Committee also called for a broad and principled impact assessment of a constitutional norm, see Innst. 285 S (2018–2019) page 6.

[1850] Williamson (2000) page 610.

[1851] Furubotn and Richter (2008); Faundez (2016).

[1852] Bergo (2004).

does not adhere to their assumptions. Driesen recognizes that well-organized interest groups can influence policy makers to their benefit, but sees empowerment analysis of whom laws might empower and disempower as tools to support decision-making.[1853] This thesis will not further pursue these issues theoretically, but acknowledges that there are different viewpoints and welcomes further discussion that can improve normative theorization and discussion on how to legislate fisheries.

There are also other dimensions that this thesis has not explored, which may suggest that the approach must be nuanced or adjusted. First, it considers commercial fisheries isolated from other saltwater fishery related issues, including recreational fisheries, indigenous fisheries and the interface to private law issues and possible existence of private fishing rights. Second, it has had an emphasis on the regulatory framework for the fishing fleet with modest attention to the fish processing industry on land. Third, it does not address the co-existence with other interests and activities in the coastal zone and ocean areas, which is of increasing importance. Lastly, it does not account for the important international fisheries law context and coastal state interactions.

The scope of the thesis has, on the other hand, revealed that cultural differences within one jurisdiction can be so significant that a development of multiple FLAs could be necessary. The identification of the Norwegian FLA can furthermore be biased by the choice of the cod fisheries in the north as a case (and the halibut case in Canada).

A last point is that the thesis has attempted to construct a platform for normative analyses by reviewing and synthesising the empirical material and theory primarily from an academic perspective. With an underlying normative ambition, more real-life perspectives could have been fruitful in the research efforts. Although it could have been possible to rely more on stakeholder input, or more in-depth inquiries of the law in action in both jurisdictions, the independent theorizing also has a value on its own. The thesis recognizes that this can come at the expense of the understanding of the actual problems and

[1853] Driesen (2012) page 10–11.

interactions within the system, and thereby also solutions. This is also why the thesis efforts should be further studied and refined, and that the policy discussion is preliminary and explorative.

16.1.2 Concluding remarks

Building on *theories* in sociology of law, legal cultural ideas and comparative law and new institutional law and economics, and a multi-method *analytical approach*, the thesis has through its five parts contributed to demystifying and theorizing on design and content of commercial fisheries legislation. The intention has been to provide ideas for future discussion and research on how regulatory frameworks can perform better.

Part I equipped the thesis for its journey with an ambitious research design, with an introduction and contextualization of the Norwegian legal framework and by giving an overview of the different theoretical approaches on how to govern commercial fisheries. In addition, the theoretical overview has identified and placed some of the relevant existing legal analysis into a theoretical context.

Part II has uncovered the regulatory trends in the Norwegian framework since the first written codifications and up to our time. An overarching finding is that the current legal framework is the outcome of centuries of evolution and that many fundamental norms and legislative design choices are rooted far back in time. The inquiry has also demonstrated how factual events and technological developments have been important impetuses in the legislative processes and how new objectives and considerations have gradually gained influence. Figure 11 in chapter 9.1 summarizes what considerations the legislation generally is built on, with an increasing influence of biological and economic justifications. Visualizing the legal framework concurrently as a *timeline* and a *snapshot* of the current state of law has brought in a fresh view of the regulatory system. Lastly, six key features of the system were identified and given a point of departure for the synthesis.

Part III has brought to the fore a comparative light on Norwegian legal framework and what legislating fisheries means in practice. Although the study of the legal history and legislative

context of Pacific Canada fisheries is not done at the same level of detail as the Norwegian case in part II, it demonstrates how similar factual circumstances and events have influenced the legislative developments. Moreover, many of the regulatory tools in the two jurisdictions are similar, including limited entry fisheries with a licence requirement, harvest limitations in the form of individual quotas, some degree of transferability of fishing rights (ITQs), stakeholder consultations in the decision-making, rules of conduct, risk and deterrence-based enforcement strategies by public authorities and the use of ticketing and punishment in the criminal prosecutorial path. These are therefore components of the legal framework that point to common characteristics across jurisdictions. These are at the same time not new nor ground-breaking observations, and they largely resonate with international best-practices and prescriptions in theory, but the thesis has demonstrated how the instruments are implemented and how the legislative and cultural context come into play.

Major differences are also observed. First and most striking is how a majority of the rights and duties of the licence holders are set out in their licence in the Canadian case, whereas many of the same rules are set out in multiple regulations in Norway. Second, the principles of fisherman ownership of the fleet, and the legal monopoly of first-hand sales by cooperatives in the Norwegian approaches are not found in the Canadian case. Third, the enforcement strategy of the halibut case in Canada with 100 % monitoring with cameras at-sea and physical inspection of all landings conducted by an independent third-party differs significantly from approaches in the coastal cod fisheries in Norway. The Norwegian case, on the other hand, has its own features with the role of the fish sales organizations in the quota accounting, in conducting physical inspections and in issuing administrative confiscation of excess harvests. Also, the shift into more use of administrative sanctions has no formal equivalent in the Canadian approaches.

Part IV has synthesized and further reflected on the following six key features under a Norwegian fisheries legislator approach (FLA): 1) a strong role of the state to achieve continuous evolving objectives, 2) widespread use of conferred authorities and adoptive governance, 3) collaborative legislative process, 4) limited entry regimes with an increasing market orientation, 5) mixed enforcement strategies and 6) a potential strong role of

technology and use of artificial intelligence (AI) in the future enforcement. These are issues viewed through different perspectives throughout the thesis, allowing for both scrutiny of specific rules, and to see how the components fit into the broader picture. To conclude the synthesis, chapter 14.8 turned attention on the dualistic character of a fishing licence and made more explicit how the decision-making is a balancing of consideration to the environment and society on one side, and consideration to the individuals on the other. Moreover, it has brought attention to the legal limits for a legislator at different levels and how some decisions are in the nature of fisheries management, and others more concerned with the commercial aspects of the activities. The thesis calls for more explicit recognition of these nuances and has brought attention to the weak explicit legal position of the principle of common shared resources in the overall Norwegian framework.

Part V moved on to a preliminary policy analysis to test out the Norwegian FLA on the selected research question of how the principle of common shared resources in the Marine Resources Act section 2 can be operationalized and strengthened. Building on the thesis observations and analytical exercises, I have come up with a general recommendation of initiating a statutory reform and exploring the idea of a constitutional norm of the principle. Ideally, more time should have been spent on this part and on multiple research questions, but it has brought to the fore what I find to be important points of departure for discussion of the regulatory framework through an open and verifiable reasoning that can be validated, challenged and further advanced in a future discourse.

To conclude, the thesis has explored domestic fisheries legislation as a set of rules, and sub-systems, from different viewpoints in an effort to advance new knowledge on how to improve it. The development of a dynamic FLA must be seen as a step in establishing a research platform for legal theoretical scrutiny of a regulatory area of high topicality and future importance. Several unresolved legal issues have been exposed for the Norwegian case during this journey, which calls for more *de lege lata* analysis of specific rules and legal constructs. The thesis has at the same time confirmed the strong interconnectedness between the different components of, and the interdisciplinary nature of, the system, which calls for increased research efforts also at systems level, and on broader legal perspectives.

The inclusion of comparative perspectives has called attention to the issue of domestic fisheries legislation more generally. From the thesis investigations it seems that the lack of legal attention at domestic level is widespread, which is surprising, given the importance of commercial fisheries in certain countries. One reason for this might be that an opaque nature of domestic fisheries law with wide executive authorities, sector specific terminology and technical details in a highly politicized regulatory area are common characteristics across jurisdictions. As stated in chapter 12, VanderZwaag in 1983 labelled the Canadian fisheries management system "somewhat like a ghost ship." This thesis is an attempt to contribute to unveiling the "mysterious mist" surrounding the ghost ship, specifically for the Norwegian case. There is a logic and rationale behind a complex regulatory design, but there is nevertheless an improvement potential and need for critical legal review of the system. This area of law is therefore overdue for increased academic attention.

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Forskrift 30. juni 2000 om enhetskvoteordning for torsketrålflåten (**Unit Quota Regulations 2000**).

2.4. NORWEGIAN BILL PROPOSTIONS AND PARLIAMENT RECOMMENDATIONS, NEGOTIATIONS AND DECISIONS (SORTED BY YEAR)

Stortingsforhandlinger (1816), O. April 10, pages 314–315.

Stortingsforhandlinger (1821), Indst. Tillægshefte, August 20, page 66.

Stortingsforhandlinger (1830), 5. del, O. June 28, page 650.

O. No. 63 (1848) Angaaende naadigst Proposition til Norges Riges Storthing betræffende Udfærdigelse af en Lov om Fredning af Hummer.

Indst. XLVII (1848) Innstilling fra Næringscommitteen Nr. 1 i Anledning af den kongelige Proposition om "Fredning af Hummer."

S. (1851) Angaaende naadigst Proposition til Norges riges Storthings betræffende Udfærdigelse af en Lov om Vaarsildefiskeriet.

Indst. D4. (1851) Indstilling fra Næringskommitteen Nr. 1 til Lov om Vaarsildefiskeriet.

O. No. 2 (1856) Angaaende naadigst Proposition til Norges Riges Storthing betræffende Udfærdigelsen af en Lov om Torskefiskeriet i Nordlands Amt og Senjens og Tromsø Fogderi.

Indstill. O. NO. 12 (1857) Indstilling fra Committeen for Næringsveiene NO. 1, i Anledning af den kongelige Proposition betræffende Udfærdigelsen af En Lov om Torskefiskeriet i Nordlands Amt og Senjens og Tromsø Fogderi

O. No. 42 (1868–69) Om Indskrænkning i Brugen af Redskaber til Fiskeri i Saltvandsfjorde.

Indst. S. No 165 (1890) Indstilling fra næringskomiteen No 1 angaaende et i Troldfjorden under indeværende Aars Lofotfiske foretaget Notstæng af Vinterskrei.

Oth. Prp. No. 4 (1891) Ang. Udfærdigelse af en Lov indeholdende Tillæg til Lov om Torskefiskeriet i Nordlands Amt og Senjen og Tromsø Fogderi af 23de Mai 1857.

Indst. O. IX. (1892) Indstilling fra Næringskomiteen No 1 angaaende Udfærdigelse af en Lov om Sildefiskerierne.

Dokument Nr. 65 (1893) Forslag til Lov om Fredning af Sildestørje.

Oth. Prp. NO. 23 (1896) Om Udfærdigelse a en Lov ang. Skreifiskeriene i Lofoten.

Indst. O. XVI (1896) Indstilling fra Næringskomiteen NO. 1 angaaende Udfærdigelse af en Lov angaaende Skrefiskeriene i Lofoten.

Oth. Prp. No. 21 (1897) Om Udfærdigelse af en Lov angaaende Saltvandsfisket i Finmarken.

Indst. S. XVII (1899/1900) Indstilling fra næringskomiteen nr. 1 angaaende bevilgning til foranstaltninger vedkommende saltvandsfiskeriene.

Ot. prp. nr. 18 (1908) Angaaende utfærdigelse av en lov om forbud mot fiskeri med bundslæpenot.

Ot. prp. nr. 39 (1925) Om lov om forbud mot fiske med bunnslepenot (trål).

Forhandlinger Odelstinget (1930), page 328.

Ot.prp. nr. 7 (1930) Om utferdigelse av en midlertidig lov om utførsel av storsild og vårsild.

Ot.prp. nr. 26 (1932) Om lov om fredning av gullflyndre.

Ot.prp. nr. 57 (1936) Lov om fiske med bunnslepenot (trål).

Innst. O. XXXIII (1936) Innstilling fra sjøfarts- og fiskerikomitéen om miderltidig lov om fiske med bunnslepenot (trål).

Ot.prp. nr. 1 (1936) Midlertidig lov om utførsel av vintersild.

Ot.prp. nr. 11 (1937) Om lov om sild- og brislingfiskeriene.

Innst. O. nr. 30 (1938) Innstilling fra sjøfarts- og fiskerikomiteen til midlertidig lov om fredning av saltvannsfisk.

Ot. prp. nr. 16 (1938) Om lov om fredning av saltvannsfisk.

Ot. prp. nr. 51 (1938) Om lov om fiske med bunnslepenot (trål).

Ot.prp. nr. 59 (1938) Midlertidig lov om omsetningen av råfisk.

Forhandlinger Odelstinget (1938), page 584-606.

Innst. O. II (1939) Innstilling fra den forsterkede sjøfarts- og fiskerikomité til lov om fiske med bunnslepenot (trål).

Ot.prp. nr. 67 (1947) Midlertidig lov om konsesjon for ervervelse av eiendomsrett til fiskefartøyer.

Ot.prp. nr. 25 (1950) Om lov om fiske med trål.

Innst. O. I. (1951) Innstilling fra sjøfarts- og fiskerikomiteen om lov om fiske med trål

Ot.prp. nr. 63 (1951) Om lov om omsetning av råfisk.

Ot.prp. nr. 51 (1954) Om lov om saltvannsfiskeriene.

Innst. O. nr. 120 (1956) Tilråding frå sjøfarts- og fiskerinemnda om mellombels lov om eigedomsretten til fiske- og fangstfarkostar.

Ot.prp. nr. 24 (1956) Om lov om eindomsrett til fiskefartøyer m. v. .

Ot.prp. nr. 47 (1960–61) Lov om brigde i mellombels lov av 29. juni 1956 om eigedomsretten til fiske- og fangstfarkostar.

Ot.prp. nr. 39 (1967–68) Lov om brigde i mellombels lov av 29. juni 1956 om eigedomsretten til fiske- og fangstfarkostar.

Ot.prp. nr. 22 (1971–72) Om lov om regulering av detagelsen i fisket.

Innst. O. nr 54 (1971–72) Innstilling fra sjøfarts- og fiskerikomitéen om lov om regulering av deltagelsen i fisket.

Forhandlinger Odelstinget (1971–72), page 567-575.

Ot.prp. nr. 39 (1975–76) Om lov om endring i lov av 16. juni 1972 nr. 57 om regulering av deltagelsen i fiskeriene.

Innst. O. nr. 53 (1975–76) Innstilling fra sjøfarts- og fiskerikomiteen om lov om endring i lov av 16. juni 1972 nr. 57 om regulering av deltagelse i fisket.

Ot.prp. nr. 85 (1981–82) Om lov om saltvannsfiskeriene.

Ot.prp. nr. 4 (1983–84) Om lov om oppheving av lov 21. juni 1963 nr. 2 om bygging, innredning og utvidelse av anlegg for hermetisering og frysing av fisk og fiskevarer m.v.

Ot.prp. nr. 17 (1984–85) Om midlertidig lov om endring i lov av 3. juni 1983 nr. 40 om saltvannsfiske m.v.

Ot.prp. nr. 77 (1987–88) Om lov om endringer i lov 3. juni 1983 nr. 40 om saltvannsfiske m.v. og i visse andre lover.

Innst. O. nr. 20 (1988–89) Innstilling fra sjøfarts- og fiskerikomiteen om lov om endringer i lov av 3. juni 1983 nr. 40 om saltvannsfiske m.v. og i visse andre lover.

Ot.prp. nr. 81 (1988–1989) Om lov om endring i lov 3. juni 1983 nr. 40 om saltvannsfiske m.v. og i lov 14. desember 1951 nr. 3 om omsetning av råfisk.

Innst. S. nr. 50 (1992–93) Innstilling frå sjøfarts- og fiskerikomiteen om struktur- og reguleringspolitikk overfor fiskeflåten (strukturmeldinga) og forslag frå stortingsrepresentantane Jens Marcussen og Paal Bjørnestad om endringar i fiskeripolitikken (En lønnsom fiskerinæring - et håndslag til kystsamfunnet.

Ot.prp. nr. 75 (1992–93) Om enhetskvoteordningen i saltvannsfiskeloven.

Ot.prp. nr. 22 (1994–95) Om lov om politiet.

Ot.prp. nr. 33 (1996–97) Om lov om oppheving av lov 11. juni 1982 om rettledningstjenesten i fiskerinæringen og endringer i visse andre lover mm

Ot.prp. nr. 41 (1996–97) Om lov om kystvakten.

Ot.prp. nr. 67 (1997–98) Om lov om retten til å delta i fiske og fangst.

Innst. S. nr. 93 (1998–99) Innstilling fra næringskomiteen om perspektiver på utvikling av norsk fiskerinæring.

Ot.prp. nr. 7 (1999–2000) Om lov om endringer i politiloven.

Ot.prp. nr. 92 (2000–2001) Om lov om endringer i lov 3. juni 1983 nr. 40 om saltvannsfiske m.v. og lov 14. desember om omsetning av råfisk (kontrolltiltak).

Ot.prp. nr. 76 (2001–2002) Om lov om endring i lov 3. juni 1983 nr. 40 om saltvannsfiske m.v. (strukturfond for kapasitetstilpasning av fiskeflåten)

Innst. O. nr. 34 (2002–2003) Innstilling fra næringskomiteen om lov om endring i lov 3. juni 1983 nr. 40 om saltvannsfiske m.v. (strukturfond for kapasitetstilpasning i fiskeflåten).

Innst. S. nr. 271 (2002–2003) Innstilling til Stortinget fra næringskomiteen om strukturtiltak i kystfiskeflåten.

Ot.prp. nr. 90 (2003–2004) Om lov om straff (straffeloven).

Ot.prp. nr. 99 (2005–2006) Om lov om endring i lov 17. juni 1966 om forbud mot at utlendinger driver fiske m.v. i Norges territorialfarvann.

Ot.prp. nr. 21 (2006–2007) Om lov om samvirkeforetak.

Innst. S. nr. 238 (2006–2007) Innstilling fra næringskomiteen om strukturpolitikk for fiskeflåten.

Ot.prp. nr. 20 (2007–2008) Om lov om forvaltning av viltlevande ressursar.

Innst. O. nr. 45 (2007–2008) Innstilling fra næringskomiteen om lov om forvaltning av viltlevande marine ressursar (havressurslova).

Ot.prp. nr. 52 (2008–2009) Om lov om forvaltning av naturens mangfold (naturmangfoldloven).

Prop. 70 L (2011–2012) Endringar i deltakerloven, havressurslova og finnmarksloven.

Prop. 93 L (2012–2013) Lov om førstehandsomsetninga av viltlevande marine ressursar.

Prop. 59 L (2012–2013) Endringer i deltakerloven, fiskeforbudsloven mv.

Prop. 103 L (2012–2013) Endringer i avkakulturloven.

Prop. 88 L (2014–2015) Om endringer i deltakerloven.

Prop. 62 L (2015–2016) Endringer i forvaltningsloven mv.

Dokument 12:41 (2015–2016) Grunnlovsforslag 41 om ny § 111 første ledd (de marine ressurser).

Dokument 12:26 (2015–2016) Grunnlovsforslag 26 om ny § 111 (om at de marine ressursene tilhører fellesskapet og skal komme kystsamfunnene til gode).

Dokument 12:23 (2015–2016) Grunnlovsforslag 23 om ny § 112 a (om at dei marine ressursane høyrer fellesskapet til).

Innst. 285 S (2018-2019) Innstilling til Stortinget fra kontroll- og konstitusjonskomiteen. Dokument 12:13 (2015-2016), Dokument 12:26 (2015-2016), Dokument 12: 41 (2015-2016).

Innst. 243 S (2019–2020) Innstilling fra næringskomiteen om Et kvotesystem for økt verdiskaping. En fremtidsrettet fiskerinæring.

Innst. 80 S (2020–2021) Inntilling til Stortinget fra kontroll- og konstitusjonskomiteen om Dokument 3:6 (2019-2020).

Prop. 137 L (2019–2020) Lov om endringar i deltakerloven og havressurslova (endringer i kvotesystemet).

Innst. 190 L (2020–2021) Innstilling frå næringskomiteen om Lov om endringar i deltakerloven og havressurslova (endringar i kvotesystemet).

2.5. NORWEGIAN WHITE PAPERS TO THE PARLIAMENT (SORTED BY YEAR)

Sth. Prp. No. 68 (1890) Angaaende et i Troldfjorden under indeværende Aars Lofotfiske foretaget Notstæng af Vinterskrei.

St.prp. nr. 214 (1917) Om ekstraordinære foranstaltninger til fiskerienenes fremme.

St.prp. nr. 21 (1936) Om foranstaltninger til støtte av torskefiskeriene.

St.meld. nr. 71 (1959) Innstillingen fra Torskefiskeutvalget 1957 (Cod Fishery Commission 1957).

St.prp. nr. 143 (1963–64) Forhøyelse av bevilgningen på statsbudsjettet for 1964 under kap. 1531, Pristilskott, post 72, Til støtte av torske- og sildefisket og bevilgning på statsbusjettet for 1964 under kap. 1076, Pristilskott m.m., ny post 72, Til støtte av effektiviseringstiltak i fiskerinæringen.

St.meld. nr. 7 (1964–65) Om hovedavtale for fiskerinæringen.

St.meld. nr. 18 (1977–78) Om langtidsplan for norsk fiskerinæring.

St.meld. nr. 93 (1982–83) Om retningslinjer for fiskeripolitikken.

St.meld. nr. 58 (1991–92) Om struktur- og reguleringspolitikk overfor fiskeflåten.

St.meld. nr. 51 (1997–98) Perspektiver på utvikling av norsk fiskerinæring.

St.meld. nr. 20 (2002–2003) Strukturtiltak i kystfiskeflåten.

St.meld. nr. 21 (2006–2007) Strukturpolitikk for fiskeflåten.

Meld. St. 10 (2015–2016) En konkurransekraftig sjømatindustri.

Meld. St. 20 (2016–2017) Pliktsystemet for torsketrålere.

Meld. St. 37 (2016–2017) Tilbaketrekking av Meld. St. 20 (2016–2017).

Meld. St. 32 (2018–2019) Et kvotesystem for økt verdiskaping. En fremtidsrettet fiskerinæring.

Meld. St. 15 (2018–2019) Noregs fiskeriavtalar for 2019 og fisket etter avtalane i 2017 og 2018.

2.6. Norwegian orders in council, directives, hearings and administrative practice (sorted by year)

Kongelig resolusjon nr. 24 av 8. desember 1989 (**Order in Council 1989**).

Fiskeridepartementet: Vedtak 14. oktober 1996 på søknad om endring i eiersammensetning i Melbu Fiskeindustri AS - Dispensasjon i henhold til deltakerlovens § 4 siste ledd.

Justisdepartementet: Veileder februar 2000 i lovteknikk og lovforberedelse (**Guidance on the drafting of law and regulations**).

Fiskeri- og kystdepartementet: Høring 26. november 2004 om strukturkvoteordning for havfiskeflåten (**Offshore SQA Hearing 2004**).

Fiskeri- og kystdepartementet: Høring av 23. juni 2006 om forslag til endring av leveringsplikt for fartøy med torsketråltillatelse (**Delivery Duties Hearing 2006**).

Fiskeri- og kystdepartementet: Høringsnotat 20. august 2007 om størrelsesbegrensning for store kystfartøy (**Vessel Length Hearing 2007**).

Fiskeri- og kysdepartementet: Høyring av 21. januar 2011 - Forslag til ny forskrift om lovbrotsgebyr og tvangsmulkt i medhald av havressurslova (**Administrative Sanctions Hearing 20**11).

Fiskeri- og kystdepartementet: Høring - instruks om administrative redere 2013 (**Administrative Vessel Owner Hearing 2013**).

Nærings- og fiskeridepartementet 30. april 2014: Instruks om praktiseringen av ordningen med administrerende reder (**Executive Order on Administrative Vessel Owners**).

Fiskeridirektoratet: Fiskeridirektoratets oppfølging av salgslagens kontrollarbeid - Tilsynsrapport 2016 (**Fish Sales Organization Audit 2016**).

av Meld. St. 16 (2014–2015) (**Aquaculture Regulations Hearing 2016**).

Kongelig resolusjon av 16. februar 2016: Utredningsinstruksen (**Executive Order on Examination**).

Nærings- og fiskeridepartementet: Høringsnotat 21. september 2016 om implementering Fiskeridirektoratet: Offentliggjøring av landings og sluttsedler, June 24 2016 nr. 16/1549.

Fiskeridirektoratet: Avgjørelse av klage på vedtak om overtredelsesgebyr med hjemmel i havressurslova 23. august 2016 sak 16/2668.

Fiskeridirektoratet: Vedtak 27. oktober 2016 nr. 16/13866.

Fiskeridirektoratet: Avgjørelse av klage på vedtak om overtredelsesgebyr med hjemmel i havressurslova 11. april 2017 sak 16/7201.

Nærings- og fiskeridepartementet: Instruks om forholdsmessighet mellom driftsgrunnlag og fartøystørrelse aved tildeling av deltakeradgang, June 15 2017 (**Executive Order on Proportionality 2017**).

Riksrevisjonen: Dokument 3:9 (2016–2017) Riksrevisjonens undersøkelse av fiskeriforvaltningen i Nordsjøen og Skagerrak (**Auditor General Report 2017**).

Fiskeridirektoratet: Fiskeridirektoratets oppfølging av salgslagenes kontrollarbeid - tilsynsrapport 2019 (**Fish Sales Organization Audit 2019**).

Riksrevisjonen: Dokument 3:6 (2019–2020) Riksrevisjonens undersøkelse av kvotesystemet i kyst- og havfisket (**Auditor General Report 2020**).

Fiskeridirektoratet: Nasjonal strategisk risikovurdering (NSRV) 2021.

Fiskeridirektoratet: Høring 14. juni 2021 om forslag til endring av havressurslovens § 54 om administrativ inndragning (**Administrative Confiscation Hearing 2021**).

Fiskeridirektoratetet: Høringsbrev 16. Juli 2021 med forslag om innføring av eierkonsentrasjonsregler i kystfiskeflåten (**Ownership Hearing 2021**).

Fiskeridirektoratet: Høringsnotat 12. oktober 2021 om ny forskrift om tildeling av fiskeritillatelser og kvotefaktorer (**Fishery Licence Hearing 2021**).

2.7. NORWEGIAN OFFICIAL REPORTS (SORTED BY YEAR)

Fishing Village Commission 1888: Indstilling fra den ved Kongelige Resolution af 13de Oktober 1884 nedsatte Kommission til Undersøgelse af Væreierforholdene.

Lofoten Commission 1893: Indstilling fra den ved Kgl. Res af 12te December 1891 nedsatte kommisjon til utarbeidelse av love om Skreifisket i Lofoten.

Finnmark Fishery Commission 1894: Indstilling fra den ved Kongelige Resolution af 12te December 1891 nedsatte Kommission til Revision af Lovgivningen om Fiskeriene i Finmarken.

Herring Commission 1934: Innstilling fra komiteen til revisjon av lovene om sildefiskeriene, utarbeidelse av lov om brislingfisket.

Trawler Commission 1935: Komité til Behandling av forskjellige Spørsmål vedkommende Fiskeribedriften: Innstilling VI angående spørsmålet om norsk trålfiske.

Raw Fish Commission 1935: Komité til Behandling av Forskjellige Spørsmål vedkommende Fiskeribedriften: Innstilling IV angående spørsmålet om å organisere omsetningen av råfisk.

Trawler Commission 1937: Innstilling fra en av Handelsdepartementet nedsatte komité: Innstilling om fiske med trål.

Profitability Commission 1937: Komité til Behandling av Forskjellige Spørsmål vedkommende Fiskeribedriften: Innstilling VIII om fiskerienes lønnsomhet.

Raw Fish Commission 1938: Innstilling fra en av Handelsdepartementet nedsatte komité: Innstilling om organisasjon av RÅFISK-OMSETNINGEN.

Fisheries Commission 1949: Innstilling fra Komitteen til samling og revisjon av fiskerilovene.

Trawler Commission 1949: Komitéen til utredning av spørsmålet om rasjonalisering av fisket og fisketilvirkningen: Innstilling om endring av lov av 17. mars 1939 om fiske med bunnslepenot (trål), og en redegjørelse om den norske fiskeflåtes stilling og fremtidige utviling .

NOU 1972: 24 Konsesjonsordninger i fiske.

NOU 1975: 31 Kodifikasjon av fiskerinæringen.

NOU 1975: 50 Oppsynet med fiskeri- og petroleumsvirksomheten.

NOU 1981: 3 Konsesjonsordninger i fisket.

Structural Commission 1989: Innstilling fra kontaktutvalg for strukturspørsmål i fiskeflåten.

NOU 1992: 32 Bedre struktur i lovverket.

NOU 1994: 21 Bruk av land og vann i Finnmark i historisk perspektive - Bakgrunnsmateriale for Samerettsutvalget.

NOU 1995: 4 Virkemidler i miljøpolitikken.

NOU 2002: 13 Eierskap til fiskefartøy.

NOU 2005: 15 Fra bot til bedring - et mer nyansert og effektivt sanksjonssystem med mindre bruk av straff.

NOU 2005: 10 Lov om forvaltnings av viltlevende marine ressurser.

NOU 2006: 16 Strukturvirkemidler i fiskeflåten.

NOU 2008: 5 Retten til fiske i havet utenfor Finnmark.

Working Group First-hand Sales 2011: Gjennomgang av råfiskloven: Forslag til ny lov om førstehåndsomsetning av viltlevende marine ressurser.

NOU 2013: 10 Naturens goder - om verdier av økosystemtjenester.

NOU 2013: 10 Naturens goder - om verdier av økosystemtjenster.

NOU 2015: 15 Sett pris på miljøet - Rapport fra grønn skattekommisjon.

Expert Group on First-hand Sales 2016: Forenklinger og forbedringer innen førstehåndsomsetningen av fisk.

Delivery Duties Expert Group 2016: Rapport fra ekspertgruppe nedsatt av Nærings- og fiskeridepartementet: Vurdering av leveringsplikten, bearbeidingsplikten og aktivitetsplikten.

NOU 2019: 21 Framtidas fiskerikontroll.

3. CANADIAN SOURCES

3.1. CANADIAN LEGISLATION AND REGULATIONS (HISTORICAL AND CURRENT)

The Constituion and statutes (Sorted by year)

The Constitution Act, 1867 (UK), 30 & 31 Victoria, c 3 (Constituion Act 1867).

Fisheries Act, S.C. 1868 (Fisheris Act 1868).

Salmon Fishery Regulations for the Province of British Columbia, Order in Council May 1878 (Salmon Regulations 1878).

Fishery Regulations, Order in Council 11 June 1879 (Fishery Regulations 1879).

Fishery Regulations for the Province of British Columbia (Fishery Regulations 1894).

Statute of Westminster, 1931 (UK), 22-23 George V, c 4 (Statute of Westminister).

Canadian Bill of Rights, SC 1960, c 44 (Canadian Bill of Rights).

The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11 (The Constitution Act 1982).

Coastal Fisheries Protection Act, RSC 1985, c C-33 (Coastal Fisheries Protection Act).

Parliament of Canada Act, RSC 1985, c P-1 (Parliament Act).

Supreme Court Act, RSC 1985, c S-26 (Supreme Court Act).

Inquiries Act, RSC 1985, c I-11 (Inquiries Act).

Bankrupcy and Insolvency Act, RSC 1985, c B-3 (Bankrupcy and Insolvency Act).

Criminal Code, RSC 1985, c C-46 (Criminal Code).

Fisheries Act, RSC 1985, c F-14 (Fisheries Act).

Federal Courts Act, RSC 1985, c F-7 (Federal Courts Act).

Privacy Act, RSC 1985, c P-21 (Privacy Act).

Statutory Instruments Act, RSC 1985, c S-22 (Statutory Instruments Act).

Access to Information Act, RSC 1985, c A-1 (Access to Information Act).

Personal Property and Security Act, RSO 1990, c P.10 (Personal Property and Security Act).

Contraventions Act, SC 1992, c 47 (Contraventions Act).

Judicial Review Procedure Act, RSBC 1996, c 241.

Human Rights Code, RSBC 1996, c 210 (Human Rights Code BC).

Oceans Act, SC 1996, c 31 (Oceans Act).

Administrative Procedures and Jurisdiction Act, RSA 2000, c A-3.

Species at Risk Act, SC 2002, c 29 (Species at Risk Act).

Royal Assent Act, SC 2002, c 15 (Royal Assent Act).

Administrative Tribunals Act, SBC 2004, c 45.

Impact Assessment Act, SC 2019, c 28, s 1 (Impact Assessment Act).

Regulations (sorted alphabetically):

Contravention Regulations, SOR/96-313 (Contraventions Regulations).

Fishery (General) Regulations, SOR/93-53 (Fishery (General) Regulations), Fishery (General) Regulations.

Pacific Fishery Regulations, SOR/93-54 (Pacific Fishery Regulations), Pacificc Fishery Regulations.

3.2. CANADIAN CASE LAW (SORTED ALPHABETICALLY)

Anglehart v. Canada, 2018 FCA 115 (CanLII), [2019] 1 FCR 504.

Att. Gen. of Can. v. Inuit Tapirisat et al.,1980 CanLII 21 (SCC), [1980] 2 SCR 735.

Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 SCR 81.

Beckman v. Little Salmon/Carmacks First Nation,2010 SCC 53 (CanLII), [2010] 3 SCR 103.

Canada (Attorney General) v. Arsenault, 2009 FCA 300 (CanLII).

Canada v. Haché, 2011 FCA 104 (CanLII).

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 (CanLII).

Cardinal v. Director of Kent Institution,1985 CanLII 23 (SCC), [1985] 2 SCR 643.

Carpenter Fishing Corp. v. Canada, 1997 CanLII 6391 (FCA), [1998] 2 FC 548.

Chrétien v. Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities),2008 FC 802 (CanLII), [2009] 2 FCR 417.

Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans), 1997 CanLII 399 (SCC), [1997] 1 SCR 1.

Committee for Justice and Liberty et al. v. National Energy Board et al.,1976 CanLII 2 (SCC), [1978] 1 SCR 369.

Doucette v. Canada, 2015 FC 734 (CanLII).

Dunsmuir v. New Brunswick,2008 SCC 9 (CanLII), [2008] 1 SCR 190.

Elson v. Canada, 2019 FCA 27 (CanLII).

Haida Nation v. British Columbia (Minister of Forests),2004 SCC 73 (CanLII), [2004] 3 SCR 511.

Howard Johnson Inn v. Saskatchewan Human Rights Tribunal,2010 SKQB 81 (CanLII).

Imperial Oil Ltd. v. Quebec (Minister of the Environment), 2003 SCC 58 (CanLII), [2003] 2 SCR 624.

Jada Fishing Co. Ltd. v. Canada (Minister of Fisheries and Oceans), 2002 FCA 103 (CanLII).

Kelly v. Canada (Attorney General), 1997 CanLII 5468 (FC).

Knight v. Indian Head School Division No. 19,1990 CanLII 138 (SCC), [1990] 1 SCR 653.

Malcolm v. Canada (Fisheries and Oceans), 2014 FCA 130 (CanLII)

Maracle v. Travellers Indemnity Co. of Canada, 1991 CanLII 58 (SCC), [1991] 2 SCR 50.

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Appendices

APPENDIX I: THE MARINE RESOURCES ACT

Source Fiskeridirektoratet:
https://www.fiskeridir.no/English/Fisheries/Regulations/The-marine-resources-act

Act of 6 June 2008 no. 37 relating to the management of wild living marine resources

CHAPTER 1 INTRODUCTORY PROVISIONS

Section 1 Purpose

The purpose of this Act is to ensure sustainable and economically profitable management of wild living marine resources and genetic material derived from them, and to promote employment and settlement in coastal communities.

Section 2 Rights to resources

The wild living marine resources belong to Norwegian society as a whole.

Section 3 Substantive scope

This Act applies to all harvesting and other utilisation of wild living marine resources and genetic material derived from them. Wild living marine resources means fish, marine mammals that spend part or all of their life cycle in the sea, plants and other marine organisms that live in the sea or on or under the seabed and that are not privately owned. Nevertheless, the Act does not apply to harvesting and other forms of utilisation of anadromous salmonids as defined in section 5 (a) of the Act of 15 May 1992 No. 47 relating to salmonids and freshwater fish, etc.

To ensure that harvesting and other forms of utilisation take place in accordance with provisions laid down in or under this Act, the Act also applies to other activities in connection with harvesting and other utilisation of catches, such as transhipment, delivery, landing, receipt, storage, production and placing on the market.

The provisions of Chapter 5, cf. Chapters 11 and 12, also apply to activities other than those mentioned above if they have an impact on harvesting and other forms of utilisation of wild living marine resources and genetic material derived from them.

Section 4 Territorial extent

This Act applies on board Norwegian vessels, within Norwegian land territory with the exception of Jan Mayen and Svalbard, in the Norwegian territorial sea and internal waters, on the Norwegian continental shelf, and in the areas established pursuant to sections 1 and 5 of the Act of 17 December 1976 No. 91 relating to the Economic Zone of Norway.

The King may prescribe that all or part of the Act is to apply to Norwegian land territory on Jan Mayen, Svalbard, Bouvet Island, Peter I's Island and Dronning Maud Land.

Outside the areas mentioned in the first and second paragraphs, the Act applies to Norwegian legal persons in so far as this is not in conflict with the jurisdiction of another state, and for those to whom section 5, second paragraph, applies.

Section 5 Personal scope

This Act applies to anyone within the area covered by its geographical scope. Nevertheless, in the areas established under sections 1 and 5 of the Act of 17 December 1976 No. 91 relating to the Economic Zone of Norway, regulations under the present Act apply to foreign nationals and foreign undertakings only if this is laid down in the said regulations. The Act applies to foreign nationals and foreign undertakings in areas outside the jurisdiction of any state if this follows from an international agreement. In such areas, the Act also applies to stateless vessels and for vessels that are assimilated to stateless vessels.

Section 6 Relationship to international law

This Act applies subject to any restrictions deriving from international agreements and international law otherwise.

Section 7 Principle for management of wild living marine resources and fundamental considerations

The Ministry shall evaluate which types of management measures are necessary to ensure sustainable management of wild living marine resources.

Importance shall be attached to the following in the management of wild living marine resources and genetic material derived from them:

a) a precautionary approach, in accordance with international agreements and guidelines,

b) an ecosystem approach that takes into account habitats and biodiversity,

c) effective control of harvesting and other forms of utilisation of resources,

d) appropriate allocation of resources, which among other things can help to ensure employment and maintain settlement in coastal communities,

e) optimal utilisation of resources, adapted to marine value creation, markets and industries,

f) ensuring that harvesting methods and the way gear is used take into account the need to reduce possible negative impacts on living marine resources,

g) ensuring that management measures help to maintain the material basis for Sami culture.

Section 8 Council for Regulatory Advice

The Ministry may appoint a Council for Regulatory Advice that can give its opinion before regulations are made under this Act. The Ministry may adopt regulations on the composition of the Council and its tasks. The Council shall include representatives of organisations for the parties that normally have an interest in such cases.

If the Council has given an opinion on regulations made under sections 11–13 or 16, consultation under the provisions of section 37 of the Act of 10 February 1967 concerning Procedure in Cases relating to the Public Administration (the Public Administration Act) is not necessary.

Chapter 2 Marine bioprospecting

Section 9 The conduct of marine bioprospecting

The King may prescribe that harvesting and investigations in the sea in connection with marine bioprospecting require a permit from the Ministry.

The provisions of this Act apply to marine bioprospecting in so far as they are appropriate.

The King may adopt regulations on marine bioprospecting; these may, inter alia, grant exemptions from provisions made in or under the Act, prescribe the types of information applications shall include, and set out further rules on the types of conditions that may be laid down.

Section 10 Benefits arising out of the use of marine genetic material

A permit issued under section 9 may lay down that a proportion of the benefits arising out of the use of Norwegian marine genetic material shall accrue to the state.

A permit issued under section 9 may lay down that genetic material and the results of bioprospecting activities may not be sold or communicated to others without the consent of and, if required, payment to the state.

The King may prescribe that if marine bioprospecting or the use of genetic material has taken place without a permit being issued pursuant to section 9, a proportion of the benefits such as are mentioned in the first paragraph shall accrue to the state.

CHAPTER 3 CATCH QUANTITIES AND QUOTAS

Section 11 National quotas, group quotas and district quotas

The Ministry may prescribe the maximum permitted quantities (national quotas) of wild living marine resources that may be harvested, expressed in terms of; weight, volume, number of individuals, the number of days harvesting is permitted, or in other terms. A

national quota shall be determined for a specific period of time. When a national quota has been determined, the total quantity of group quotas, research and training quotas and other quotas issued may not exceed the national quota.

The Ministry may prescribe the maximum permitted harvest for each vessel group, gear group or other defined group (group quota). A group quota shall be determined for a specific period of time.

The Ministry may prescribe that part of the national quota or part of the group quota for one or more vessel groups shall be delivered for processing at onshore facilities in particular districts (district quotas). The Ministry may adopt regulations on the allocation of district quotas and conditions for utilising them.

The Ministry may prescribe that part of the national quota or part of a group quota for one or more vessel groups shall be delivered for a specific use or in a particular condition.
Provided that a vessel group is granted reasonable overall fishing opportunities, the Ministry may prescribe restrictions on catches for the vessel group or prescribe that vessels belonging to the group may not participate in certain fisheries.

Section 12 Vessel quotas
The Ministry may by regulations prescribe quotas for individual vessels expressed in terms of weight, volume, number of individuals, the number of days harvesting is permitted, or in other terms. Such quotas may be prescribed for a specific period of time or per trip, or for a stock or jointly for several stocks.

If an activity is governed by the Act of 26 March 1999 No. 15 relating to the right to participate in fishing and hunting, a vessel quota may only be taken using a vessel for which a commercial permit has been issued, and that may be used for the activity in question under the provisions of the Act relating to the right to participate in fishing and hunting.

If an activity is not governed by the Act relating to the right to participate in fishing and hunting, a quota may be allocated to a person or to a business undertaking. Such allocations may be made conditional on registration in a separate register. The Ministry may adopt further provisions on the register.

Section 13 Quotas for research, monitoring, training and practical testing of gear
Quotas may be allocated to

a) research institutions,
b) anyone that is issued with a permit for practical testing in connection with the development of gear, catch methods, etc. under section 66,
c) monitoring of fishing grounds,
d) officially approved educational institutions.

Anyone harvesting from quotas such as are mentioned in the first paragraph may use their own vessels, or hired vessels for which commercial permits have been issued if the activities in question would otherwise be governed by the Act relating to the right to participate in fishing and hunting.

Restrictions on the use of gear for vessels that are not registered in the register of fishing vessels, cf section 22, do not apply to harvesting pursuant to this provision.

Section 14 Special quota arrangements
As a means of adjusting the catch capacity of the fishing fleet to the resource base, the Ministry may by adopt regulations providing for higher quotas for individual vessels when other vessels are permanently or temporarily withdrawn from harvesting operations. The Ministry may lay down further conditions for the allocation of higher quotas.

CHAPTER 4 THE CONDUCT OF HARVESTING OPERATIONS AND OTHER UTILISATION OF WILD LIVING MARINE RESOURCES

Section 15 Duty to land catches

All catches of fish shall be landed. The Ministry may by regulations grant exemptions from the duty to land catches and may also prohibit discarding of biological waste.

The Ministry may by regulations lay down a duty to land bycatches of other marine organisms, including plants, marine mammals and seabirds, or a duty to provide reports on such bycatches.

Section 16 The conduct of harvesting operations

All harvesting and other utilisation of wild living marine resources shall be carried out as in such a way as to minimise impact.

The Ministry may adopt regulations on the conduct of harvesting operations, including provisions on the following:

a) the periods when harvesting is permitted and times for departure from port,
b) the number of vessels from different vessel groups that may harvest at the same time in an area,
c) prohibition of harvesting in certain areas, of certain species or using certain types of gear,
d) the design, marking, use and tending of gear and other devices used in connection with harvesting,
e) the maximum or minimum permitted sizes of individual organisms, and requirements for part or all of the harvest to consist only of males or females,
f) permitted bycatches,
g) the design and use of harvesting gear to reduce damage to species other than the target species.

Section 17 Loss of gear

Anyone that loses gear or cuts it adrift has a duty to search for the gear. The Ministry may grant exemptions from the duty to search for gear.

The Ministry may adopt regulations relating to reports of gear that is lost or found, including information on what gear was lost and where.

Section 18 Prohibition of the use of explosives, etc.

It is prohibited to use explosives, firearms or poison in harvesting operations.

The prohibition of the use of explosives and firearms does not apply to the harvesting of marine mammals and large cartilaginous fish. The Ministry may lay down further rules to ensure that the methods used for killing marine mammals and large cartilaginous fish are acceptable.

Section 19 Marine protected areas

The King may establish marine protected areas where harvesting and other forms of use of wild living marine resources is prohibited. Exemptions may be granted for harvesting activities and other forms of use that will not be in conflict with the purpose of protecting the area.

Section 20 Prohibition on harvesting with trawls and other types of gear in certain areas

It is prohibited to harvest using trawls inside the territorial limit around the Norwegian mainland, except when trawling for kelp, shrimps or Norway lobster. The Ministry may by regulations grant exemptions from the prohibition set out in the first sentence for certain areas, certain periods of time, harvesting with specific types of trawling gear or harvesting of particular species, and may determine what is to be considered as a trawl under to this section.

The Ministry may by regulations prohibit harvesting using other vessel or gear groups inside the baselines, inside lines drawn at a certain distance from the baselines or within specified positions.

Section 21 Prohibition on harvesting in areas that are affected by pollution

The Ministry may prohibit or limit harvesting in areas and of species that may be affected by pollution.

Section 22 Angling and recreational fishing

When harvesting from land, or using vessels that are not registered in the register of fishing vessels, only the following gear may be used:

a) handline, fishing rod and similar hand gear,
b) one mechanised pole-line,
c) drift nets with a total length of up to 210 metres,
d) longlines with up to 300 hooks,
e) up to 20 traps.

These restrictions on the use of gear also apply when several vessels are being used by the same legal person or persons.

The Ministry may by regulations grant exemptions from the provisions of the first paragraph for the use of beach seines.

The Ministry may by regulations lay down restrictions on catch quantities, stricter restrictions on the gear that may be used, or prohibitions on harvesting in specified areas, if this is necessary for the purpose of resource management.

The stricter restrictions on allowable gear set out in section 3 of the Act of 17 June 1966 No. 19 relating to a prohibition against fishing, etc., by foreign nationals in Norway's territorial waters apply to anyone who is not a Norwegian national or assimilated to Norwegian nationals pursuant to section 2 of the said Act.

The Ministry may by regulations require selected subjects who engage in angling or recreational fishing to provide the authorities with information on their activities for

statistical purposes. Similar requirements may also be made applicable to anyone that owns or operates facilities from which such activities are conducted.

Other provisions made in or under this Act apply in so far as they are appropriate.

Section 23 Limit for sales of catches from angling and recreational fishing

A person or undertaking may not sell catches taken with vessels that are not registered in the register of fishing vessels, or from land, for an amount per year exceeding that prescribed in section 28, first paragraph, first sentence, of the Act of 19 June 1969 No. 66 relating to value-added tax. This limit applies even if several persons or undertakings sell catches that have been taken using the same vessel. The owner of a vessel that is registered in the register of fishing vessels may nevertheless not sell catches such as are mentioned above of fish species for which he has been allocated a quota under section 12.

The Ministry may by regulations grant exemptions from the provisions of the first paragraph for sales of catches taken with beach seines.

The prohibition on sales set out in section 3 of the Act of 17 June 1966 No. 19 relating to a prohibition against fishing, etc., by foreign nationals in Norway's territorial waters applies to anyone who is not a Norwegian national or assimilated to Norwegian nationals pursuant to section 2 of the said Act.

CHAPTER 5 ORDER ON HARVESTING GROUNDS, COMPENSATION, LOCAL REGULATION AND COMMITTEES

Section 24 Rules on due care

Anyone arriving at harvesting grounds where gear has been set shall acquaint himself with the location of such gear. All shall conduct themselves in such a way that fishing gear is not damaged or unnecessarily endangered.

It is prohibited to impede harvesting or spoil harvesting opportunities by means of shooting, noise or other improper conduct.

The Ministry may adopt further provisions on the manoeuvring of vessels and conduct on harvesting grounds.

Section 25 The first cast rule

The one who first begins to set gear and continues to do so without undue delay has the right to the stretch of water required by the gear or that will be encircled by it.

If two or more vessels begin to set their gear at the same time, they have equal rights.

A vessel that has no gear set shall when requested move if it is hindering others that have begun harvesting operations or are in the process of setting their gear.

Section 26 Trawling and Danish seining

It is prohibited to fish with trawls or Danish seines at a distance of less than one nautical mile from fishing or hunting gear that is already set, or markers for such gear, or vessels that are engaged in longlining or drift netting.

The Ministry may prescribe that the limit set out in the first paragraph shall be reduced or shall not apply to specific fisheries using trawls or Danish seines.

The provisions of the first paragraph do not apply where a committee system has been established and harvesting grounds have been shared out under section 32.

Section 27 Mooring of net pens

Anyone harvesting with a seine is entitled to moor the net pen to the shore, provided this is done at a reasonable distance from any inhabited house or holiday home that is in use and does not unduly impede or inconvenience others.

It is prohibited to harvest closer than 100 metres or approach closer than 20 metres to a net pen that is moored to shore or otherwise fixed.

The Ministry may adopt regulations concerning towing and mooring of net pens in the sea, including provisions on storing catches and opening net pens to prevent catches from being damaged or their quality impaired, or to prevent them from polluting the surrounding environment or becoming contaminated.

Section 28 Prohibition on leaving objects in the sea

It is prohibited to dump gear, moorings and other objects in the sea or leave such objects unnecessarily in the sea or on the seabed if they may injure marine organisms, impede harvesting operations, damage harvesting gear or endanger vessels.

Anyone that acts in contravention of the first paragraph has a duty to clear up or remove the objects in question. The Directorate of Fisheries may order such clearing up or removal.

In the event of failure to comply with orders issued under the second paragraph above, the Directorate of Fisheries may implement any necessary measures at the expense and risk of the party responsible. The costs of such measures are enforceable by execution proceedings.

Section 29 Salvage of gear and catches

Anyone that salvages gear that has drifted away, been lost or been abandoned, including dories and other equipment, shall report this to the owner as soon as possible. The Ministry may adopt regulations on reporting of the salvage of gear that has drifted away, been lost or been abandoned, including on what has been salvaged and where it was found.

Anyone that salvages gear is entitled to a reward. The reward shall be fixed in accordance with custom or what is considered to be reasonable. The amount of the reward may not exceed the value of what was salvaged.

A salvaged catch accrues to the salvager. If the value of the catch considerably exceeds the reward payable, the latter may be wholly or partly remitted.

The release of salvaged property may not be required before the reward and costs have been paid. When the reward and costs have been paid, the salvor has a duty to release the property that has been salvaged. The owner has a duty to accept the salvaged property if it is reasonable for the salvor to require this after the salvaged articles have been secured.

The Ministry may adopt regulations on the salvage of gear.

Section 30 Liability

Anyone that causes damage to gear set in the sea for the purpose of harvesting has a duty regardless of fault to pay compensation for the damage, including any catch lost and losses resulting from any interruption in harvesting.

Any compensation payable under the first paragraph may be reduced or remitted if the subject causing the damage can establish that he was not at fault.

If damage has been done to drifting or fixed gear, fishermen who were using trawls or Danish seines on the fishing ground at the same time have a duty to provide proof that they did not cause the damage. in question.

Section 31 Security for claims

Anyone that has a claim to compensation under this Act or ensuing from a collision between harvesting vessels, auxiliary vessels or vessels engaged in transporting catches has a maritime lien on the vessels, gear and catches of those who have caused the damage. The provisions governing maritime liens set out in Chapter 3 of the Norwegian Maritime Code of 24 June 1994 No. 39 apply correspondingly. The claim has equal priority with the claims mentioned in section 51, first paragraph, item 4, of the Maritime Code.

Liens on a catch cease to apply when the catch is sold. Anyone that sells a catch without the consent of the claimant is liable for the claim. Nevertheless, this liability does not apply to the amount that the subject in question can demonstrate could not have been covered by the lien.

Section 32 Local regulation and committees

The Ministry may establish districts where the Directorate of Fisheries or a committee appointed by the Directorate of Fisheries may adopt local regulations on

a) sharing of sea areas and safe distances between different types of gear,

b) placing and marking of gear,

c) times for departure from port, etc.,

d) duty to provide reports and catch reports to the Directorate of Fisheries as a condition for participating in harvesting in such areas.

The Directorate of Fisheries may also adopt local regulations outside such districts.

Local organisations have the right to submit proposals when local regulations are drawn up and when committees are appointed.

Section 33 Supervisors

In a district, the Directorate of Fisheries may appoint supervisors who shall seek by means of advice and warnings to prevent the contravention of provisions set out in or issued under this Act and help to maintain peace and order on harvesting grounds.

CHAPTER 6 ARRANGEMENTS FOR CONTROL AND ENFORCEMENT

Section 34 Duty to facilitate inspections on board vessels

To facilitate control and enforcement of provisions made in or under this Act or other legislation relating to marine resources, the Ministry may by regulations prohibit or prescribe rules relating to:

a) carrying on board or using gear,

b) how gear that is not in use is to be stored,

c) carrying on board or using equipment that can be used for sorting, grinding, dumping or discarding catches, etc.,

d) carrying on board and using equipment to monitor and report on the vessel's activities, such as satellite-based monitoring equipment and voyage data recorders,
e) carrying on board approved drawings of storage compartments and the rest of the vessel,
f) how catches are to be labelled and stowed, and carrying on board a plan showing how the catch is stowed,
g) carrying on board and using equipment and documentation to ensure control of the quantity harvested.

Section 35 Duty to obtain information
The Ministry may adopt regulations on a duty to listen to particular radio frequencies at specific times and on a duty to procure and use other communication equipment in order to receive messages from the authorities.

Section 36 Duty to provide information (catch logbooks, etc.)
The Ministry may by regulations require the owner or user of a vessel to keep a catch logbook and may adopt further rules on how catch logbooks shall be kept, which kinds of information they shall contain, and on retaining and submitting catch logbooks.

The Ministry may by regulations require the owner or user of a vessel to give other information on the harvesting and processing of catches.

Section 37 Transhipment, changing harvesting area and discontinuing harvesting
The Ministry may for control and enforcement purposes prohibit or adopt further rules on transhipment, including requirements that anyone that tranships catches shall report this within specified time limits, and that transhipment may only take place at or within specified positions or in a particular port.

The Ministry may by regulations require anyone that starts harvesting operations, changes harvesting area or discontinues harvesting operations to send reports on this within specified time limits and report for control at or within specified positions or in a specific port.

Section 38 Registration as a recipient or first-hand purchaser of catches

The Ministry may by regulations prescribe that any recipient of catches unloaded or transhipped from a vessel shall be registered with the Directorate of Fisheries as a recipient of catches, and that any first-hand purchaser of catches shall be registered with the Directorate of Fisheries as a purchaser. Conditions may be laid down for such registration.

Section 39 Landing notes and sales notes and prior notification of landing

The owner or user of a harvesting or transport vessel and the one that receives the catch shall complete a landing note with information on the catch. This applies regardless of whether the catch is transferred to a land-based facility, to another vessel or to storage in the sea.

The owner or user of a harvesting or transport vessel and the first-hand purchaser of the catch shall complete a sales note with information on the catch.

The Ministry may by regulations adopt further rules on the scope of the duties set out in the first and second paragraphs, including how landing and sales notes are to be filled out, the type of information they are to include, and on retaining and submitting landing and sales notes.

The Ministry may by regulations require those mentioned in the first and second paragraphs to send prior notification to the authorities of where, how and when catches are to landed or received, prescribe the type of information on the catch prior notification shall include, and require prior notification to be sent a certain period of time before the catch may be landed.

Section 40 Duty to ensure that information on catches is available

The Ministry may by regulations prescribe that anyone who harvests, receives, transports, stores, processes or places on the market wild living marine resources shall have and use documentation and equipment that ensures control of the quantities received, transported, stored, processed, removed from the storage or production site or placed on the market. The Ministry may also prescribe how wild living marine resources shall be stored.

Section 41 Traceability

The Ministry may by regulations prescribe that anyone who harvests, receives, transports, stores or processes wild living marine resources or places them on the market shall be able to document the information needed to make it possible at all times to trace fish and other resources back to a catch registered on a landing or sales note.

Section 42 Conversion factors

The Ministry may by regulations lay down conversion factors from processed or landed catches to live weight and between different stages of the production chain.

The owners and users of harvesting vessels and processing plants have a duty to cooperate when the Directorate of Fisheries collects samples for determining conversion factors.

Section 43 Use of electronic equipment and software

The Ministry may by regulations prescribe that the registration and transfer of information such as is mentioned in this chapter shall be carried out using specified electronic equipment and software.

CHAPTER 7 CONTROL AND ENFORCEMENT

Section 44 Responsibilities of the Directorate of Fisheries

The Directorate of Fisheries shall ensure that those to whom this Act applies comply with provisions laid down in or under the Act and with other legislation on participation in the harvesting, marketing, production, import and export of wild living marine resources.

Section 45 Cooperation during control activities

Anyone whose activities are inspected in accordance with provisions issued in or under this Act or other legislation such as is mentioned in section 44 shall cooperate with the competent authorities during inspections, among other things by answering calls on the radio or other communication equipment.

Section 46 Inspections

The Directorate of Fisheries shall be given unimpeded and direct access to vessels when carrying out inspections under section 44. In the same way, the Directorate of Fisheries shall be given access to shipping company offices and onshore facilities and the premises of all others who possess, transport, store, process or in other ways handle wild living marine resources for commercial purposes, and to places where relevant documents and information are kept. The same also applies to those that by regulations are required to provide information under the fifth paragraph of section 22.

The Directorate of Fisheries shall be given unimpeded and direct access to accounts and relevant documents, objects and information at the premises of all those mentioned in the first paragraph.

The person in charge or a representative of the person in charge shall make available and provide relevant objects, relevant and correct information and documents, and authenticate copies of these. Moreover, this person shall permit notes to be made in catch logbooks, delivery records, etc., and sign the inspection report. The person in charge or representative of the person in charge may add comments to the report.

The Directorate of Fisheries may issue orders to stop a vessel or haul in gear, or may itself haul in gear and moorings for gear and stop other activities that are being carried out on board a vessel or on land. Moreover, the Directorate of Fisheries may give orders to stop means of transport. The Directorate of Fisheries may seal gear and facilities for the storage of wild living marine resources, documents, relevant information and objects.

The Directorate of Fisheries may take samples of products, open packaging and take samples of goods, and may among other things thaw frozen products. If the owner of the goods or anyone else incurs expenses as a result of such investigations, they may not claim to have these expenses refunded.

The police shall provide the Directorate of Fisheries with any assistance and protection needed to conduct inspections.

Section 47 Placing inspectors and observers on board vessels

Inspectors and observers may be placed on board harvesting vessels. They shall be provided with necessary board and lodging at the vessel's expense, and they shall have use of communication equipment without charge.

The Ministry may adopt regulations relating to:

a) the duties of an observer,

b) which vessel groups and how many vessels are to carry an inspector or observer on board, and how these vessels are to be selected,

c) that the costs of inspection and observation schemes, including wage and transport costs, are to be divided among all participating vessels in a specified vessel group, or in special cases are to be met partly or entirely by individual vessels,

d) that vessels that have not paid the inspection and observation costs imposed may be refused permission to take part in harvesting operations.

Costs imposed by decisions under the second paragraph, c), are enforceable by execution proceedings.

Section 48 Responsibilities of the sales organisations

Sales organisations whose statutes have been approved under the Raw Fish Marketing Act of 14 December 1951 No. 3 shall ensure compliance with provisions laid down in or under the present Act. Their control activities shall be restricted to information acquired as a natural result of a sales organisation's activities under the Raw Fish Marketing Act, in particular ensuring that the catches taken and landed are in accordance with provisions laid down in or under the present Act. The Ministry may order the sales organisations to check information on catches to which their right to first-hand sales does not apply.

When carrying out inspections, a sales organisation may require unimpeded access to harvesting or transport vessels and to offices, storage facilities and production plants belonging to the purchaser or recipient. The same applies when catches are transferred to or from net pens. In this connection, the sales organisation may require unimpeded access to catch logbooks, delivery records, landing and sales notes and accounts. The Ministry may by regulations lay down requirements relating to how sales organisations organise their control activities.

Anyone that is inspected has a duty to cooperate during this process.

The Ministry may adopt regulations on conducting inspections such as are mentioned in this section, and on reporting and control routines.

Section 49 Exchange of information between supervisory authorities, etc.

Notwithstanding their duty of confidentiality, personnel from the Ministry of Fisheries and Coastal Affairs and the Directorate of Fisheries may provide other supervisory authorities, the police or the prosecuting authority with any information naturally relating to their duties under this Act.

The duty of confidentiality that applies to personnel in other supervisory authorities, the police and prosecuting authority does not prevent them from disclosing such information as is mentioned in the first paragraph to the Ministry of Fisheries and Coastal Affairs or the Directorate of Fisheries.

The King may adopt further regulations relating to the exchange of information under this section.

CHAPTER 8 MEASURES AGAINST ILLEGAL, UNREPORTED AND UNREGULATED FISHING

Section 50 Prohibition on landing catches

The Ministry may prohibit landing of wild living marine resources caught by vessels that are not Norwegian, or by vessels that are not under the command of a Norwegian national or anyone assimilated to Norwegian nationals, if:

a) the catch is from a fish stock of joint interest to Norway and other states that is not subject to a joint management regime,

b) the catch has been taken in contravention of a desired harvesting or fishing pattern, will result in a reasonable total allowable catch being exceeded, or is in contravention of international agreements,

c) the flag state cannot on request confirm that the catch has been taken during fishing activities that are in accordance with a desired harvesting or fishing pattern or that are not in contravention of rules for fishing activities that have been agreed with another country.

Section 51 Measures targeting anyone engaged in or accessory to illegal, unreported and unregulated fishing

The Ministry may adopt regulations:

a) prohibiting landings, transhipments and processing of catches in Norwegian ports by vessels that are not Norwegian if such vessels have taken part in fishing activities in serious contravention of a desired harvesting or fishing pattern or in serious contravention of rules for fishing activities that have been agreed with another country,

b) prohibiting landings, transhipments and processing of catches in Norwegian ports by vessels that are not Norwegian, if such vessels are owned or operated by a legal person that has used another vessel to take part in fishing activities in serious contravention of a desired harvesting or fishing pattern or in serious contravention of rules for fishing activities that have been agreed with another country,

c) prohibiting on- and offloading and the provision of port, supply and support services in Norwegian ports to and from vessels that are or become subject to prohibitions under a) or b) above,

d) prohibiting transhipment and the provision of supply and support services in Norway's territorial waters to and from vessels that are or become subject to prohibitions under a) or b) above,

e) prohibiting the provision of supply and support services to and from vessels using a Norwegian vessel or in other ways, if the former are or become subject to prohibitions under a) to d),

f) prohibitions under a) to e) above applying to vessels that are included on lists of vessels that have taken part in illegal, unreported and unregulated fishing activities drawn up by fisheries management organisations.

The King may adopt regulations prohibiting vessels that are not Norwegian, cf section 2 of the Act relating to a prohibition against fishing etc by foreign nationals in Norway's territorial waters, from entering Norwegian internal waters if the requirements for prohibiting landing of catches under section 50 or under the first paragraph, a), b) or f), of this section are satisfied.

Section 52 Prohibition against activities that may undermine management measures

The Ministry may, in order to combat illegal, unreported and unregulated fishing, prohibit activities that may undermine national management measures or measures taken by international or regional fisheries management organisations.

CHAPTER 9 CATCHES TAKEN OR DELIVERED IN CONTRAVENTION OF THIS ACT

Section 53 Prohibition on sales

It is prohibited to receive or sell catches caught in contravention of provisions set out in or issued under this Act. The Ministry may by regulations lay down a prohibition on receiving or selling catches if provisions laid down in or under sections 40, 41 or 52 have been contravened.

Nevertheless, it is permitted to receive or sell such catches when a decision has been made under section 54, or if the Directorate of Fisheries or sales organisation has consented to this.

Section 54 Catches harvested or delivered in contravention of this Act

Catches or the value of catches harvested or delivered in contravention of provisions laid down in or under the present Act or the Act relating to the right to participate in fishing and hunting, accrue to the appropriate sales organisation or to the state if the sales organisation's rights to first-hand sales do not apply to the catch. This applies irrespective of whether the case entails liability to a penalty.

The Ministry may by regulations adopt provisions on how such cases are to be dealt with, how the value of the catch is to be determined, whether remuneration may be paid for the costs of landing catches, and the purposes for which the sales organisation may use the proceeds.

A final decision is enforceable by execution proceedings, and the value of the catch may be collected by deducting it from payments for catches. The Ministry may adopt regulations on the temporary withholding of the value of catches.

CHAPTER 10 FEES, REGISTERS AND DUTY TO PROVIDE INFORMATION ON THE OPERATION OF VESSELS

Section 55 Control fees

The Ministry may adopt regulations relating to inspection fees.

Such regulations may contain provisions on a duty to pay control fees, how such fees are to be collected, and on the duty of those who deliver and receive catches to provide information if this is of importance for the extent of the duty to pay control fees.

Amounts outstanding are enforceable by execution proceedings.

Section 56 Registers
The Directorate of Fisheries may establish registers for the collection, storage and use of information obtained by means of orders laid down in or under this Act.

Furthermore, the Directorate of Fisheries may for control purposes establish a register for the collection, storage and use of information such as is mentioned in the first paragraph, together with information obtained from other sources.

The Ministry may by regulations lay down further rules on registration and the use of the information in such registers.

Section 57 Duty to provide information on the operation of vessels
The Ministry may by regulations order owners or users of harvesting vessels to provide the Directorate of Fisheries with accounts and other information on the operation of vessels.

CHAPTER 11 COERCIVE FINES AND INFRINGEMENT FINES

Section 58 Coercive fines
The Ministry may impose coercive fines to ensure compliance with provisions made in or under this Act.

A coercive fine is a continuous fine that becomes effective from a specified deadline for complying with an order, if the deadline for compliance with the order is not met. The Ministry may in special cases reduce or waive a coercive fine that has accrued.

The Ministry may by regulations adopt further provisions on setting and imposing coercive fines, the time period for which they are to apply, and provisions on interest and surcharges in the event that a coercive fine is not paid by the due date.

A coercive fine may be collected through a sales organisation by deducting the amount from payments for catches.

Section 59 Infringement fines

The Ministry may order anyone that wilfully or through negligence contravenes provisions or decisions laid down in or under this Act to pay an infringement fine. An infringement fine may be imposed as a fixed penalty or the amount may be fixed in each case. Such factors as the profit or potential profit those responsible have made through the contravention, how serious the contravention was, and the extra costs of control measures and processing the case may be taken into account in determining the amount of the fine.

The Ministry may by regulations adopt provisions on fixing infringement fines and provisions on interest and surcharges in the event that an infringement fine is not paid on the due date.

A final decision on an infringement fine is enforceable by execution proceedings. An infringement fine may also be collected through a sales organisation by deducting the amount from payment for catches. The amount of an infringement fine may be put before a court.

An infringement fine and penal measures as set out in Chapter 12 may not be applied to the same offence.

CHAPTER 12 CRIMINAL LIABILITY

Section 60 Contravention of regulatory provisions

Anyone who wilfully or through negligence contravenes provisions laid down in or under sections 9, 10, 11, third and fourth paragraphs, and 12 to 14 is liable to fines or to a term of imprisonment not exceeding one year, unless more severe penal provisions apply.

Section 61 Contravention of provisions on the conduct of harvesting operations and order on harvesting grounds

Anyone who wilfully or through negligence contravenes provisions laid down in or under sections 15, 16, second paragraph, 18 to 21, 22, first and third paragraphs, 23 and 24 is liable

to fines or to a term of imprisonment not exceeding one year, unless more severe penal provisions apply.

Section 62 Contravention of provisions on arrangements for control and enforcement
Anyone who wilfully or through negligence contravenes provisions laid down in or under sections 34 and 36 to 42 is liable to fines or to a term of imprisonment not exceeding one year, unless more severe penal provisions apply.

Section 63 Contravention of provisions on control and enforcement
Anyone who wilfully or through negligence contravenes provisions laid down in or under sections 45, 46, first to fifth paragraphs, 48, second to fourth paragraphs, and 50 to 53 is liable to fines or to a term of imprisonment not exceeding one year, unless more severe penal provisions apply.

Section 64 Miscellaneous provisions on penal measures
Serious offences committed through gross negligence or wilfully are punishable by a term of imprisonment not exceeding three years. In evaluating whether an offence is serious, special weight shall be given to whether the financial or potential financial gain from the offence was large, whether the offence was committed systematically and over time, and whether it was committed as part of an organised activity.

If criminal liability under sections 60 to 63 can be imposed on the master of a vessel for an offence committed by one of the crew, only a subordinate who contravened provisions wilfully is liable to a penalty. In determining whether a subordinate is liable to a penalty, particular account shall be taken of the preventive effect of the penalty, how serious the offence was, and whether those in question have had or could have obtained any advantage by the offence.

If a foreign vessel has contravened provisions such as are mentioned in sections 60 to 63 outside the territorial sea, a term of imprisonment may not be imposed. Nor may a term of imprisonment be imposed in default of payment of a fine. A term of imprisonment may

nevertheless be imposed if this follows from an agreement with a foreign state or if the vessel is stateless.

The master of a vessel may accept an optional fine on behalf of the employer. An employer may also be liable to a penalty in criminal proceedings against the master.
Complicity or an attempt is liable to the same penalties.

Section 65 Confiscation
In the case of contravention of provisions set out in sections 60 to 63, catches may be confiscated. The same applies to gear, objects, property, facilities or vessels that were used in the contravention. This applies irrespective of who the owner is. Instead of any object, its value may be confiscated wholly or in part from the offender or from those on whose behalf he has acted or from the owner.

It may be decided that liens on or other rights to objects that are confiscated shall wholly or partly cease to apply. The provisions of section 37 c of the Act of 22 May 1902 No. 10, the Penal Code, apply correspondingly.

If lawful and unlawful catches have been mixed together, the entire catch may be confiscated.

CHAPTER 13 GENERAL PROVISIONS AND ENTRY INTO FORCE

Section 66 Marine research and practical testing of gear
When it is necessary to carry out marine research or practical tests of gear, catch methods, etc., the Directorate of Fisheries may grant exemptions from provisions laid down in or under this Act or other fisheries legislation. Other provisions of this Act apply in so far as they are appropriate.

The Ministry may lay down what is considered to constitute marine research and practical testing of gear, catch methods, etc.

Section 67 Regulations

The Ministry may adopt regulations for the implementation of this Act. Regulations made under this Act may differentiate between

a) vessel groups and gear groups,

b) areas, species or times of year,

c) types of activities.

Section 68 Regulations under the Seawater Fisheries Act, etc

Regulations made under the Act of 3 June 1983 No. 40 relating to Seawater Fisheries, etc. (Seawater Fisheries Act) and the Act of 24 June 1994 No. 34 relating to registration as a first-hand purchaser of raw fish, etc., will continue to apply after the entry into force of the present Act. Regulations made under the present Act may nevertheless repeal regulations under the Acts mentioned above if this is expressly provided.

Section 69 Entry into force

This Act enters into force on the date determined by the King. From the same date, the Act of 3 June 1983 No. 40 relating to Seawater Fisheries, etc., is repealed. The King may put different provisions into effect on different dates and repeal individual provisions of the Seawater Fisheries Act on different dates. The Act of 24 June 1994 No. 34 relating to registration as a first-hand purchaser of raw fish, etc. is repealed from the date when section 38 is put into effect.

Section 70 Amendments to other acts

From the date of entry into force of this Act, the following amendments are made to other Acts:

Updated: 17.03.2015

APPENDIX II: EXAMPLE OF INTERVIEWEE INFORMATION LETTER

Participation in the research project:

" Legal analysis of Norwegian fisheries legislation"

This is an information letter regarding participation in a research project regarding Norwegian fisheries legislation. The main objective of the project is to analyse to what extent the licence and enforcement scheme provides for environmental sustainability, and at the same time secures a clear and predictable exercise of authority. In the following we will present you more information on the project and what participation, as an interviewee, entails.

Scope and objectives

The research is conducted in a PhD-project at the Faculty of Law, University of Oslo. Ms Guri Hjallen Eriksen is the project manager and PhD Candidate, and there are two main supervisors. The project is currently structured in several sub-studies that will result in a monography (book). The *first study* is to analyse whether there is a unique Norwegian fisheries legislation culture, what such a possible culture constitutes, and what are its epistemic foundations. The methodology will be legal historical analysis of primary and secondary sources.

The *second study* is a comparative analysis of the licence and enforcement system in Norway and the province British Columbia (BC) in Canada. The aim is to reveal similarities and differences in the regulatory schemes in two jurisdictions with different legal traditions. More specifically, the aim is to gain new insights into how the Canadian regulatory scheme is organized and designed to prevent overfishing, high-grading and other violations of legislation.

The intention is not to fully understand the Canadian system, rather to gain inspiration and with new perspectives review the Norwegian legislation. The study will be a combination of

doctrinal and comparative study of current law. This will include desk studies of authoritative legal sources and literature, and a collection of empirical data through interviews with researchers, actors in the Department of Fisheries and Oceans (DFO) and the industry.

The *third study* is a prescriptive policy analysis of the fisheries legislation. The aim is to review findings from the previous studies in a broader societal context and use theories from other disciplines, including resource economics, legal sociology, political science, resource management theory, to evaluate the licence and enforcement system in Norway.

Who is responsible for the research project?

The PhD-project is a collaboration between the University of Oslo (Faculty of Law) and the company SALT Lofoten under the industrial PhD arrangement by the Norwegian Research Council. xxxx is supervisor at the University, while xxxx is supervisor at SALT.

Why are you asked to participate in the project?

The Candidate would like to talk to persons that are familiar with or knowledgeable about the Canadian fisheries legislation from a practical point of view, both from the management side and the industry side. You have been asked to participate as you have legal expertise in the federal government and can provide valuable insights into the legislative processes, various elements of the legislation, legal challenges and law in action.

What does it mean for you, as an interviewee, to participate in the project?

If you choose to participate in the project the Candidate will talk with you for 1-2 hours. This will be a conversation in the form of a semi-structured interview. The Candidate has prepared some questions in advance, but there is also room for elaborating on topics, or ask follow-up questions that are not prepared. The main topics will be sent to you in advance. The Candidate will record audio of the conversation and take notes concurrently. The audio files will be deleted as soon as the content is transcribed.

Participation is voluntarily

It is voluntarily to participate in the project. If you choose to participate, you can at any time withdraw your consent without providing any reasons for it. All information collected from you will be anonymized. There are no consequences for you if you chose not to participate or later chose to withdraw.

Your personal protection - how we store and use your information

We will only use the information provided within the scope and objectives of the project. We process your data confidentially and pursuant to EU personal data protection legislation. Only the PhD Candidate and supervisors will have access to the information. Data will be stored anonymized on the home area of the Candidate at the University of Oslo.

What happens to your data after the project is completed?

The project is to be finalised in August 2021. The data will be kept stored anonymized on an encrypted area in One Drive/Sharepoint that can be accessed only by the PhD Candidate. This is so that the work can be tested and possibility for use in follow-up studies within the scope of the project.

Your rights

As long as you can be identified in the material, you have a right to:

- access the personal data that is registered on you,
- get corrected personal data on you,
- get deleted personal data on you,
- receive a copy of your personal data, and
- complain to the Data Protection Authorities about the processing of your personal data.

What gives us a right to process personal data on you?

We will process personal data on basis of your consent. On behalf of University of Oslo/SALT Lofoten, the Norwegian Centre for Research Data (https://nsd.no/nsd/english/) has reviewed the scope and methodology and concluded that the processing of personal data in the project is in accordance with the data protection legislation.

Where can I find more information?

If you have questions on the project, or want to use your rights, please contact:

- University of Oslo/SALT, Guri Hjallen Eriksen, g.k.h.eriksen@jus.uio.no
- The Data Protection Officer at University of Oslo: xxxx on e-mail: personvernombud@uio.no
- The Norwegian Centre for Research Data (https://nsd.no/nsd/english/index.html), on e-mail (personverntjenester@nsd.no) or phone: + 47 55 58 21 17.

Kind regards,

Project manager

Guri Hjallen Eriksen

Consent form

I have received and understood the information provided on the PhD project "Legal analysis of Norwegian fisheries legislation" and had an opportunity to ask questions. I consent to:

- ☐ participate in a semi structured interview by the Candidate
- ☐ the storage of anonymized data from the interview after the project is finished

I consent to that my data can be processed until the project is finished in August 2021.

(Signature and date)

APPENDIX III: EXAMPLE OF INTERVIEW GUIDE

INTERVIEW GUIDE – SEMI STRUCTURED INTERVIEW INDUSTRY RESPONDENT

- **Introduction – background interviewee and role in industry**

- **Overview regulatory system, legislative processes and stakeholder involvement**
  - What would you say are the main characteristics in the Canadian pacific fisheries?
  - Could you tell me a little about the role of the stakeholders, and use of stakeholder knowledge in decision-making processes in the Pacific fisheries?
  - Role and impact of industry organizations more specifically, also differences Atlantic vs Pacific Fisheries
  - Do you think the industry could be more involved in these processes, including a more active role in the management?

- **Licenses**
  - What role do you think that the licenses have in the management system?
  - How does the industry generally perceive the terms and conditions connected to the licenses?
  - How are the actors consulted before the licenses are issued annually?
  - Do you have any experience with pacific license appeal board and how the appeal processes work?
  - How does the industry generally view the owner operating policies and fleet segmentation in the Atlantic fisheries that some have suggested for west coast fisheries?

- **Rules of conduct - technical regulations - gear restrictions - area closures etc.**
  - How does the industry perceive all obligations and duties in regulations and licensing conditions as a whole?
  - Is it your impression that all the duties and obligations are perceived necessary?

- How does the industry find that the operative management function, for example dissemination of information like variations orders?

- **Enforcement system -fisheries officers - sanctioning - penalties**
  - What would you say are the main elements in the enforcement of the fisheries?
  - What is the general view of questions related to compliance and enforcement by the industry?
  - Background and functioning of the user payment of monitoring costs?
  - Do you have any experience of how the industry perceive the size of penalties that are issued by Fisheries officers (tickets) or sentenced by courts?
  - Do you have any general knowledge of how the collaboration between Fisheries Officers and vessel crews' function?

- **Discretionary powers and legal remedies**
  - How is the industry perceiving the wide discretionary powers that the authorities have and how it is used?
  - What is your experience with, and thoughts about, the use of legal remedies, especially judicial review by courts?

- **Ongoing policy issues – future challenges**
  - What is in your opinion the main challenges in regulating fisheries today, and in the future?
  - How can these challenges be best dealt with?