LAND TENURE JOURNAL

REVUE DES QUESTIONS FONCIÈRES

REVISTA SOBRE TENENCIA DE LA TIERRA

1·13

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LAND TENURE JOURNAL

The *Land Tenure Journal* is a peer-reviewed, open-access flagship journal of the Climate, Energy and Tenure Division (NRC) of the Food and Agriculture Organization of the United Nations (FAO). The *Land Tenure Journal*, launched in early 2010, is a successor to the *Land Reform, Land Settlement and Cooperatives*, which was published between 1964 and 2009. The *Land Tenure Journal* is a medium for the dissemination of quality information and diversified views on land and natural resources tenure. It aims to be a leading publication in the areas of land tenure, land policy and land reform. The prime beneficiaries of the journal are land administrators and professionals although it also allows room for relevant academic contributions and theoretical analyses.

REVUE DES QUESTIONS FONCIERES

La *Revue des questions foncières* est une publication phare, accessible à tous et révisée par les pairs de la Division du climat, de l'énergie et des régimes fonciers (NRC) de l'Organisation des Nations Unies pour l'alimentation et l'agriculture (FAO). La *Revue des questions foncières*, lancée au début 2010, est le successeur de la revue *Réforme agraire, colonisation et coopératives agricoles*, publiée par la FAO entre 1964 et 2009. La *Revue des questions foncières* est un outil de diffusion d'informations de qualité et d'opinions diversifiées sur le foncier et les ressources naturelles. Elle a pour ambition d'être une publication de pointe sur les questions relatives aux régimes fonciers, aux politiques foncières et à la réforme agraire. Les premiers bénéficiaires de la revue sont les administrateurs des terres et les professionnels du foncier, mais elle est également ouverte à des contributions universitaires et à des analyses théoriques pertinentes.

REVISTA SOBRE TENENCIA DE LA TIERRA

La *Revista sobre tenencia de la tierra* es una revista insignia, de libre acceso, revisada por pares de la División de Clima, Energía y Tenencia de Tierras (NRC) de la Organización de las Naciones Unidas para la Alimentación y la Agricultura (FAO). Es la sucesora de *Reforma agraria, colonización de la tierra y cooperativas*, que se publicó entre 1964 y 2009. La *Revista sobre tenencia de la tierra*, cuyo primer numero apareció a comienzos de 2010, es un medio de difusión de información de calidad que proporciona opiniones diversas sobre la tenencia de la tierra y los recursos naturales. Aspira a ser una publicación líder en el sector de la tenencia de la tierra, la política agraria y la reforma agraria. Los principales beneficiarios de la revista son los administradores de la tierra y los profesionales del sector aunque también da espacio a contribuciones académicas relevantes y análisis teóricos.

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ORGANISATION DES NATIONS UNIES POUR L'ALIMENTATION ET L'AGRICULTURE

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Preface

The endorsement of the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (VGGT) by the Committee on World Food Security (CFS) in May 2012 was of major significance to all those who depend on fisheries and fish for their livelihoods and wellbeing. In particular small-scale fisheries play an important role in food security and nutrition, poverty eradication, equitable development and sustainable resource utilization. Promoting and enhancing this role requires, among other things, secure and equitable access to fishery and other natural resources by fishing communities, especially marginalized and vulnerable groups, and the VGGT provide a crucial framework for improving governance in this respect.

As each sub-sector has its particular characteristics, implementing responsible governance of tenure in fisheries requires sector specific knowledge and considerations. To provide fisheries relevant inputs and guidance for the VGGT and their implementation, an *FAO workshop on governance of tenure for*

Préface

L'approbation des *Directives volontaires pour une gouvernance responsable des régimes fonciers applicables aux terres, aux pêches et aux forêts dans le contexte de la sécurité alimentaire nationale* (VGGT) par le Comité de la sécurité alimentaire mondiale (CSA) en Mai 2012 constitue un évènement majeur pour tous ceux dont les moyens d'existence et le bien-être dépendent de la pêche et du poisson. Il s'agit notamment du secteur de la pêche artisanale qui joue un rôle important en matière de sécurité alimentaire, de nutrition, de lutte contre la pauvreté, de développement équitable et d'utilisation durable des ressources. Pour que ces communautés de pêcheurs – groupes marginalisés et vulnérables notamment – puissent étendre et renforcer ce rôle, il faut qu'elles disposent d'un accès sûr et équitable aux ressources halieutiques. Les VGGT fournissent un cadre indispensable pour améliorer la gouvernance du secteur de la pêche.

Chaque sous-secteur présentant des caractéristiques spécifiques, une gouvernance responsable des régimes fonciers de la pêche implique un savoir et des considérations spécifiques. Pour apporter les éléments de pertinence

Prefacio

La aprobación, en mayo de 2012, de las *Directrices voluntarias sobre la gobernanza responsable de la tenencia de la tierra, la pesca y los bosques en el contexto de la seguridad alimentaria nacional* por el Comité de Seguridad Alimentaria Mundial tuvo una importancia decisiva para todas las personas cuyos medios de subsistencia y cuyo bienestar dependen del sector de la pesca y del pescado. Las pesquerías en pequeña escala juegan, en particular, un papel esencial en la seguridad alimentaria y la nutrición, en la erradicación de la pobreza, en el desarrollo equitativo y en la utilización sostenible de los recursos. La promoción y mejora de esta función hace necesario, entre otras cosas, que las comunidades pesqueras, y, en especial, los grupos marginados y vulnerables tengan un acceso seguro y equitativo a la pesca y a otros recursos naturales; y, a este respecto, las Directrices voluntarias proporcionan un marco fundamental para perfeccionar la gobernanza.

Puesto que cada subsector tiene aspectos característicos que les son particulares, la puesta en práctica de una gobernanza responsable de la tenencia en la pesca requiere de un conocimiento y de consideraciones específicos de este sector. Para formular aportaciones y orientaciones pesqueras

responsible capture fisheries was convened in Rome on 4-6 July 2011. The workshop was jointly organized by the Fisheries and Aquaculture Department and the Natural Resources and Environment Department with the assistance of John Kurien, FAO Consultant and Visiting Faculty at the Azim Premji University, Bangalore, India. Together with a collection of voices of fishers expressing their perspectives and experiences with regard to tenure, several case studies had been prepared for the workshop providing insights into tenure arrangements in different fisheries, socio-economic settings and regions of the world.

This issue of the FAO Land Tenure Journal includes seven articles based on the case studies presented and discussed in the workshop. These articles, together with other information and experiences on small-scale fisheries around the globe, have been used as the basis for the work on a fisheries implementation guide in support of the VGGT that is currently under development and they provide a thorough overview of fisheries tenure.

et d'orientation nécessaires à l'application des VGGT dans ce secteur, la FAO a organisé, du 4 au 6 juillet 2011 à Rome, un atelier sur la gouvernance des régimes fonciers applicables aux pêches de capture. Mis en œuvre conjointement par le Département des pêches et de l'aquaculture et par le Département des ressources naturelles et de l'environnement de la FAO – avec la participation de John Kurien, Consultant de la FAO et professeur invité de l'Université indienne Azim Premji de Bangalore – cet atelier a permis de faire entendre la voix de nombreuses communautés de pêcheurs et de présenter leurs expériences. Il a également été l'occasion d'examiner plusieurs études de cas relatives aux dispositions foncières en vigueur au sein d'une diversité de pêcheries, de contextes socioéconomiques et de régions du monde.

Ce numéro de la Revue des questions foncières de la FAO comprend sept articles reprenant les études de cas présentées et débattues au cours de l'atelier. Ces articles, ainsi que d'autres informations et expériences sur la pêche artisanale à travers le monde, ont constitué la matière première d'un guide d'application des VGGT en matière de pêches – ouvrage en

pertinentes relacionadas con las Directrices voluntarias y su aplicación, fue celebrado, los días 4 a 6 de julio de 2011, el *Taller FAO sobre la gobernanza de la tenencia para la pesca de captura responsable*. El taller fue organizado conjuntamente por el Departamento de Pesca y Acuicultura y el Departamento de Gestión de Recursos Naturales y Medio Ambiente de la FAO, con la asistencia de John Kurien, Consultor de la Organización y Profesor visitante de la Universidad Azim Premji, Bangalore (India). Habían sido preparados para el taller varios estudios de caso y una serie de intervenciones mediante las cuales los pescadores comunicaron sus puntos de vista y experiencias sobre la tenencia; se vertió así luz sobre los acuerdos de tenencia que se han pactado en el ámbito de pesquerías y en condiciones socioeconómicas y regiones diferentes del mundo.
Este número de la *Revista sobre tenencia de la tierra* comprende siete artículos que se basan en los estudios de caso presentados y debatidos en el taller. Estos artículos, junto con otras informaciones y experiencias sobre la pesca en pequeña escala en diversos lugares del mundo, han servido de base para los trabajos destinados a una guía de aplicación sobre la pesca en apoyo de las Directrices voluntarias, actualmente en elaboración. Los

- **The first article** (by Anthony Charles, Saint Mary's University, Nova Scotia, Canada) examines the general conditions of tenure systems in small-scale fisheries in order for them to be effective and fair. The importance of linking fishing rights and involvement in fishery decision-making to human rights is highlighted. Context-sensitive perspectives on tenure in small-scale fisheries, rooted in values and compatible with local objectives, and attention to process – how tenure is implemented - are required for successful outcomes.
- **The second article** (by Robert S. Pomeroy, University of Connecticut, USA) notes the importance of secure tenure for fishers to fishery resources in order to improve fisheries management in Southeast Asia. The article considers good practices that would foster responsible governance of tenure. These practices refer to decentralization, co-management, policy and legal frameworks, values, management plans, conflict management, empowerment,

cours d'élaboration – et ont apporté aux participants un aperçu détaillé des régimes fonciers existant en ce domaine.

- **Le premier article** (proposé par Anthony Charles, de l'Université Saint Mary de Nouvelle Ecosse, Canada) examine les conditions d'efficacité et d'équité des systèmes fonciers applicables aux pêches. Il souligne l'importance de la question des droits de l'homme dans la définition des droits de pêche et dans les mécanismes de décision en la matière. Pour parvenir à des résultats positifs à cet égard, les processus d'élaboration des régimes fonciers de la pêche artisanale doivent respecter les valeurs des communautés de pêcheurs et intégrer leurs objectifs à l'échelle locale.
- **Le deuxième article** (proposé par Robert S. Pomeroy, Université du Connecticut, USA) souligne l'importance de la sécurisation foncière des communautés de pêcheurs à l'égard des ressources halieutiques qu'ils exploitent pour améliorer la gestion des pêches en Asie du sud-est. Cet article inventorie les bonnes pratiques susceptibles de favoriser une gouvernance foncière

artículos proporcionan una visión exhaustiva general de la tenencia pesquera.

- **El primer artículo** (por Anthony Charles, Universidad Saint Mary's, Nueva Escocia [Canadá]) examina las condiciones generales que hacen que los sistemas de tenencia en las pesquerías en pequeña escala puedan ser eficaces y justos. Se destaca la importancia de la vinculación entre derechos pesqueros y participación en la toma de decisiones sobre la pesca, y derechos humanos. Para lograr resultados positivos, es necesario que la perspectiva adoptada —con sensibilidad respecto al contexto en que se desarrolla la pesca en pequeña escala— esté arraigada en los valores humanos y sea compatible con los objetivos locales, y que la aplicación de la tenencia sea un proceso al que se preste la debida atención.
- **El segundo artículo** (por Robert S. Pomeroy, Universidad de Connecticut [Estados Unidos de América]) pone de relieve la importancia que reviste, en el Asia sudoriental, para los pescadores una tenencia segura de los recursos, entendida como instrumento con el cual es posible mejorar la ordenación pesquera. El artículo

political support, enforcement, and community organizations.

- **The third article** (by Paul Onyango, University of Dar es Salaam, Tanzania), discusses tenure and co-management in the Lake Victoria fisheries. The experience from the Beach Management Units (BMUs) show how important it is to institute a sound governance system that encompasses participation, legitimacy, genuine involvement in decision-making, fairness and coherence. The article also points out the importance of community values contained in customary tenure systems and how these impact on fishers' current perspectives on ownership of and access to fishery resources.
- **The fourtth article** (by Svein Jentoft, Norwegian College of Fishery Science/ University of Tromsø, Norway) describes how the issue of historical rights of indigenous (Sami) people has challenged the fisheries governance system in Norway, which is based on the principle that marine resources are no one's property. The article

responsable sur les plans de la décentralisation, de la cogestion, du cadrage politique et juridique, de la production de valeurs, de la conception de plans de gestion, de la résolution des conflits, de la responsabilisation des individus, des formes de soutien politique, des modes d'organisation des communautés et des modalités d'exercice de cette gouvernance.

- **Le troisième article** (proposé par Paul Onyango, Université de Dar Es-Salaam, Tanzanie), aborde les questions liées aux régimes fonciers et aux problématiques de cogestion des pêcheries du Lac Victoria. L'expérience des Unités de gestion des plages (BMU) montre l'importance cruciale d'instituer un solide système de gouvernance pour assurer la participation, la légitimité et l'engagement des communautés de pêcheurs et pour garantir plus globalement équité et cohérence. L'article souligne également l'importance des valeurs que portent les systèmes fonciers coutumiers et l'influence de ces valeurs sur les perspectives des communautés de pêcheurs en termes d'accès aux ressources halieutiques et d'appropriation de ces ressources.

toma en consideración las buenas prácticas que podrían fomentar la gobernanza responsable de la tenencia, a saber: la descentralización, la cogestión, el marco político y jurídico, los valores, los planes de ordenación, la gestión de conflictos, el empoderamiento, el apoyo político, la aplicación de la reglamentación y las organizaciones comunitarias.

- **El tercer artículo** (por Paul Onyango, Universidad de Dar es-Salam [República Unida de Tanzanía]) describe la tenencia y las actuaciones de cogestión en las pesquerías del Lago Victoria. La experiencia sacada de las Unidades de Gestión de Playas muestra cuán importante es implantar un sistema de gobernanza sólido que abarque la participación, la legitimidad, la real participación en la toma de decisiones, la justicia y la coherencia. El artículo también pone de relieve la importancia de los valores comunitarios que forman parte de los sistemas consuetudinarios de tenencia, y la manera en que estos repercuten en los puntos de vista que los pescadores tienen hoy de la propiedad y el acceso a los recursos pesqueros.

notes that marginalized coastal peoples would often benefit from a shift in focus by which common property rights and tenure are regarded as human rights and take social justice into consideration.

- **The fifth article** (by Jackie Sunde and Merle Sowman, University of Cape Town, and Henk Smith and Wilmien Wicomb, Legal Resources Centre, Cape Town, South Africa) describes the development of a new policy for small-scale fisheries in South Africa and how it created an opportunity to interpret the emancipatory potential of living customary law – i.e. customary law that is observed by the people who created it – to give substance to good governance of tenure. Tenure governance needs to be locally appropriate, legitimate and sustainable and using living customary law would facilitate the establishment of such arrangements.
- **The sixth article** (by James Finlay, Springs, St George's, Grenada, and Patrick McCooney and Hazel A. Oxenford,

- **Le quatrième article**, (proposé par Svein Jentoft, du Collège norvégien des sciences de la pêche, Université de Tromsø, Norvège) décrit comment les populations autochtones (Sami) ont fait valoir leurs droits historiques pour contester le système de gouvernance foncière de la pêche en Norvège, celui-ci s'appuyant sur le principe de non appartenance des ressources marines. Cet article montre comment la situation des populations côtières marginalisées pourrait être améliorée si les droits de propriété et les droits fonciers collectifs étaient définis comme des droits humains et si les questions de justice sociale étaient prises en compte.
- **Le cinquième article** (proposé par Jackie Sunde et Merle Sowman, Université de Cape Town, ainsi que par Henk Smith et Wilmien Wicomb, Centre de ressources juridiques de Cape Town, Afrique du Sud) décrit le processus d'élaboration d'une nouvelle politique de la pêche artisanale en Afrique du Sud et montre l'influence de cette nouvelle politique sur le potentiel émancipateur du droit

- **El cuarto artículo** (por Svein Jentoft, Escuela Noruega de Ciencia Pesquera, Universidad de Tromsø [Noruega]) describe el desafío que las cuestiones relacionadas con los derechos históricos de los indígenas (de la etnia sami) ha representado para el sistema de gobernanza pesquera en Noruega, que descansa en el principio de que los recursos marinos no son propiedad de ningún individuo o entidad. El artículo nota que los pueblos costeros marginados sacarían con frecuencia mayores beneficios si los comunes derechos de propiedad y la tenencia se considerasen como derechos humanos y si la justicia social se tuviese en cuenta en ellos.
- **El quinto artículo** (por Jackie Sunde y Merle Sowman, Universidad de Cuidad del Cabo, y Henk Smith y Wilmien Wicomb, Centro de Recursos Jurídicos, Cuidad del Cabo [Sudáfrica]) estudia el desarrollo de una nueva política para la pesca en pequeña escala en Sudáfrica y la oportunidad que de esa política ha derivado de interpretar las fuerzas de emancipación de la ley consuetudinaria viva —es decir, la ley que es observada por las personas que fueron sus creadoras— de dar sustancia a la

University of the West Indies, Barbados) describes the fishing rights and tenure system of the traditional beach seine fishery in Grenada. The article explains the factors that impeded the implementation of a new co-management system. While fishers were consulted in the design process, they lacked the adaptive capacity to transform the earlier informal tenure arrangements into successful legalized tenure. It is noted that fishery managers need to pay more attention to the human dimensions of fisheries management to be able to support viable arrangements.

- **The seventh article** (by Chandrika Sharma and Ramya Rajagopalan, International Collective in Support of Fishworkers – ICSF) addresses tenure governance issues in relation to marine protected areas (MPAs). MPAs are increasingly used as tools for conservation and management of coastal and marine biodiversity and resources in areas where small-scale fishing communities have local or customary tenure rights. The coutumier vivant – droit qui émane directement de la population qui l'applique – pour renforcer la gouvernance foncière. L'article souligne comment le recours au droit coutumier pourrait faciliter la mise en place d'arrangements fonciers localement appropriés, légitimes et durables.
- **Le sixième article** (proposé par James Finlay, Springs, St George, Grenade, ainsi que par Patrick McCooney et Hazel A. Oxenford, Université des Indes occidentales, La Barbade) aborde la question des droits de pêche et du régime foncier de la pêche traditionnelle à la senne de plage à Grenade, s'agissant notamment des facteurs qui ont empêché la création d'un nouveau système de cogestion. Les communautés de pêcheurs ont bien été associées au processus de conception de ce nouveau système, mais, faute de facultés d'adaptation suffisantes, les arrangements fonciers antérieurs n'ont pas pu être traduits en système foncier formel. L'article souligne également que les gestionnaires de la pêche doivent accorder plus d'attention aux dimensions humaines de la gestion des pêches s'ils veulent parvenir à des arrangements viables.

buena gobernanza de la tenencia. La gobernanza de la tenencia debe ser, en el plano local, apropiada, legítima y sostenible; y el recurso a la ley consuetudinaria viva facilitaría la instauración de este tipo de acuerdos.

- **El sexto artículo** (por James Finlay, Springs, St George's, [Granada], y Patrick McCooney y Hazel A. Oxenford, Universidad de las Indias Occidentales [Barbados]), analiza los derechos pesqueros y el sistema de tenencia que imperan en la pesquería tradicional con chinchorros de playa en Granada. El artículo explica cuáles fueron los factores que obstaculizaron en ese país la implantación de un nuevo sistema de cogestión. Aunque los pescadores fueron consultados durante la fase de diseño del sistema, ellos no contaban con la capacidad de adaptación que les hubiese permitido transformar los anteriores acuerdos informales de tenencia en un efectivo régimen de tenencia legalizada. Se observa que los administradores pesqueros deben prestar mayor atención a las dimensiones humanas de la ordenación para estar en condiciones de constituir acuerdos viables.

article points to the importance of respecting such rights and of creating conditions for communities to take the initiative in MPA practice. If existing rights are weakened or extinguished, the social conflict and sense of alienation generated can undermine conservation efforts.

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→ **Le septième article**, (proposé par Chandrika Sharma et Ramya Rajagopalan, du Collectif international d'appui aux travailleurs de la pêche – ICSF) aborde les questions de gouvernance foncière dans le cadre des Aires marines protégées (AMP). Dans les zones où un certain nombre de communautés de pêcheurs artisanaux disposent de droits fonciers locaux ou coutumiers, les AMP sont de plus en plus considérées comme des outils de conservation et de gestion de la biodiversité et des ressources côtières et marines. Cet article souligne la nécessité de respecter ces droits et de créer les conditions favorables au développement des initiatives des communautés de pêcheurs au sein des AMP. Tout affaiblissement ou suppression des droits dont ces communautés disposent actuellement conduirait à un sentiment d'aliénation et favoriserait l'émergence de conflits sociaux qui ne pourraient qu'être préjudiciables aux efforts de conservation.

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→ **El séptimo artículo** (por Chandrika Sharma y Ramya Rajagopalan, Colectivo Internacional en Apoyo al Pescador Artesanal [CIAPA]) aborda algunos problemas relacionados con la gobernanza de la tenencia en las áreas marinas protegidas (AMP). Las AMP se usan cada vez más como herramientas para la conservación y ordenación de la biodiversidad y los recursos costeros y marinos en zonas donde las pequeñas comunidades pesqueras poseen derechos de tenencia locales o consuetudinarios. El artículo subraya la importancia de respetar esos derechos y de crear las condiciones para que las comunidades tomen iniciativas relacionadas con las AMP y su funcionamiento. Si los derechos existentes son debilitados o se extinguen, los conflictos sociales y las enajenaciones resultantes podrían anular los esfuerzos que se despliegan para conservar esas áreas y sus recursos.

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GOVERNANCE OF TENURE IN SMALL-SCALE FISHERIES
Key considerations

GOUVERNANCE FONCIÈRE DANS LE SECTEUR DE LA PÊCHE ARTISANALE
Considérations essentielles

LA GOBERNANZA DE LA TENENCIA EN LAS PESQUERÍAS EN PEQUEÑA ESCALA
Consideraciones esenciales

ABSTRACT

FISHERIES GOVERNANCE

ACCESS RIGHTS

MANAGEMENT RIGHTS

HUMAN RIGHTS

This paper examines the recognition, development and reinforcement of tenure systems in small-scale fisheries, and the conditions for those tenure systems to be effective and fair. Good governance of tenure requires that rights to access fishery resources (use rights) and rights to be involved in fishery decision-making (management rights) are linked to social, economic and human rights. This leads to a modern and more comprehensive view of rights-based fisheries governance, recognizing not only the need for rights, but also the need for attention to the details of those rights, to avoid negative impacts.

This paper explores (a) the links of fishery tenure systems to use rights,

RÉSUMÉ

GOUVERNANCE DE LA PÊCHE

DROITS D'ACCÈS

DROITS DE GESTION

DROITS HUMAINS

Le présent document examine les systèmes fonciers du secteur de la pêche artisanale en termes de reconnaissance, de développement et de renforcement. Il se penche également sur les facteurs qui conditionnent l'efficacité et l'équité de ces systèmes fonciers. Une bonne gouvernance foncière suppose que les droits d'accès aux ressources halieutiques (droits d'utilisation) et les droits d'association aux décisions en matière de pêche (droits de gestion) puissent prendre en compte les droits sociaux, économiques et humains. Cette approche fait émerger une vision plus moderne et plus globale de la gouvernance foncière de la pêche dans la mesure où elle s'appuie

SUMARIO

GOBERNANZA PESQUERA

DERECHOS DE ACCESO

DERECHOS DE GESTIÓN

DERECHOS HUMANOS

Estetestudio examina el reconocimiento, desarrollo y refuerzo de los sistemas de tenencia en las pesquerías en pequeña escala y las condiciones que garantizan que esos sistemas puedan funcionar de manera eficaz y justa. La buena gobernanza de la tenencia requiere que los derechos de acceso a los recursos pesqueros (derechos de uso) y los derechos de participación en las decisiones relativas a la pesca (derechos de gestión) estén vinculados a los derechos sociales, económicos y humanos. Esta ligazón conduce a una visión moderna y más exhaustiva de una gobernanza pesquera basada en los derechos, y al reconocimiento de que es menester prestar atención a las particularidades de esos derechos a

management rights and human rights; (b) the dynamics of tenure, including processes for determining who should hold the rights and recognition of pre-existing tenure arrangements; and (c) the roles of organizational capacity, legal space, and empowerment, together with the relationship of fishery tenure to the broader objectives of development policy, such as community well-being, food security and poverty alleviation.

sur la reconnaissance des droits en vigueur et leur examen détaillé pour prévenir toute forme de dysfonctionnement.

Ce document explore: (a) la prise en compte des droits d'usage, des droits de gestion et des droits humains par les système fonciers de la pêche; (b) les dynamiques foncières et notamment les processus d'attribution des droits et la prise en compte des arrangements fonciers antérieurs; et (c) la capacité organisationnelle et juridique nécessaire pour intégrer les droits fonciers de la pêche au sein d'objectifs plus généraux de politiques de développement comme le bien-être des communautés, la sécurité alimentaire et la lutte contre la pauvreté.

fin de evitar consecuencias adversas.

En el estudio se investigan a) las vinculaciones de los sistemas de tenencia pesquera a los derechos de uso, a los derechos de gestión y a los derechos humanos; b) la dinámica de la tenencia, incluidos los procedimientos para determinar sobre quién debería recaer la titularidad de los derechos, y el reconocimiento de la validez de los acuerdos de tenencia preexistentes; y c) las funciones de las instancias organizativas, del ordenamiento jurídico y del empoderamiento, además de la relación entre tenencia pesquera y los objetivos más amplios de la política de desarrollo, tales como el bienestar comunitario, la seguridad alimentaria y el alivio de la pobreza.

INTRODUCTION

Tenure has been defined as *'... the relationship among people with respect to land and other natural resources. The rules of tenure determine which resources can be used by whom, how long for and under which conditions.'* (FAO, 2011). In the fishery sector, issues of tenure closely relate to the much-referenced shift in fishery thinking over the past century or so, from a 'freedom of the seas' mentality of open access with no limits on fishery access and use, to a recognition of the fundamental limitations inherent in fish stocks. This point lies at the heart of the emergence of abundant literature in recent decades on the importance of well-defined 'rights' in fisheries – both *use rights* that specify and limit resource access, and *management rights* that specify who is to be involved in decision-making.

This paper focuses primarily on considerations relating to recognizing, reinforcing or developing tenure systems in small-scale fisheries, and creating the right conditions for flourishing tenure systems that are effective and fair. The paper relates tenure to the many forms of rights currently under discussion in fisheries, and explores key factors in recognizing and/or designing tenure systems. The goal is to provide insights relevant to the governance of tenure, with governance referring to '*the full range of public and private interactions taken to solve societal problems and create societal opportunities*' through dynamic institutions and processes (McConney and Charles, 2009).

The focus is on recognizing, reinforcing or developing tenure systems, and creating the right conditions for flourishing tenure systems that are effective and fair

Two major considerations underlie the analysis of tenure systems in this paper:

1. Fishery governance requires context-sensitive perspectives on tenure in small-scale fisheries, *rooted in values* and *compatible with local objectives*. This contrasts with the promotion over the past few decades of one-size-fits-all versions of 'rights-based management', which led to inappropriate policy measures. A key message is that the wrong tenure system may be harmful to the well-being of small-scale fishers and communities.

The wrong tenure system may be harmful to the well-being of small-scale fishers and communities

2. With tenure having both positive and negative potential, there is a need to be concerned about *process* in terms of how tenure is implemented, and the good governance arrangements in place for decision-making. It is important to understand the objectives being pursued, and to ask fundamental questions: Tenure for what ends? Tenure for whom? The process of building, reinforcing and adjusting tenure systems, and particularly how the rights are handled, makes a critical difference to the broader issues of community well-being, poverty alleviation, socioeconomic success and system resilience.

It is important to understand the objectives being pursued, and to ask fundamental questions: Tenure for what ends? Tenure for whom?

In addition, it is important to recognize that the governance of tenure relates to the use and management of resources, but not to the ownership of those resources *per se*, i.e. who owns the fish in the sea. Furthermore, the *responsibilities* that accompany rights and tenure, as identified in FAO's Code of Conduct for Responsible Fisheries (FAO, 1995), must also be recognized. These and other factors described in this paper are some of the nuances to be taken into account in evaluating tenure systems.

The paper begins with three sections that review the relationship between tenure and the major forms of rights. Two of these forms fall under the category 'fishery rights' (use rights and management rights), while the other is the broad category 'human rights', including social and economic rights. Following that is a section focusing on the dynamics of tenure and underlying processes, relating to the recognition of existing tenure systems and the design of new systems. The final sections survey important success factors in the governance of tenure, and offer a number of closing conclusions.

The paper draws extensively on two key sources:

a. the Code of Conduct for Responsible Fisheries (FAO, 1995) and related technical guidelines
b. the Global Conference on Small-Scale Fisheries (FAO, 2008) and the related 'Bangkok Statement' (Civil Society Preparatory Workshop, 2008).

TENURE AND FISHERY USE RIGHTS

Fishery tenure is closely related to the idea of use rights (Charles, 2001, 2002, 2009) – 'the right to use' fishery resources, as recognised or assigned by the relevant management authority, whether formal or informal. Indeed, tenure through use rights is referenced in the Code of Conduct Article 6.18 (FAO, 2005, Paragraph 2.7.6):

'When designing management measures, it might be appropriate to consider those which provide exclusive or preferential access for small-scale fisheries.'

Furthermore, the Code of Conduct (FAO, 1995, Article 10.1.3) states:

'States should develop, as appropriate, institutional and legal frameworks in order to determine the possible uses of coastal resources and to govern access to them taking into account the rights of coastal fishing communities …'

Fishery tenure is closely related to the idea of *use rights* – 'the right to use' fishery resources

Tenure systems, and corresponding use rights, address two key objectives:

- From a sustainability perspective, tenure systems limit the use of fisheries (and other natural resources), thereby avoiding or eliminating the hazards of *open access*. Experience with fisheries worldwide demonstrates that a limited resource exploited in an unlimited manner is incompatible with long-term sustainability. On the other hand, when fishers and fishing communities have suitable tenure arrangements, including fishing rights that are both 'secure' and justly distributed, this is seen as a key means to ensure sustainability. Specifically, the geographical bond between a fishing community and its local fishing grounds, combined with the security that comes from clear rights over access to fishery resources, are the ingredients for good fishery stewardship.
- This relates closely to the second perspective on tenure, namely its role in addressing the major concern of small-scale fishing communities: access to the resources they need for their livelihood and food security. Effective tenure systems may enhance economic efficiency and social stability, as well as processes of fishery governance.

Suitable tenure arrangements, including fishing rights that are both secure and justly distributed, are key to sustainability

Effective tenure systems may enhance economic efficiency and social stability, as well as processes of fishery governance

In small-scale fisheries, use rights within tenure systems may arise in a number of ways. First, they may be held at a variety of organizational levels, depending on the fishery objectives: by individuals, by geographical communities or regions, or by specific groupings such as the fishing vessel sector or the gear sector. Second, use rights may focus solely on the core goal of restricting who can have access to the fishery (access rights), or may go further to specify what locations fishery participants may use for their fishing (spatial or territorial rights). Other possibilities include the rights of each fishery participant to specific levels of fishing effort (effort rights) or of catch (catch rights). However, these are relatively uncommon in small-scale fisheries due to their high data needs and monitoring requirements. Whatever the specific form of use rights, it is important that these are not misinterpreted as implying ownership of the fish resource itself – the right to access the fishery does not equate to 'owning' fish swimming in the sea.

Access rights, whether specified through informal means or formal licenses, are crucial in small-scale fisheries, and are the focus of attention for fisherfolk organizations in the *Bangkok Statement* to the Global Conference on Small-Scale Fisheries (Civil Society Preparatory Workshop, 2008). The Statement highlights the need for tenure systems that:

'Guarantee access rights of small-scale and indigenous fishing communities to territories, lands and waters on which they have traditionally depended for their life and livelihoods.'

... and that specifically:

'Protect access of women of fishing communities to fish resources ...'

If the access rights within a tenure system are managed well, they can reflect a desired balance of social, cultural, economic and environmental goals, assist in reducing conflict, enhance food security and livelihoods for small-scale fishers and fishing communities, and facilitate the protection of local ecosystems, notably if rights-holders support or initiate conservation actions. Furthermore, as noted by FAO (2005), strategic decisions about access rights may be important, since '*Promoting the small-scale over the industrial sub-sector may bring efficiency gains for the fisheries as a whole in addition to social benefits for the small-scale subsector.*'

The benefits of tenure systems for fishers and communities, notably in specifying access and use rights, has fostered the emergence of such arrangements in a wide range of locations around the world. The development of use rights systems has been documented, for example, across the Pacific Islands – see Johannes (2002), Ruddle (1989) and Veitayaki (1998). For further discussion of this, see Dyer and McGoodwin (1994) and Hanna *et al.* (1996). Meanwhile Béné *et al.* (2010) have suggested that the dynamic emergence of rights systems is a general reality, and that '*...access to fisheries (in particular, small-scale coastal or inland fisheries) is always conditioned by some form of formal or informal, symbolic or substantial, control systems generally established at the local/community level.*'

Territorial Use Rights in Fishing and Customary Marine Tenure have a long history in small-scale fisheries worldwide

A specific form of tenure and access rights system with a long history in small-scale/artisanal and indigenous fisheries worldwide is that of spatial or territorial rights, notably Territorial Use Rights in Fishing (TURFs) and Customary Marine Tenure (Christy, 1982). These involve rights assigned to individuals and/or groups to fish in certain locations, often on the basis of long-time use ('customary tenure'). They can provide an efficient, effective means of fishery management – see, for example, Acheson (1975), Johannes (1978) and Ruddle *et al.* (1992). An important example of this is in the fisheries of Oceania, where durable CMT/TURF systems developed over time, but declined in the face of fishery 'modernization' that imposed new regimes without understanding the effectiveness of those already in place. In recent years, there has been increasing recognition of the efficiency of the CMT/TURF systems, and initiatives have been put in place to restore and reinforce them.

Despite the potential benefits of tenure arrangements and use rights, the processes used to implement and/or reinforce them must be designed with care. There are significant issues to be addressed in tenure systems with respect to how one restricts fishery access.

First, the nature of a tenure system will depend on the attributes of the corresponding use rights, including:

- Security – the degree of assurance, whether moral, legal, physical or by other means, that one's tenure is protected from encroachment by others
- exclusivity – the ability to exclude others from infringing on the right, i.e. enforceability of the relevant use rights

- durability – the degree of longevity in the tenure arrangement
- transferability – whether one is able to temporarily or permanently transfer one's use rights to other fishery participants.

The nature and extent of these attributes will vary from fishery to fishery. Given that each may have both positive and negative implications, the choices in this regard need careful consideration. Most notably, the concept of security – that is, 'secure' tenure, in which those holding use rights have security in knowing the rights will not be altered – is widely viewed as a positive attribute. Indeed, it is important to fishers and fishing communities in ensuring long-term resource access and compatibility with societal values. However, 'secure' tenure is not necessarily a positive attribute: it may be counterproductive in situations where the fishery becomes locked into an undesirable state, such as one reflecting an inappropriate distribution of resource access. Similarly, exclusivity is positive if it protects small-scale fishers and communities from 'invasions' of their fishing grounds by outsiders. However, exclusivity might be considered undesirable in other circumstances: for example, if it maintains an elite in control of the fishery. (The question of the desirable degree of transferability, and of durability, will be considered later in the paper.)

Second, the dominance of an industrialized fishery perspective in international fishery discourse has led to too much attention being paid to the creation of *new* use rights arrangements. In small-scale fisheries, evidence in much of the world shows that tenure systems have often developed naturally over time, and many are still in place, as noted for CMT and TURFs above. Recognizing and reinforcing those existing systems – and where needed augmenting them with elements of new rights-based approaches – may be the most cost-effective path to ensure effective use rights. It may also avoid the creation of conflict between culturally appropriate practices already in place and newly imposed rights schemes.

In small-scale fisheries, tenure systems have often developed naturally over time, and many are still in place

Third, it is crucial to assess the implications of the alternative mechanisms for allocating use rights within tenure systems. One option heavily promoted is a reliance on market forces, notably market-based catch rights such as individual transferable quotas (ITQs). However, in small-scale fisheries, this is now recognized as typically inappropriate, on account of:

- high data and monitoring requirements
- negative impacts on economic efficiency at the scale of the fishery system
- a lack of fit with the social values that are crucial in such fisheries (Panayotou, 1982, p.43)
- serious negative consequences on the resilience and sustainability of fishers and coastal communities, as use rights invariably become concentrated in fewer hands (Copes and Charles, 2004).

This final outcome relates to the point about 'secure' tenure above, in that those remaining in the fishery following the buying and selling of tenure rights may have 'secure' rights, but that outcome in itself is not a positive one.

Indeed, equity considerations are critically important in tenure systems, as are the impacts on the poverty and the vulnerability of households and communities (Béné *et al.*, 2010). The tenure processes and access restrictions put in place must be carefully considered and evaluated, because problems can arise with too *little* access as well as with too much. In this regard, the market option contrasts with another commonly advocated mechanism: community-based or collective approaches to tenure. While it is true to say that both approaches involve equity and power issues, the community-based approach seems to have a better record in small-scale fisheries, for example in distributing livelihood security more widely.

Equity considerations are critically important in tenure systems

TENURE AND FISHERY MANAGEMENT RIGHTS

While tenure systems are often seen as focused on access to resources, together with the duration and conditions of resource use, there is another important component to tenure, namely matters of decision-making and control over the resources. Thus a tenure system may specify who has the right to be involved in fishery management decision-making – i.e. through *management rights*. Often, the state has the responsibility for management, but may seek to involve others in the process – the issue is one of who is *or should be* involved in fishery management, whether alongside government or delegated by government. The processes needed to implement and/or

A tenure system may specify who has the right to be involved in fishery management decision-making – i.e. through management rights

reinforce management rights can draw on important insights related to collective action, and notably how governance institutions develop (Ostrom, 1990, 1995).

A number of situations across the world have demonstrated that, while access rights are undoubtedly crucial for the well-being of small-scale fishers, this must be accompanied by suitably-distributed management rights, given that success in fishery conservation and management requires the support and participation of fishery stakeholders. Accordingly, management rights are referred to in the Code of Conduct's call to '*... facilitate consultation and the effective participation of industry, fishworkers, environmental and other interested organizations in decision-making with respect to the development of laws and policies related to fisheries management ...*' (Paragraph 6.13). This leads to the approach of co-management, through the joint development of management measures by fishers, government and possibly local communities (Berkes *et al.* (2001), Pinkerton (1989), Pomeroy (2001) and Wilson *et al.* (2003). As FAO (2005) notes, 'Co-management is also expected to promote improvements in public accountability and to foster empowerment of poor and vulnerable groups'.

Who exactly should hold management rights over fishery decision-making is a key question to be considered in the governance of tenure. The above discussion highlights that fishers should be among the rights-holders, particularly at the *operational* level of management. At the *strategic* level, debates over the fishery's overall objectives and policy directions are typically matters of public interest, so wider participation may be desired – e.g., with non-governmental organisations and fishing communities as legitimate interested parties, in addition to the fishers. For example, legislation in the Philippines places management rights over coastal 'municipal fisheries' (notably small-scale community-based fisheries) clearly with local municipalities.

In the context of small-scale fisheries, there are many cases in which the fishing activity essentially takes place at a local community scale, replicated across all the communities in a coastal area. For example, fishers in Zanzibar leave from their community to go fishing and return to the same location, bringing their catch to the local village market for sale. In such situations, an important option to consider is that of community-based fisheries

management, in which management rights are assigned on a community basis and the tenure system also operates on a community basis. Rights are assigned either to the set of fishers in a community or to the community itself. In this 'place-based' approach, fisherfolk, and potentially others within a coastal community or coastal region, participate in local fishery management decision-making.

Such community management rights, while not suitable to every fishery, may be especially feasible in '*small-scale fisheries in which the community of users is relatively homogeneous and the group size relatively small*' (Berkes, 1986, p.228). To be effective, they typically require both a geographical clarity and a cohesiveness of the community involvement. They also require local experience in and capacity for management, and an institutional framework specifying rights – whether through legislation, government decisions, customary/informal arrangements, or a combination of these (Charles, 2011). The rationale for these community-based rights systems is two-fold:

a. They have the capability under the right circumstances to draw on local institutions, as well as moral pressure, to create incentives for resource stewardship, which in turn can increase management efficiency.
b. They can support equity and fairness goals by taking into account a broader range of fishery participants within a community, including boat owners, crew members and shore workers (Graham *et al.*, 2006).

While community tenure arrangements are working successfully in many locations and have potential applicability more broadly, there are other cases in which either the conditions needed for this approach are absent locally, or the larger spatial scale of the fishery is such that community rights are not feasible. In either of these cases management rights need to be dealt with on a larger scale, and it is important that small-scale fishers have the organizational capability, as well as the internal capacity and external support, to engage in fishery-wide (or region-wide) decision-making. It is also important that the tenure system and its management rights arrangements are considered appropriate by the fishery participants, even when the arrangements are implemented on a large spatial scale. In other words, the benefits described above for a community rights system – in terms of the desired institutions, incentives and cultural compatibility – must be scaled up to be present in the larger tenure system.

TENURE AND HUMAN RIGHTS

In one of its few explicit references to small-scale fisheries, the Code of Conduct for Responsible Fisheries (FAO, 1995; Article 6.18) states:

> *'Recognizing the important contributions of artisanal and small-scale fisheries to employment, income and food security, States should appropriately protect the rights of fishers and fishworkers, particularly those engaged in subsistence, small-scale and artisanal fisheries, to a secure and just livelihood, as well as preferential access, where appropriate, to traditional fishing grounds and resources ...'*

This statement encompasses two specific kinds of rights for small-scale fishers – the right '*to a secure and just livelihood*' and the right to '*preferential access, where appropriate, to traditional fishing grounds and resources*' (FAO, 1995; Article 6.18). While the second of these fits within the usual sense of use rights in fisheries, the first relates to human, social and economic rights. Until recently, human rights (cf. Universal Declaration of Human Rights – United Nations 1948) have rarely been considered in fishery policy debates, but this is changing within legal and policy circles. Today, debates concerning governance in tenure systems, and specifically fishery rights, are seen as best discussed alongside human rights, particularly in small-scale fisheries (FAO, 2007; Civil Society Preparatory Workshop, 2008). Furthermore, the details of implementing this linkage are being actively explored in academic circles, such as a special issue of the journal, Maritime Studies (MAST) (Allison *et al.*, 2011).

Governance in tenure systems, and specifically fishery rights, are seen as best discussed alongside human rights, particularly in small-scale fisheries

This reflects a recognition of two realities. First, in a small-scale fishery setting fishery rights can affect human rights, impacting on the well-being and security of fishers and fishing communities with effects that may be positive – given suitable recognition, design and implementation of rights – or negative (Charles, 2001; Béné, 2003; Béné *et al.*, 2010). Second, the pursuit of human rights can alter how fishery rights are designed and implemented, such as decisions concerning who should hold those rights, and how they should be managed (Charles, 2008, 2009). An example could be the reinforcing of existing tenure systems in small-scale fisheries, as noted earlier. This recognizes the connection of fisheries to the well-being of fishing communities, and as

such relates to the linking of fishery rights with human, social and economic rights. (This will be discussed further in this paper, in the following section on the dynamic aspects of tenure systems.)

The *Bangkok Statement* (Civil Society Preparatory Workshop, 2008) defined a human rights approach for fisheries. The approach includes the rights of fishing communities (ICSF-WFFP, 2009, p.3) to:

a. 'their cultural identities, dignity and traditional rights, and to recognition of their traditional and indigenous knowledge systems'
b. 'territories, lands and waters on which they have traditionally depended for their life and livelihoods'
c. 'use, restore, protect and manage local aquatic and coastal ecosystems'
d. 'participate in fisheries and coastal management decision-making'
e. 'basic services such as safe drinking water, education, sanitation, health and HIV/AIDS prevention and treatment services'
f. of all fish workers 'to social security and safe and decent working and living conditions'.

Linking tenure and human rights considerations is important in particular to addressing the challenge of livelihoods and poverty in fishing communities (Béné *et al.*, 2007). FAO (2007, p.6) indicates that '*A rights-based approach, in defining and allocating rights to fish, would also address the broader human rights of fishers to an adequate livelihood and would therefore include poverty-reduction criteria as a key component of decisions over equitable allocation of rights.*' This is compatible with international efforts to link fishery reform to achievement of the Millennium Development Goals (United Nations, 2000); these goals have contributed to the increasing attention being paid to human rights, poverty alleviation, food security and food sovereignty globally. Indeed, there are important links to sustainable livelihoods approaches in small-scale fisheries (Allison and Horemans, 2006). Fundamentally, as stated by FAO (2007), '*Adopting a rights framework also reminds fishery managers, community leaders, fish consumers and donors that small-scale fishers have a right to development, and that governments are accountable for helping them realise that right.*' To this end, the *Bangkok Statement* calls on nations to '*Guarantee the rights of all categories of workers in the fisheries, including*

Linking tenure and human rights considerations is important in particular to addressing the challenge of livelihoods and poverty in fishing communities

self-employed workers and workers in the informal sector, to social security and safe and decent working conditions.'

Finally, it is important to note that recognizing the links between fishing rights and human rights is not at all equivalent to suggesting that fishing 'is a human right'. Taken literally, the latter would have disastrous consequences for fish stocks and small-scale fishers, as it may be interpreted (given that human rights are 'universal') as advocating 'universal' access to fisheries, and thus unlimited exploitation. This would lead to serious fish stock depletion and a consequent inability to meet food security, poverty alleviation and other development objectives. To put this another way, the links between fishing rights and human rights also need to take future generations into consideration. As Allison *et al.* (2011) indicate, '*As well as defining rights to fish, the rights of present and future generations to benefit from the resources should be included*.' Accordingly, adding a human rights dimension to discussions of tenure systems should be seen not as replacing or interfering with fishery governance, but rather as providing guidance for decision-making. Thus, among the range of choices that might be made in terms of fishery tenure, we should prefer those that are both compatible with long-term sustainability and superior from a human rights perspective; we should also specifically reject those that are contrary to basic human rights (for example, those that involve unreasonable working conditions).

THE DYNAMICS OF TENURE SYSTEMS

Fishery tenure systems are as much about process as structure. The dynamics of how a tenure system is established, and how it adjusts and adapts over time, is a crucial factor influencing its ultimate success, just as are the details of its structure and operation, and its interaction with the various fishery and human rights discussed above. In this section we focus on the processes of change that take place in creating new tenure systems, as well as the processes that also change existing tenure systems, albeit more slowly.

Dynamics of existing tenure systems

As noted earlier, many tenure systems have developed in small-scale fisheries worldwide and these typically have their own complex dynamics. These tenure systems respond to changes in the systems themselves, and/or in their environment, and/or in the goals being pursued in the fishery. As these dynamics work on the system, the key to long-term success may well be to ensure that policy measures accept and reinforce the tenure system. This implies that the system remains acceptable to stakeholders, is suitably effective in meeting the current objectives in the fishery, and encompasses criteria such as equity and sustainability. The *Bangkok Statement* notes the need to '*Ensure the integration of traditional and indigenous knowledge and customary law in fisheries management decision-making*' and to '*Protect the cultural identities, dignity* and *traditional rights of fishing communities and indigenous peoples*'.

On the other hand, if the tenure system is for some reason unsustainable or unsuitable, more fundamental change within it may be needed. Consider, for example, the degree of equity and fairness in an existing tenure system. What if the set of use rights represented by the status quo is seen as inappropriate in the context of the community's or society's priorities and policy directions? In South Africa, for example, national policy goals drove use rights decisions in the fishery sector, as the transformation from apartheid to democracy meant that broadening the basic right of *access* to the fishery was a matter of urgency (Cochrane and Payne, 1998). The allocation of use rights under apartheid did not pass the test of equity and fairness, and concerns over the distribution of fishery access remain even today. Thus, in the case of South Africa, a major policy issue relates to which parties in the fishery should receive priority within tenure arrangements. **In that country, and more generally, fishery** policy directions need to provide guidance on how change should take place in the tenure system.

Therefore, there is a balance needed between the recognition of existing tenure systems and the ability to adapt such systems over time. The key here is to ensure that the system is compatible with community and societal values. In some circumstances, this may imply reinforcing an existing system, in other cases adapting it to new circumstances, and in still other situations,

inventing a new system. The process required must be carefully considered. First, there is the question of who is empowered to make decisions about changes in the tenure system. Should this be at governmental level or at community level? Second, how do power imbalances – among participants and over time – affect the outcomes, and the long-term acceptability of the system? Inter-temporal issues arise here, in that decisions involving tenure can affect not only current fishers but potential future participants as well, so that participation in discussions of tenure and use rights may need to go beyond just the current fishers.

Decisions involving tenure can affect not only current fishers but potential future participants as well

Processes for designing and implementing tenure systems

While many small-scale fisheries already have tenure systems in place, there are situations in which no use rights arrangements exist, or current rights are seen as ineffective or unacceptable. In such cases, a process will be needed through which a suitable tenure system can be designed and implemented to meet the set of goals in place. This can be a complex process requiring a mixture of regulation, informal or traditional arrangements, and institutional development. The process will need to recognize that what is 'best' will depend on the specific situation given that various choices are available, each with its own advantages and limitations: no single approach will be applicable everywhere. As Nomura (2006, p.25) notes, '*...fisheries policies, management approaches—and fishing rights—need to be tailored to the specific context of countries and localities with respect to the fisheries in question, the social setting, culture, etc*.'

In designing a tenure system, factors to take into account will include:

a. societal objectives
b. relevant history and traditions
c. relevant social, cultural and economic environment
d. key features of the fish stocks and the ecosystem
e. financial and personnel capacity of the particular fishery (Charles, 2002).

While there are no clear rules concerning which approach is most compatible with which fishery, practical experience provides some tentative guidance. For example, sedentary fishery resources seem to be especially

amenable to the use of territorial rights (TURFs). Meanwhile, fishing effort-based rights may be preferable to harvest rights (quotas) if biomass estimates are unavailable or unreliable, or if catch monitoring is too expensive, as is the case in most small-scale fisheries. In any given case, the importance of the fishery characteristics must be weighed up in assessing tenure options.

The process by which allocation of tenure rights takes place is critical, and interacts with decisions about who can hold the rights – notably whether rights may be held by individual fishers or in a collective manner by a community, or a fishers' association. Notably, tenure rights held collectively by communities, fishing sectors or other identifiable groups can create the incentive to establish local institutions to manage the rights, thereby bringing people in a community or group together as resource stewards. This can also be more easily and dynamically adjusted to suit specific local situations and to reflect community values and objectives (Willmann, 2000; Charles, 2001). These community-based rights have a lengthy history in many small-scale fisheries (Charles, 2006; Kurien, 2000, 2007), as in the case of exclusive artisanal fishing zones, implemented through policy measures and/or legislation (Sharma, 2008). Furthermore, the Code of Conduct technical guidelines argue that community rights are particularly suitable to 'pro-poor' policies for small-scale fisheries. As noted by FAO (2005), '*The concept of community property rights is therefore particularly attractive from a poverty alleviation perspective*'. At the same time, it is important to ensure that possible imbalances in power within the community do not lead to inequitable results in the allocation of rights.

Tenure rights held collectively by communities, fishing sectors or other identifiable groups can create the incentive to establish local institutions to manage the rights

The dynamics of tenure are affected greatly by decisions about transferability of tenure, i.e. whether the rights can be transferred to others. The process could involve permanent transfers (e.g. by selling the rights, or handing them down in a family from one generation to the next), or temporary transfers (e.g. from one fisher to another within a fishing season). The choices can have large impacts on small-scale fisheries and fishing communities. Temporary transferability within a fishing season can be important in providing short-term flexibility while maintaining long-term stability in distributing the rights. On the other hand, for permanent transfers, local cultural and institutional factors must be considered. For example, transferability may be

considered reasonable within households or even families, but not through the use of market mechanisms (buying and selling rights). The dynamics of tenure in the latter case tends to lead to the concentration of control over rights, a shift of these rights out of small communities, and consequent negative effects on rural livelihoods, on community stability and sustainability, and on equity in the coastal economy (Copes and Charles, 2004).

INTERNAL AND EXTERNAL CONSIDERATIONS IN THE GOVERNANCE OF TENURE

The preceding discussion suggests a set of multiple ingredients of 'success' for fishery tenure systems: achievement of broadly-defined sustainability in the fishery, widespread acceptance of the system, processes that are considered fair, and a reasonable level of effectiveness in the system's functioning. A variety of considerations have been examined in this paper from the perspective of tenure design and dynamics, that suggest the extent to which the ingredients for sustainability and fairness are present in a given tenure system. This section continues the assessment of tenure systems by looking beyond the structural and dynamic aspects of tenure itself to consider additional factors. These factors relate to enabling conditions internal to the fishery, and the interactions of tenure systems with the realities of coastal communities and broad policy measures.

Internal enabling conditions

Effective governance of tenure in small-scale fisheries will require accompanying efforts to ensure that the enabling conditions are in place, so that fishery participants can properly take part in and benefit from the tenure system. These conditions include empowerment and provision of the 'legal space' (notably through legislation and clear policy) so that fisher organizations and fishing communities are able to manage access rights and take on other management responsibilities (Charles *et al.*, 2010). Related to this is the need for efforts to support and build the capacity of fisher organizations and community institutions.

Effective governance of tenure will require accompanying efforts to ensure that the enabling conditions are in place, so that fishery participants can properly take part in and benefit from the tenure system

FAO (2005) notes that participation in management needs to cover the spectrum from the harvesting process to higher levels of decision-making, and in particular that '*…small-scale fishers and fishworkers must be included in the process of developing legislation …*'. If the focus is on 'pro-poor' approaches, empowerment must go beyond policy and legislation to include participatory processes implemented at the community level. FAO (2005) cautions that since communities '*are usually stratified by wealth and power, with local elites and decentralized governments sometimes colluding to exclude the less powerful … fisheries development programmes should examine ways in which 'traditional' leadership, local government and civil society can work together to ensure that the interests of poorer and marginalized groups are taken into account in decentralized resource management.*'

Good governance also implies suitable attention to a wide range of capacity and institutional development. FAO (2005) calls for measures to '*enhance the capacity in organizations representing and working for small-scale fisheries – e.g. those concerned with technical fisheries management issues, social welfare, credit/savings and marketing, and political negotiation or lobbying.*' Capacity building and institutional development are needed: not only on the part of fisher and community organizations, but also by governments. In particular, government staff and institutional arrangements must consider the needs and rights of small-scale fishers and communities, so that processes are in place to support their participation.

Connections beyond fishery boundaries

In small-scale fisheries, tenure arrangements are likely to be affected by, and have impacts on, realities beyond the fishery – notably the well-being of fishing communities, and a range of broader policy and legal frameworks (De Young *et al.*, 2008). For example, Allison *et al.* (2010) note that beyond-fishery needs include: '*value-addition in the supply chain, infrastructure, market cooperatives, and access to credit*' and '*addressing deficiencies in fishing people's rights of equitable access to health care, education, and community services*'.

Furthermore, as noted in the Code of Conduct technical guidelines (FAO, 2005), it is necessary for fishery governance to deal with '*(i) cross-sectoral policies at the national level, (ii) policies in other sectors, and (iii) local policies – all of which can impact on small-scale fisheries*'. Similarly, the Code of Conduct's Article 10.1.2 specifically refers to fisher participation in broader decision-making, noting: '*States should ensure that representatives of the fisheries sector and fishing communities are consulted in the decision-making processes and involved in other activities related to coastal area management planning and development*.' This suggests that the discussion earlier in the paper about the relationship between tenure and management rights needs to be expanded to consider tenure over coastal areas – not only fishery resources – and a role for fishers and fishing communities in exercising management rights relating to the coastal zone.

The relationship between tenure and management rights needs to be expanded to consider tenure over coastal areas – not only fishery resources – and a role for fishers and fishing communities in exercising management rights relating to the coastal zone

Tenure arrangements can also strongly affect the interaction of small-scale fisheries with food security and livelihoods (Schumann and Macinko, 2007), which in turn relate closely to human rights considerations. The importance of small-scale fisheries to food sovereignty is reflected in the Code of Conduct's Article 11.2.15 (FAO, 1995), which, in addressing international fish trade and export production, notes that '*States, aid agencies, multilateral development banks and other relevant international organizations should ensure that their policies and practices ... do not result in environmental degradation or adversely impact the nutritional rights and needs of people for whom fish is critical to their health and well-being.*' In connecting small-scale fisheries with goals of food sovereignty and community well-being, Allison *et al.* (2010) recommend that authorities '*Integrate responsible fisheries policies with wider poverty reduction policies in countries where fisheries are economically important.*' A key element in this is the development of livelihood diversification options: if those lacking fishery use rights are enabled to pursue other livelihoods, these new options can reduce the negative impact of restrictions on fishery access that are inherent in a tenure system.

CONCLUSION

The governance of tenure in small-scale fisheries requires the right ingredients and the right processes. There is a need for a modern view of 'rights-based fishery governance' that looks at tenure in an integrated manner – connecting rights to access fishery resources (use rights), rights to manage the fishery (as in co-management), and underlying social, economic and human rights. Developing the processes to support and implement corresponding tenure systems requires a more nuanced approach to rights-based thinking in fisheries – as crucial a move for governance today as was the shift away from a universal assumption of the Tragedy of the Commons over the past couple of decades.

The governance of tenure in small-scale fisheries requires the right ingredients and the right processes

The new thinking recognizes that in small-scale fisheries, it is important that tenure systems provide security for the rights-holders and a greater incentive to take care of the resource into the future, while also providing more comprehensive and more just arrangements that seek to avoid negative impacts. The latter implies the need for attention to the various success factors described in the paper, including achievement of fishery sustainability, widespread acceptance of the tenure system, processes considered fair and effective, provision of legal space and empowerment, organizational capacity and institutional development, and positive accomplishments beyond fishery boundaries (e.g., in terms of food sovereignty, community well-being and livelihood diversification). Three specific areas requiring attention are:

1. who holds the rights – and particularly the potential of collective or community rights, which often work particularly well in small-scale fisheries
2. whether there are pre-existing tenure arrangements – which in most cases should likely be reinforced for the sake of efficiency, equity and good governance
3. how fishing rights connect with other rights – since there can be significant impacts on social, economic and human rights, and specifically on related goals such as community well-being, food security and poverty alleviation.

From a small-scale fishery perspective, this calls for government support in protecting and/or enhancing the tenure arrangements of fisherfolk. For example, larger-scale fishing enterprises may exploit the same fish stocks as small-scale fishers, and may threaten (whether deliberately or indirectly) to take over increasing proportions of the fishing space or fishery activity, i.e. to shift the tenure arrangements in their direction. In such situations, while small-scale fisherfolk may be keen to hold both secure access rights and meaningful management rights, they may also see an important role for government in the governance of tenure, particularly in mediating fishery tenure debates.

Accordingly, while the role of 'good governance' with respect to fishery tenure may relate to local management of tenure within a small-scale fishing community, its processes also include a role for governments in creating the policy environment and policy space for effective *and* fair tenure arrangements to succeed. As pre-existing tenure systems change over time, and as systems of tenure are put in place where they do not currently exist (or where what

There is a role for governments in creating the policy environment and policy space for effective *and* fair tenure arrangements to succeed

does exist is widely considered ineffective or unacceptable), attention must be paid to combining fishery rights and human rights, in a manner appropriate to the cultural and historical situation, the policy directions, and the capacities of the particular fishery. More broadly, attention must also be paid to how tenure and fishery rights relate to the overall objectives of development policy, applying a broad perspective that must include post-harvest aspects, and should look beyond the fishery 'silo' in addressing rights.

Finally, thinking on tenure arrangements must be connected with that on the sustainability of the fishery – as the FAO Code of Conduct for Responsible Fisheries (1995, Article 6.1) states, '*The right to fish carries with it the obligation to do so in a responsible manner ...*'. A key aspect in moving toward responsible fisheries thus lies in developing effective and accepted sets of rights and responsibilities, involving a broader perspective on rights-based management, and a suitable focus on 'responsibilities-based fisheries management'.

Thinking on tenure arrangements must be connected with that on the sustainability of the fishery

All of these considerations must be brought to bear in exploring and evaluating existing tenure arrangements, in adapting these systems over time, and if necessary, in creating new arrangements. The governance of tenure is undoubtedly a complex and sensitive task, involving as it does this complex blend of use rights, management rights and human rights. The importance of the 'right' tenure system cannot be over-estimated if small-scale fisheries are to meet their potential as sustainable sources of livelihoods and well-being.

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GOVERNANCE OF TENURE IN CAPTURE FISHERIES IN SOUTHEAST ASIA

GOUVERNANCE FONCIÈRE DANS LE SECTEUR DE LA PÊCHE DE CAPTURE EN ASIE DU SUD-EST

LA GOBERNANZA DE LA TENENCIA EN LAS PESQUERÍAS DE CAPTURA EN ASIA SUDORIENTAL

ABSTRACT

TENURE

FISHERIES

SOUTHEAST ASIA

GOOD PRACTICES

Secure tenure for fishers to fisheries resources has been proposed as an important component in improving fisheries governance in the southeast Asia region. This paper presents a review of national laws, policies and administrative structures in the region. It also considers examples of good practice in the governance of tenure vis-à-vis capture fisheries in Cambodia, Thailand, the Philippines and Viet Nam. Specific case studies of governance of tenure in selected fisheries within each country are presented. Some of the good practices identified that would foster good governance of tenure in the region include

RÉSUMÉ

RÉGIMES FONCIERS

PÊCHE

ASIE DU SUD-EST

BONNES PRATIQUES

Le programme régional d'amélioration de la gouvernance de la pêche en Asie du Sud-Est a élaboré un projet de régime foncier sécurisé à l'intention des pêcheurs de la région. Le présent document examine ce projet à partir de l'analyse de l'ensemble des législations, politiques et structures administratives nationales de la région. Il propose des exemples de bonnes pratiques en matière de gouvernance foncière de la pêche de capture au Cambodge, en Thaïlande, aux Philippines et au Viêt-Nam. Des études de régimes fonciers spécifiques à certaines formes de pêche sont présentées pour chaque pays concerné. Les bonnes pratiques identifiées constituent des éléments d'amélioration de la gouvernance

SUMARIO

TENENCIA

PESQUERÍAS

ASIA SUDORIENTAL

BUENAS PRÁCTICAS

La seguridad de la tenencia de los pescadores sobre los recursos pesqueros es un principio importante que ha sido propuesto para mejorar la gobernanza del sector en la región sudoriental asiática. Este artículo ofrece un examen de las leyes nacionales, de las políticas y de las estructuras administrativas de la región. También estudia algunos ejemplos de buenas prácticas de gobernanza en las pesquerías de captura en Camboya, Tailandia, Filipinas y Viet Nam. Se presentan en el trabajo estudios de caso específicos sobre la gobernanza de la tenencia en pesquerías selectas de cada uno de esos países. Algunas de las buenas prácticas descritas —que podrían impulsar una gobernanza de

decentralization, co-management, policy and legal frameworks, values, management plans, conflict management, empowerment, political support, enforcement, and community organizations.

foncière dans la région à de nombreux égards: décentralisation, cogestion, renforcement des cadres politiques et juridiques, consolidation des valeurs, plans de gestion, résolution des conflits, responsabilisation, appui politique, mise en vigueur et organisation des communautés.

la tenencia óptima en la región— son la descentralización, la cogestión, la creación de marcos políticos y jurídicos, los valores pesqueros, los planes de ordenación, la gestión de conflictos, el empoderamiento, el apoyo político, el cumplimiento de la reglamentación y la organización de entidades comunitarias.

INTRODUCTION

The coastal waters of southeast Asia are among the most productive and biologically diverse in the world. The members of the Association of Southeast Asian Nations (ASEAN)—Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei, Viet Nam, Laos, Myanmar, and Cambodia—are responsible for one-quarter of global production of fish products every year: some 21 million tonnes. Southeast Asians rely more heavily on fish as a primary source of dietary protein and livelihood than any other people in the world. Furthermore, fish consumption continues to increase across the region, ensuring that the role of fisheries in providing livelihoods, trade, and food security to southeast Asia will continue to grow.

High rates of population growth and rapidly increasing food needs are putting enormous pressures on the region's coastal and marine resources, as are uneven levels of economic development, resource use, and technological change. It is now almost universally accepted that most of the nearshore fisheries in southeast Asia are overfished, and that overcapacity is one of the leading causes of this overfishing. Consequently, these waters are now experiencing increased levels of conflict and social unrest, affecting both regional security and environmental sustainability.

Weak governance[2] is one of the main causes of the present poor condition of fisheries in the region. Factors characterizing weak governance in fisheries in the region include (but are not limited to) corruption, lack of stakeholder participation, poor enforcement, weak institutional capacity, overcapacity of fishing fleets, inadequate information, and illegal fishing. If managed more effectively, capture fisheries can provide economic benefits to the countries of southeast Asia. Better management can also help to avoid the continuing collapse of aquatic and marine ecosystems, and the loss of associated biodiversity occurring throughout the region's oceans and

Weak governance is one of the main causes of the present poor condition of fisheries in the region

2 Governance concerns the rules, processes and structures through which decisions are made about access to land/natural resources and its use, the manner in which the decisions are implemented and enforced, the way that competing interests are managed. (FAO 2011).

aquatic environments. Secure tenure[3] for fishers to fisheries resources has been proposed as an important component in improving fisheries governance in the region. Having good governance in place is essential to achieving most fisheries' management goals, and to help protect and enable tenurial arrangements.

Secure tenure for fishers to fisheries resources has been proposed as an important component in improving fisheries governance

The importance of fisheries' future contributions to livelihoods, food security, and regional relationships in southeast Asia cannot be underestimated. Because of the globalized nature of markets, the huge economic stakes, and the weakness of international and regional institutions for cooperation and sustainable fisheries management, optimism concerning the fate of the region's marine fisheries resources is limited at present. Past failure to address the multiple drivers of change facing marine fisheries in southeast Asia has had significant social consequences, including economic losses for millions of people living in fishing communities, and is severely impacting associated ecosystem resilience and biodiversity.

This paper will present examples of good practice in the governance of tenure[4] of capture fisheries in selected countries, specifically Cambodia, Thailand, the Philippines and Viet Nam. The paper will review national laws, policies and administrative structures in each country with respect to the governance of tenure in the fisheries sector. Specific case studies of tenure arrangements for selected fisheries in each country will be presented. These will include the Tonle Sap lake fishery in Cambodia, community-based fisheries co-management in Thailand, community based co-management systems in the Philippines, and the co-management and fishing rights in Viet Nam. The paper will conclude with an evaluation of the successful and unsuccessful functioning of these governance of tenure arrangements for

3 Tenure refers to the rules invented by societies to regulate behaviour. The rules of tenure define how rights to land and other natural resources are assigned within societies. They define how access is granted to rights to use, control and transfer these resources, as well as associated responsibilities and restraints. In simple terms, tenure systems determine who can use what resources, for how long, and under what conditions. (FAO 2011).

4 Governance of tenure comprises the mechanisms and processes according to which citizens and groups can articulate their interests, mediate their differences and exercise their legal rights and obligations in respect of land and other natural resources. (FAO 2011).

capture fisheries, and will offer recommendations for improving governance of tenure in fisheries.

COUNTRY CASE STUDIES

The Philippines

Fisheries management in the Philippines is largely guided by three key national laws (Table 1), which in turn guide the Department of Agriculture (DA) Bureau of Fisheries and Aquatic Resources (BFAR) at the national level, as well as the local government units at province, municipality and *barangay* (village) levels (DA-BFAR, 2006; de Sagan, 1992; Garcia, 2004; Tabunda and Galang, 1992; Briones, 2008)

Table 1
National fisheries laws in the Philippines which affect tenure

Local Government Code (LGC) of 1991 (Republic Act (RA) 7160)
Agriculture and Fisheries Modernization Act of 1997 (RA 8435)
Fisheries Code of 1998 (RA 8550)

The Local Government Code of 1991 (LGC) devolved much authority to local government units (LGUs), specifically municipalities. The LGUs and local communities are given certain privileges and/or preferential rights. Municipalities have the exclusive authority to grant fishery privileges in municipal waters, up to 15 km from shore, and impose rentals, fees and charges. In 1998, Republic Act No. 8550, or the Philippine Fisheries Code, was signed into law. Under this Code several sections of the LGC were supported, such as:

Local government units and local communities are given certain privileges and/or preferential rights

- the devolution of the function of fisheries management to local government
- the designation of municipal waters up to 15 km from shore
- the granting of preferential rights to fishing privileges in municipal waters to registered fisher organizations and cooperatives.

In addition, the Fisheries Code (Section 73) endorsed the establishment of Fisheries and Aquatic Resources Management Councils (FARMC) at the national, municipal and barangay levels.

The 1987 Philippine Constitution (Article XIII, Section 7) states that the government *'shall protect the rights of subsistence fishermen, especially of local communities, to the preferential use of the communal marine and fishing resources, both inland and offshore. It shall provide support to such fishermen through appropriate technology and research ... and other services.'* Each coastal LGU may initiate greater municipal fisher involvement in fisheries management through formulation of a coastal management plan, where their rights to the fishery resources can be asserted and protected.

Case Study: Hinatuan, Surigao del Sur (Vera *et al.* 2007)

Hinatuan is located in northeastern Mindanao in the Philippines. It is one of the 15 coastal municipalities of the province of Surigao del Sur facing the Pacific seaboard. Hinatuan is bound to the north by the municipality of Barobo, to the south by Bislig City, to the east by the Pacific Ocean and to the west by the municipality of Tagbina. The municipality is composed of 24 barangays with a total land area of 423 square kilometres. Mahaba Island is located off the coast of the municipality of Hinatuan, around 20 minutes by motorized boat from the mainland. Fishing is the main source of livelihood on Mahaba Island.

Continuing threats to Hinatuan's coastal and marine resources include mangrove clearing for fishpond building, illegal fishing and overfishing, and poaching inside declared marine sanctuaries. Illegal practices like dynamite fishing and the use of triple mesh nets (overlaying nets of different sizes) have been identified as the main reasons for the rapid decline in fish catches in the mid-1990s. Commercial fishers using big boats and more efficient gears have also intruded into municipal waters, accelerating overfishing. Pollution

has also been a major concern: for example, quarrying activities inland and dumping of domestic wastes in coastal areas.

The Provincial Council of Surigao del Sur approved and adopted the Hinatuan Municipal Fisheries Ordinance (MFO) in June 2004. Among other things, the MFO provided for and put in place the following policies and management systems:

- A participatory coastal governance regime that mandates the municipal government to manage, protect, and regulate the use of coastal and marine fishery resources, consult with the Municipal Fisheries and Aquatic Resources Management Council (MFARMC), and delegate its powers to the Barangay Fisheries and Aquatic Resources Management Councils (BFARMCs), NGOs, and fisherfolk organizations in enforcing fishery and environmental laws.
- *Exclusive use of Hinatuan's coastal and fishery resources is granted to Hinatuan residents, with preferential rights to marginal and subsistence fisherfolk. Prohibition of commercial fishing within municipal waters. Prohibition of fishing activities within declared marine sanctuaries and overfished areas.*
- Regulation of all fisheries activities in municipal waters, including aquaculture activities, through the imposition of fees, issuance of licenses, leases and permits, and registration of fishers, fishing boats, and fishing gears.
- Zonation of coastal waters, delineating areas reserved for navigational lanes, construction of various fishing structures and apparatus, economic zones, and marine protected areas or marine sanctuaries. Eight established marine sanctuaries with a total area of 476 hectares have been included and classified under the said zonation scheme.
- Prohibition of specific fishing gears, including fine mesh nets, triple nets, baling (beach seine), and sud-sud (push net) within municipal waters. Fishing through the use of explosives, poisonous and noxious substances or chemicals, and electricity, are declared illegal.

A people's organization (PO), Ladies in United Movement Onward to Development (LUMOD), started out as a 23-member group in 1998, composed entirely of women. Since then the organization has been active in resource management and livelihood improvement efforts in Mahaba Island. It has provided various services to the community, also benefiting non-members. PO leaders and members link the Mahaba community with governance bodies and structures in the mainland, including the municipal government, fisheries regulatory agencies, national agencies, development and planning bodies, and the PO federation.

Claims and preferential rights over fisheries resources around Mahaba Island and within Hinatuan's municipal waters have strengthened through the years since LUMOD started implementing resource management measures. The approval of the MFO and the municipal government's support to the PO and their enforcement groups further bolstered the residents' perception of such claims. PO members state that access and control of coastal resources by themselves are not enough to ensure sustainable livelihoods. Fishers should receive adequate support in terms of developing their capacities to manage coastal and marine resources sustainably. Also, the right to manage coastal resources is not only geared towards protecting and sustaining the fishers' main source of livelihoods: there is a clear awareness that current management efforts would also benefit succeeding generations in the form of a healthy and improved coastal environment.

Claims and preferential rights over fisheries resources around Mahaba Island and within Hinatuan's municipal waters have strengthened through the years

For LUMOT members, the effectiveness of the community-based approach to coastal resources management lies in its strength in bringing about a sense of empowerment among PO members and other residents in Mahaba Island. Another significant result of the PO's resource management efforts is the recognition and support it has gained from the local government. POs also played a large role in drafting and preparing the MFO. The actual draft ordinance was practically written by the POs. The draft law was then presented to the Municipal Council which approved it without much revision. The POs were subsequently active in organizing education campaigns and public hearings to gain the public's support on the proposed ordinance. Most of the PO-initiated community sanctuaries were included and formally adopted in the approved ordinance (Article III, Section 7). Apart from outlining the LGU's

resource management responsibilities, the MFO also provided for a system of regulating use of coastal areas and other coastal development projects, a zoning scheme to facilitate management of municipal waters, and penalties for violations of fishing regulations.

Indigenous People's Rights (Capistrano 2010)

For the indigenous peoples who are often at the periphery of most development initiatives, securing rights to common property resources provides a basis for sustainable management by communities. Secure rights of ownership, access and use are fundamental to the sustainability of livelihoods that rely on natural resources. The Tagbanua are an indigenous people who live on Coron Island in Palawan, Philippines. In 1985, the indigenous communities established the Tagbanua Foundation to address the resource-use issues in the area and applied for a Community Forest Stewardship Agreement (CFSA) with the Department of Environment and Natural Resources (DENR). In 1993, DENR issued a Department Administrative Order 02 (DAO 02–93) that provides the rules and regulations for recognizing and awarding a Certificate of Ancestral Domain Claims (CADC), by which the nation recognizes the inherited and preferential rights of indigenous communities to extract, exploit, manage and protect their delineated ancestral territory.

Securing rights to common property resources provides a basis for sustainable management by communities

The Tagbanua formulated an Ancestral Domain Management Plan (ADMP) governing all claimed territories. In 1998, DENR approved the CADC of the Tagbanuas covering 22,284 ha that include the entire island and a portion of the seas surrounding it. The passage of the Indigenous People's Rights Act (IPRA) or Republic Act 8371 in 1997 became a milestone in establishing a comprehensive system for protecting the rights of the indigenous people's (IP). This law recognizes three basic rights:

- the rights of ownership of indigenous communities to their ancestral lands and bodies of water
- the right to traditional resource management practices
- the right to secure a free, prior informed consent (FPIC) from the community in advance of the implementation of any project or initiative within areas identified as traditional territories.

Such ownership of resources by indigenous peoples is basically private but communal and cannot be disposed of or sold. With recognition of their rights, the indigenous people have been able to define an appropriate management system in their own terms.

Viet Nam

The legal framework for marine capture fisheries management is a body of legislative texts that has evolved over the last four decades (FIC, 2008; Pomeroy *et al., 2009).* The current legal system uses a system of regulations (often at the Provincial level), decrees, ordinances, joint circulars, directives, and decisions to impart legal instruments (Table 2).

Table 2
National fisheries laws in Viet Nam which affect tenure

National Assembly of Viet Nam approved Law no. 17/2003/QH 11, the Fisheries Law
Decree No. 123–2006/ND-CP
Decree 33/ 2010/ND-CP

On 26 November 2003, the National Assembly of Viet Nam approved Law No. 17/2003/QH 11, the Fisheries Law. The Fisheries Law provides for a stronger and more comprehensive legal basis for management of fisheries and aquaculture than had existed previously. Article 5.4 states: '*The Government shall identify the border of coastal areas in order to decentralize management to local coastal authorities for integrated coastal area management as well as production and trade development based on the depth of water and the distance from shoreline and some other characteristics of coastal areas.*' Some provinces have already initiated establishment of 'co-management' systems, both through the national MPA programme and on a smaller scale in mainland inshore waters.

Two decrees focus on the confirmation of the legal aspects relating to the assignation of fishing rights to local fishers. In 2006, Decree No. 123 2006/ ND-CP focuses on coastal marine water zoning and allocation to local

communities for marine uses. The Provincial People's Committees are given responsibility to decentralize the management of coastal areas to district and commune-levels.

Decree No. 33/2010/ND-CP provided for the management of fishing activities by Vietnamese organizations and individuals in Viet Nam seawaters. Zoning is allowed as the basis for allocating water areas into fishing zones to help allocate fishing capacity in different water areas.

In June 2009, the Minister of MARD sent a letter to all provinces in Viet Nam endorsing co-management as a fisheries management strategy and encouraging them to implement co-management. Much of the innovation in fisheries management in Viet Nam is now occurring at the provincial and district levels. These innovative approaches range from the fishing rights programme in Tam Giang lagoon in Thua Thien Hue province and Binh Dinh province, to locally-managed clam fisheries, to fishing cooperatives in Ben Tre province, and to traditional fishing rights in Quang Nam province. Some case studies follow outlining recent developments.

TT Hue Province (Armitage *et al*. 2011)

Two decades of economic growth, rapid aquaculture expansion and the intensification of capture fisheries have profoundly altered the Tam Giang lagoon system in Thua Thien Hue Province. This has resulted in real dilemmas over access to resources, land allocation and coastal management. The management challenges of this lagoon ecosystem are particularly complex given the pace of change, the potential money that aquaculture development can bring, the challenges of controlling disease outbreaks in densely packed areas, and the multiple jurisdictions involved. A lack of capacity and the use of top-down decision-making strategies has led to uncertainty and mistrust of the authorities, who are inclined to use coercion and fines to implement government decisions. Nevertheless, the overall chaotic management situation has coincided with a push towards decentralized governance arrangements in Viet Nam that have catalysed potentially novel institutional changes in the lagoon.

Changes to the Land Law (2003) and Fisheries Law (2003) have given support for individual and non-State property rights arrangements, and for local people to organize around fisheries management initiatives. The 2003 Land Law put into place a stringent system of appropriate planning, pond and infrastructure design, construction guidelines and aquaculture permits, administered predominantly at the district level. The Fisheries Law also enables partnerships between state and local organizations in the management of fisheries and aquaculture resources, by supporting decentralized management and the establishment of Fishery Associations with the potential to hold resource rights. Legally constituted as 'social–professional organizations', Fishery Associations (FA) can play an important role in connecting district and commune officials with local people.

Even with policy windows that provide for innovation, it takes committed provincial officials to ensure that local policy uptake can happen: nesting of key policy changes across different levels of governance and organization is particularly important. Decision No. 4260/2005 (People's Committee of Thua Thien Hue Province) formalized the role of Fishery Associations in the local management of the lagoon, and recognized the legal status of local Fishery Associations to receive lagoon fishing rights allocations as framed within the revised Fisheries Law (2003). National and provincial policy windows have enabled lower levels of government to make decisions on their own, and in the case of Tam Giang lagoon, another major policy window opened in 2009. Decision 942/2009 issued by the Peoples' Committee of Phu Loc district (March 2009) included the first ever government allocation of fishing rights to a fishers' organization, established formal collective property rights over a capture fishery, and involved the allocation of 993 ha of lagoon space to the Vinh Giang Fishery Association.

It takes committed provincial officials to ensure that local policy uptake can happen

The allocation has formalized property rights and represents an outcome that amounts to an emergent fisheries co-management arrangement between district and commune authorities and the Fishery Association. The district PC found this experimental model to be successful: formal rights allocations have recently been granted in three more sites in the lagoon — Loc Binh and LocTri (Phu Luc district) in March 2010, and Phu My (Phu Vang district) in September 2010. In Viet Nam these are the first

examples of allocation of a spatial territory via formal rights, from the district level to fisheries associations.

Changes to the Land and Fisheries Laws, and subsequent provincial and district decisions which capitalize on these changes, represent critical policy windows for alternative governance approaches. Provincial decision No.4260/2005 provides legislative and policy support for co-management arrangements and permits the allocation of collective rights over fisheries to fishery associations. In turn, district-level decision 942/2009 specifies the rights and responsibilities of the Vinh Giang FA to 993 ha of the lagoon. These institutional innovations have created potentially powerful incentives for lagoon resource users and government actors to address lagoon ecosystem conditions and concerns over livelihoods, and in so doing shift the trajectory of resource governance approaches in this region. If and how these early stage changes are coalescing, with the aim of producing a long term governance transformation that produces desirable social and ecological outcomes, requires more time and analysis.

In Tam Giang lagoon, the Provincial People's Committee delegates power to the district to allocate fishing rights to Fisheries Associations at the grassroots level. The Integrated Management of Lagoon Activities (IMOLA) Project supports the establishment and strengthening of Fisheries Associations and the development of an effective co-management mechanism. Facilitation of this participatory process includes the development of by-laws, zoning plans (including seasonally closed areas), regulations, strategies, action plans, guidelines, and training on a variety of topics including alternative livelihoods. The IMOLA Project has been supporting traditional festivities in the target communes in order to support community solidarity, strengthen the role of the fisheries association executive board, and raise awareness of association activities.

Quang Nam Province (Ruddle, 1998)

In Viet Nam, fishers have traditionally played a role in fisheries management, being empowered in areas such as residential proximity rights, primary rights, and the right to sell, transfer or lease and share these rights. In Quang Nam province, for example, where traditional fishing rules are in place, fishers play a role in governance of their fishing rights. Once a person has set up a fishing

Fishers play a role in governance of their fishing rights

operation by establishing gear at a given fishing spot, others cannot fish in this area until the previous owner has dismantled the existing operation. For primary fishing rights, usually the son inherits the right to fish in the village's marine territory. If a family does not have any sons then a daughter is allowed to inherit this right. Outsiders must wait for a minimum of 10 years before being granted fishing rights. The fishers are permitted to loan or share their access rights, and annually reallocate these rights among other fishers in the village.

Binh Dinh Province (Todd *et al.*, 2011)

In Binh Dinh province, there is an ongoing programme to encourage co-management and fishing rights. On 28 May 2010 the Provincial People's Committee (PPC) approved a legal document for fisheries development and protection and to encourage co-management. The regulatory framework for the implementation of co-management is implemented through the administrative structure of the People's Committees, operating at district and commune levels. For each co-management 'model', a Co-Management Council and Fishery Protection Group is established under regulations promulgated by the district or commune People's Committee. The Councils are made up of approximately nine people appointed from local authorities, organizations and local communities, for a two-year term. The Co-Management Council has overall responsibility for the application of the co-management model across all the fishing communities within the co-management area. Membership of the Council is on a voluntary basis.

Reporting to the Co-Management Councils are the Fishery Protection Groups. The Fishery Protection Groups are made up of four to five members from each fishing community within the co-management area. The functions of the Fishery Protection Groups are patrolling, monitoring and enforcement of regulations (e.g. prohibition on electric fishing), and education of local fishers and households. Each Co-Management model has a Code of Practice which establishes the roles and responsibilities of the Co-Management Council, and the Fishery Protection Groups. Each Code of Practice has specific sections stating overall goals, the rights and responsibilities of the fishing communities to fish within a designated spatial area and undertake aquaculture, the protection of fisheries resources and habitats, and enforcement of regulations.

Each Co-Management model has a Code of Practice which establishes the roles and responsibilities of the Co-Management Council, and the Fishery Protection Groups

Ben Tre Province

There are five co-management sites in Ben Tre province. The Ben Tre clam fishery has received Marine Stewardship Council (MSC) certification, becoming the first fishery in southeast Asia to meet the organization's sustainability and management standards. The fishery is operated by a local cooperative that provides close management and surveillance of the broodstock and harvestable clams within their area. Support and advice are provided to the cooperative by the Ben Tre People's Committee Department of Fisheries and the Ben Tre Department of Agriculture and Rural Development (DARD). Ben Tre DARD and WWF co-sponsored the MSC certification process. In 1997, provincial authorities established the Rang Dong Fishery Cooperative, which is co-operated and managed by the fishing community. Already, ten additional clam cooperatives have now been established, forming an alliance of cooperatives that covers all clam areas in Ben Tre.

Thanh Phong is a coastal commune with 17 kilometres of coastline and a population of 9511 people. There is a fishery operating in nearshore waters for mixed species using fishing nets, clam collection and aquaculture. There are about 750 households involved in the clam fishery working with two cooperatives: Thanh Loc and Doan Ket. Plans are in place to develop fishing rights in a six square kilometre zone from the shore, with areas given to the two clam cooperatives and to the organized group of nearshore fishers. While the Provincial Department of Agriculture and Rural Development is supportive of establishing the fishing rights, difficulties continue in finding a suitable legal framework to support the programme. To this end the Provincial People's Committee is considering following the lead of TT Hue province and developing its own interpretation of national fisheries laws and decrees.

Thailand

A number of fisheries laws provide the legal basis for fisheries management in Thailand (CORIN-Asia Foundation, 2010; Nissapa *et al.*, 2002; Yamao and Suanrattanachai, 2002; Nasuchon and Charles, 2010) as shown in Table 3.

Table 3
National fisheries laws in Viet Nam which affect tenure

The Fisheries Act (1947, as amended in 1953 and 1985)
Royal Decree on Administration
Tambol Administrative Organization Act (1994)
Provincial Administrative Organization Act (1997)
National Economic and Social Development Plans
Thailand Constitution
Mandate for Decentralization

The Fisheries Act (1947, as amended in 1953 and 1985) is the principal legislative instrument dealing with fisheries in Thailand. The Department of Fisheries (DOF) is the principal government agency responsible for managing and developing fisheries and aquaculture. The Royal Decree on Administration sets out the authority of both the Provincial Fishery Officer (each province has a Provincial Fishery Officer) and the District Fishery Officers. The Tambol Administrative Organization (TAO) Act of 1994 empowers local communities, at sub-district level, to manage and conserve natural resources and the environment in their localities. These powers enable local communities to regulate any activities in their areas. The Provincial Administrative Organization Act (1997) empowers the Provincial Administrative Organization to formulate provincial development plans, coordinate and cooperate with Tambol Administrative Organizations, allocate budgets to Tambol Administrative Organizations, and protect and conserve natural resources and the environment in their territories. Although various efforts have been made over the last decade to draft and adopt new fisheries legislation, it still has to pass through a process of several stages before it is finalized.

These powers enable local communities to regulate any activities in their areas

The current Tenth Master Plan for National Economic and Social Development (2007–2011) was formulated with a vision of, '*Sustainable Fisheries under the Sufficiency Economy Concept that holds the people at the Center of Development.*' This vision focuses on marine fisheries development and envisions a more responsible fishery, and effective and sustainable use of aquatic resources. The stated mission for the Master Plan is *'to manage all activities pertaining to resource use, rehabilitation, maintenance and protection of the marine environment, to ensure its high productivity under the current socio-economic reality, and the state of the marine resources and ecosystem; to carry out human resource development, institutional strengthening and to conduct activities leading to the generation of bodies of knowledge pertaining to marine fisheries and environment management, to promote the application of the FAO Code of Conduct for Responsible Fisheries, and to promote the networking of such an observance at all levels.'*

In addition to the Plan, the new Thai constitution provides for the rights and participation of people in the management, conservation and utilization of natural resources, as well as protection of the environment. In 1999, Thailand started to decentralize at the local level. Article 283 of the Mandate for Decentralization provided localities with the right to define their own self-government, while Articles 293 and 284 address the local authority's independent power on issues of policy formulation, administration, finance and personnel management.

In line with the Master Plan, DOF strategies include community-based resources management, rights-based fisheries, establishment of fisheries associations, and advocated cooperation between resource managers and users. The policy on decentralization provides opportunity for the 'Sub-District Organization' (Or-Bor-Tor) to play a central role in fisheries management. It can facilitate the fishermen to organize themselves and manage conflict within its jurisdiction. Once again, a case study vis-à-vis Viet Nam's approach is worth exploring.

Integrated Coastal Resource Management in Pathew District (ICRM-PD), Chumphon Province (CORIN-Asia Foundation 2010)

The Integrated Coastal Resources Management project in Pathew District (ICRM-PD) in Chumphon Province (Figure 1) was a five-year project planned by the Department of Fisheries (DOF) under the Royal Project on behalf of His Majesty the King. It was part of the larger 'Rehabilitation and Management of Marine Fisheries Project'. This project aimed to introduce the concept of community-based coastal resource management and to apply practical management methods in the selected site. The project placed emphasis on promoting sustainable use of coastal resources through the creation of a demarcation zone for small-scale fisheries. After consultation with local fishers, a demarcation area was declared by the DOF. Together with this declaration, management within the demarcated zone and the types of fishing operations allowed were regulated. Both the DOF and local fishers reached an agreement regarding the areas to be managed and the types of fishing operations that are allowed or prohibited, as well as enacting effective enforcement and monitoring of illegal operations. Several types of fishing techniques such as trawling, push nets and blood cockle cast nets, as well as anchovy fishing, were banned within the three kilometre demarcated area, especially during night fishing. Furthermore, the DOF encouraged the local people in the fishing communities to improve their management capabilities and fishing methods in order to sustain the use of coastal resources, especially in the demarcated coastal areas.

Project activities focused on the establishment of a feasible framework to promote sustainable resource utilization in the demarcated zones (Zones I and II) that would be easily understood by local people. The framework ensured a participatory approach to coastal resource management that brought about a decentralized fisheries management system based upon the Tambon or Sub-district administration. In the context of decentralization, the responsibility of taking over the management of the project after its completion was to be turned over to the *Or-Bor-Tor.* However, they were not ready to take it over. A core group, the Pakklong Fisheries Group (PFG), was established to handle management. It has around 110 registered members.

The framework ensured a participatory approach to coastal resource management that brought about a decentralized fisheries management system

A capacity building activity enabled the Group's members to manage the coastal fisheries resource. In addition to management, the Group is involved with zoning issues and monitoring illegal fishing activities in the area in collaboration with the Fishery Patrol. Conflicts in the village are handled by the community members. The PFG was registered as a legal entity with the Provincial Cooperative Promotion Office (PCPO). Fishers in the PFG also participate in research, which involves recording total catch, type of fisheries, gear and species during each fishing trip.

Overall, the ICRM-PD project in Chumphon shows that community based fisheries co-management was an important approach for implementing fisheries and coastal management activities, especially taking into account the need for the full support and participation of the local people. The success of community-based fisheries resource management CBFRM stems from community organization and strengthening, as well as their legal status. Challenges include lack of cooperation between the PFG and the Tumbol Administrative Organization (TAO), and among the Department of Fisheries, TAO and village heads. By establishing a territorial fishing area, fishing communities receive some authority from the Thai government to manage their own fisheries.

CAMBODIA

Over the last decade, there has been substantial fisheries policy reform in Cambodia's inland fisheries (Levinson, 2002; Mansfield, 2002; Thay Somony, 2002; Tep Chansothea *et al.,* 2007; Ratner, 2006*;* Kurien *et al., 2006;* Nasuchon and Charles, 2010). This was largely explained by the increasing conflict between family-scale fishers and fishing lot operators, who, despite the law (Table 4), prevented subsistence fishers from accessing the resource through intimidation, violence and false imprisonment.

Sub-decree on Community Fisheries Management 2005
Fisheries Law 2006

Table 4
National fisheries laws in Cambodia which affect tenure

To address these issues, in 2001 the Community Fisheries Development Office (CFDO) was created in the Department of Fisheries and was put in charge of the process of crafting a sub-decree on community fisheries (CF). The CFDO is specifically meant to support communities and encourage them to undertake participatory management of the floodplain fisheries in the country. Subsequently, a series of sub-decrees were issued to formalize the release of the fishing lot, and a sub-decree on CF was formulated and discussed with stakeholders. On 29 May 2005, a Royal Decree on the establishment of CF was proclaimed and on 10 June 2005, the Sub-decree on Community Fisheries Management was approved by the Prime Minister. On 30 March 2006, this sub-decree was given a more solid legal standing with the approval of the new Fisheries Law by the National Assembly. Finally it was promulgated by the King on 21 May 2006.

The Ministry of Agriculture, Forestry and Fisheries is entitled to allocate part of the fishery domain to the CF that lies inside or around the fisheries domain as CF area (Article 60). The community fishery area is a Territorial Use Right in Fisheries (TURF) (Article 6).

The Ministry of Agriculture, Forestry and Fisheries is entitled to allocate part of the fishery domain to the CF that lies inside or around the fisheries domain as CF area

Bak Amrek-Doun Ent Community Fisheries (Tep Chansothea *et al.*, 2007)

Bak Amrek-Doun Ent CF is located in the villages of Bak Amrek and Doun Ent, Prek Luong commune, Ek Phnom district, Battambang province. Established on 21 September 2003, it has 280 members. The CF covers a total area of 1 075 ha of land and water. At present, the Bak Amrek-Doun Ent CF is part of a federated CF composed of three other CFs. The CF has a total population of 2 196 people: 1 138 (or 52 percent) are women and 1 058 (or 48 percent) are men. There are 431 families in the CF: 253 families

in Bak Amrek village and 178 in Doun Ent village (Provincial Department of Planning, 2005). There are seven committee members, four women and three men. The committee has one male chief, two vice chiefs—male and female—one female accountant, one female secretary, one female disseminator, and one patrolman.

With the establishment of the CF in 2003, the people's solidarity and advocacy against illegal fishing became stronger. Supported by the Village Support Group (VSG), the PFO, the local authority and other relevant institutions, the new CF started dissemination of the CF bye-law and fishery law to local people. It also collaborated with the fishery authority and commune police to crack down on illegal fishing in the community fishing ground and public areas like the Sangke River tributary. In 2005, the CF demarcated the CF boundaries by using a Global Positioning System (GPS) analysis to create a map. The demarcation was joined in by the PFO, the VSG, local authorities, district environment staff, the community committee, district representatives, and neighbouring communities. The CF map formed part of the CF agreement which was signed by Bak Amrek-Doun Ent CF committee chief, chiefs of neighbouring CFs and the village chiefs of Bak Amrek, Doun Ent and other neighbouring villages. The CF bye-laws have also been agreed upon and disseminated in the two villages and neighbouring villages. The CF serves to manage conflict over fisheries resources in the area.

The community perceives that the fishery resource is common property and that small-scale fishing is open to all at any time of the year. However, users of fishery resources have the responsibility of protecting the resources, using only legal gear, following the fisheries and CF by-laws, and not fishing during the spawning season. The use of flooded forest is more restricted. The local people play a role in protecting and conserving the fishery resources and in reporting any illegal fishing to the CF committee. The committee leads in eliminating illegal fishing activity, disseminating the fishery law, and making people understand about the advantages of community management. The CF committee is assisted by the fishery authority and the local authorities.

DISCUSSION AND CONCLUSIONS: EVALUATION OF GOOD PRACTICES AND SUCCESSFUL/UNSUCCESSFUL FUNCTIONING OF GOVERNANCE OF TENURE ARRANGEMENTS

Throughout the southeast Asian region a number of national and local level initiatives over the last two decades have had an impact on the institutional and organizational arrangements for governance of tenure. These have occurred at both national and local levels.

National level initiatives:

1. *Decentralization*. Decentralization refers to the systematic and rational dispersal of power, authority and responsibility from the central government to lower or local level government or institutions. This broad government administrative decentralization has brought about a move to decentralized fisheries management, providing more local control over fisheries management and greater participation of fishers in governance. This administrative decentralization has been formalized through laws in the Philippines, Thailand, Cambodia and Viet Nam. Decentralization is a pre-condition that can enable co-management.
2. *Co-management and community-based management*. Co-management and community-based management are governance arrangements which are now widely utilized in the region. Governments have turned to co-management as a means of responding to a management crisis, and sometimes to a management opportunity, as in the case of fishing rights, and perhaps also in some land claims agreements. The strategies of co-management not only respond to management crises, they also offer the promise of increased democratization, and empowerment and development of regional and local communities.
3. *Policy frameworks*. Many governments have policies that support co-management arrangements and the granting of exclusive fishing rights to community-based institutions. Viet Nam has a policy endorsing provinces to utilize co-management. For example, the Association of Southeast Asian Nations and the Southeast Asian Fisheries Development Center have developed regional guidelines for co-management using group user rights for small-scale fisheries.

Many governments have policies that support co-management arrangements and the granting of exclusive fishing rights to community based institutions

4. *Legal frameworks*. While not as widespread in the region as supporting policy frameworks, some countries (such as the Philippines) have Constitutional articles and/or fisheries laws that support the granting of fishing rights to fishers at local government level. The legal framework should clarify/define the designated tenure area and the co-management mechanism for governance. Some countries in the region – again the Philippines is a case in point – also have laws to support secure rights of ownership, access and use for indigenous peoples. The case studies in the Philippines show that when user rights are specified and secure, there is a change in the behaviour and attitude of the resource user towards conservation, and a much greater chance that the intervention will be maintained.
5. *Values*. To create effective governance of tenure, it is important to keep in mind that fisheries and the sea are critical assets that have multiple functions and meanings to people. In addition to its economic function as a source of food and livelihood, the sea has social and political value, as well as important religious and cultural meanings. A variety of laws (formal and informal / customary) can impact upon access and governance. Rights, authority and responsibility must be clear.

Local level initiatives:

6. *Management plans*. In the Philippines, local governments must have local fisheries management plans in order to assert and protect the rights of municipal fishers to fishery resources. In a similar fashion, in Cambodia management plans are required for a community fishery committee to have rights over the community fishery area.
7. *Conflict*. Governance of tenure arrangements may require access rights to be limited to some resource users and to exclude others, often resulting in conflicts. Conflict management mechanisms must be established.

In the Philippines, local governments must have local fisheries management plans in order to assert and protect the rights of municipal fishers to fishery resources

8. *Empowerment*. In Thailand, empowerment of local fishers is undertaken to help them better manage natural resources. This is also the case in the Philippines, where NGOs often undertake empowerment activities. Empowerment is concerned with the capability building of individuals and the community, in order for them to have greater social awareness, to gain greater autonomy over decision-making, to gain greater self-reliance, and to establish a balance in community power relations.
9. *Political support*. The cooperation of the local government and the local political elite is important to governance of tenure. There must be an incentive for the local politicians to support rights of tenure. There must be political willingness to share the benefits, costs, responsibilities and authority for tenure with the community members. Tenure rights will not flourish if the local political 'power structure' is opposed to it in any way. This can be seen in the Cambodia case.
10. *Enforcement*. The enforcement of management rules is of high importance for the success of governance of tenure. Vigorous, fair, and sustained law enforcement requires the participation of all partners. Local enforcers (*bantay dagat* in the Philippines) can be very effective, provided they are formally legitimized. Local enforcement efforts may need to be backed up by government enforcement bodies to ensure objectivity.
11. *Organization*. Governance of tenure is based on a community organization to represent its members and manage the area. People's organizations in the Philippines are engaged in everything from resource management to livelihood improvement.

The enforcement of management rules is of high importance for the success of governance of tenure

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GOVERNANCE OF TENURE IN THE LAKE VICTORIA FISHERIES, TANZANIA

GOUVERNANCE FONCIÈRE DE LA PÊCHE DANS LE LAC VICTORIA, TANZANIE

LA GOBERNANZA DE LA TENENCIA EN LAS PESQUERÍAS DEL LARGO VICTORIA (REPÚBLICA UNIDA DE TANZANÍA)

ABSTRACT

GOVERNANCE OF TENURE

RIGHTS

LAKE VICTORIA

CO-MANAGEMENT

GOVERNANCE PRINCIPLES

TANZANIA

This paper presents and discusses governance of tenure for Lake Victoria fisheries by focusing on the Tanzanian jurisdiction. The paper traces tenure governance from the pre-colonial period to the current policies, and looks at national and district laws. It argues that although the lake is a shared resource among three countries (Kenya, Uganda and Tanzania), the tenure systems and their governance show a similar pattern, especially as regards the behaviour of the historical fishing communities. There, resources were

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TANZANIE

Le présent document propose une analyse de la gouvernance foncière de la pêche dans le lac Victoria à travers un examen de la juridiction tanzanienne. Il retrace l'historique de la gouvernance foncière de la période coloniale à nos jours et examine les législations en vigueur à l'échelle du pays et des districts. Bien que les ressources du lac soient partagées entre trois pays distincts (Kenya, Ouganda et Tanzanie) on constate d'importantes similitudes dans les formes de gouvernance des systèmes fonciers, s'agissant notamment du comportement des communautés

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Este artículo analiza la gobernanza de la tenencia en las pesquerías del lago Victoria, centrándose en la jurisdicción tanzana. El estudio traza un cuadro histórico de la gobernanza de la tenencia desde el período pre-colonial hasta las políticas actuales, y examina las leyes nacionales y de distrito. Se argumenta que si bien el lago es un recurso compartido por tres países (Kenia, Uganda y la República Unida de Tanzanía), los sistemas de tenencia y su gobernanza muestran una pauta similar, en especial en lo que se refiere al comportamiento de las comunidades pesqueras tradicionales, ya que en


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administered through a communal/customary tenure system under the control of chiefs and clan elders. Under the current joint system adopted by these riparian countries, the individual states initially exercised authority, but later shared the same with local fishing communities under a co-management system.
The paper discusses these systems and teases out some governance principles that can be used to achieve a secure tenure for fisheries resources.

historiques de pêcheurs. Dans le passé les ressources étaient régies par un système foncier communal/coutumier placé sous le contrôle des notables et chefs de clans. Dans le système actuel, adopté par les pays riverains, les Etats ont commencé par administrer eux-mêmes ces ressources pour finalement partager cette responsabilité avec les communautés locales de pêcheurs dans le cadre d'un système de cogestion.
Le document analyse ces différents systèmes et en tire un certain nombre de principes généraux de gouvernance pour une sécurisation foncière des ressources halieutiques.

ellas los recursos eran administrados con arreglo a sistemas de tenencia comunales y consuetudinarios y estaban bajo el control de jefes y ancianos del clan. En el sistema conjunto actual, adoptado por estas comunidades ribereñas, la autoridad que en un primer momento había sido ejercida autónomamente por los Estados fue compartida posteriormente con las comunidades pesqueras locales con arreglo a un régimen de cogestión.
El estudio examina estos sistemas y extrae algunos principios de gobernanza que pueden ser utilizados para asegurar la tenencia de los recursos pesqueros.

INTRODUCTION

Access to fisheries resources is critical to poor rural fishing communities. Their livelihoods depend on how they access, use and control these resources. For this reason an equitable and secure access to them – whether through customary, formal or informal systems – is a necessary ingredient for sustainable development (Williamson *et al.*, 2010). Secure access can be attained through an effective governance of tenure, which is here defined as how rights to resources are allocated, and how access is granted within and among societies (http://www.fao.org/nr/tenure/en/). In addition, it includes control and transfer of resources, as well as associated responsibilities and restraints. It is about incentives and enforcement mechanisms that may be put in place to ensure that the expected results from tenurial arrangements are achieved effectively. In general, governance of tenure determines who can use what resources, for how long, and under what conditions. It is therefore central not only to sustainable fisheries management but also to the global effort to eradicate hunger, poverty and ensure sustainable livelihoods among small-scale fishers.

Drawing on a case study of Wakerewe fishing community in Lake Victoria, this paper demonstrates that an effective governance of tenure – measured in terms of how institutions allocate use, management, and ownership rights to actors – can be achieved through goals that target improved food security, livelihoods and community members' well-being. These goals should be built on community norms and principles of equity, legitimacy and property rights.

This paper explores governance of tenure for Lake Victoria fisheries by presenting a historical overview of how Lake Victoria fisheries resources have been owned and managed. The paper illustrates how a community fisheries governance have been grounded on norms and principles of equity, legitimacy and property rights. Ownership is perceived to comprise custody and use rights (Barrow & Murphree, 1998). The paper illustrates that ownership of the lake's fish resources is an important factor in understanding governance of tenure for the fisheries resources, as well as for their management. The argument goes that to have custody of a resource creates consciousness about the costs involved in losing it, as well as an appreciation of the benefits of

using it. This therefore becomes a driver for its governance. Similarly, to claim a right over a resource means that one can enjoy the benefits of it. Rights define the uses that are legitimately viewed as exclusive and the penalties for violating them.

The paper proceeds by presenting a historical analysis of how the lake's fisheries tenure system has been governed in two periods, namely the traditional period (before the colonial period) and during and after the colonial period. The paper also discusses how a co-management regime sometimes introduced in the lake in the late 1990s was grounded on an ownership regime based upon the customary tenure system. The paper then draws some lessons from these two periods.

GOVERNANCE OF TENURE SYSTEM IN THE TRADITIONAL SOCIETY

Since time immemorial, the tenure system in Lake Victoria has been customary and or communal. This is a tenure system in which ownership of resources and their governance was vested in the community authority, such as the Elders and the Chiefs. The Chiefs and Elders had the authority at all times to administrate any issues pertaining to resource ownership, allocation, and even use on behalf of the community. Although this was basically a tenure system for land, it also applied to other natural resources such as fish.

From the pre-colonial period, the Lake Victoria fishing communities generally accepted that the fish in the lake were God-given: nobody stocked them there and nobody feeds them. For this reason, none could claim ownership of them nor stop others from fishing – the fish were meant for all. Notwithstanding this, a fish was owned once it was already caught in the fishing gear. When caught, the fish belonged to the fisher's community. In addition, there was a claim to ownership of land adjacent to the lake waters. For instance, in the traditional societies before Tanzania's independence from the United Kingdom, land was communally owned and administered under community leadership. It was a common practice among riparian communities at the lake to divide land for clans, for fishing activities such as fish landing beaches, for bathing areas, and areas for washing utensils and clothes. Clans

and communities also claimed ownership of land that protruded into the lake from their areas.

During the pre-colonial period, ownership of land and other natural resources was a major source of conflict among tribes and ethnic communities in East Africa (Iliffe, 2000). Several inter-ethnic wars or conflicts were based on fighting for land ownership or a particular natural resource. For example, the Wakerewe fought several wars just to own land and resources that were important to their community, allowing them to settle in their present locations. They had come from Uganda through the western part of the Lake and Wakiseru, passing through Kenya and finally settling in Tanzania, just like other riparian communities by the lake. The Wakiseru even had to design a peace strategy of intermarrying so that they could live with their neighbours (Onyango, 2004). Once they settled, they assumed ownership of the land in those areas. The community clans were allocated land for residence and agriculture. Those whose lands were close to the lake automatically became owners of the land adjacent to the waters of the lake. However, they did not deny access to the lake to others.

Several inter-ethnic wars or conflicts were based on fighting for land ownership or particular natural resources

Access rights

Ownership of land adjacent to the lake did not lead to barring others from using the lake's resources, such as water and fish. Community members could therefore collect water from the lake, passing through land that they did not own.

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Just like any other source of livelihood, fishing was meant for food and everybody had a right to it. Everybody was allowed to go to the lake and fish. At the same time, fishing activities took place at specific times of the year: they were not necessarily activities that took place for the whole year. For instance, the riparian communities such as the Wakerewe had special designated seasons for fishing. Such seasons were selected during the non-agricultural season and lasted for about two 'full moons' (or two months). Fishing was not necessarily carried out close to the fisher's village; it often took place far away in the lake, given that fishing grounds were not owned by anybody. Moreover the types of gears used by various fishing communities are an indication of how access to fish resources was allowed. For example,

gears such as basket traps were used to fish in rivers and some shallow parts of the lake; gillnets made of sisal were used for fishing silver catfish (*Schilbe intermedius*) and ningu (*Labeo victorianus*); hooks were used for fishing bagrid catfish (*Bagrus docmak*). All of these examples demonstrate that fishing communities were using all manner of gears to access and catch fish. These gears did not allow fishing in deep waters of the lake. In most cases the gears caught enough fish in the shallow waters. In other words, fishing that took place in shallow waters was evidence of how access was granted to fishers, even in fishing areas that were not adjacent to their residence.

It was also the case that fishers would travel long distances as they looked for fish, and they were not barred from fishing in those areas where they found fish. Fishers would come back home with their catch and hand the fish to the Chief or Elders, who would distribute the catch to clan leaders. Once distributed, the fish belonged to those clans and were no longer a common property. The different clans therefore claimed rights over the fish.

GOVERNANCE OF TENURE SYSTEM: COLONIAL AND POST-COLONIAL PERIODS

The communal and or customary tenure system continued to exist until the beginning of the colonial period, when land and all natural resources were declared to be public property. As public resources, the colonialists on behalf of the Queen held them in trust. Later, the independent governments held these resources in trust on behalf of their citizens. Both the colonialists and the states assumed responsibilities similar to those that were held by the Elders and Chiefs in administering issues related to these resources. For example, the Lake Victoria fisheries – which are a shared resource between the Republic of Kenya, the United Republic of Tanzania and the Republic of Uganda – were mainly under the control of these states. The lake and its resources were a state property. The three governments took on full ownership, management and sustainable use of the lake's resources.

One observable fact both in customary and state ownership was that exploitation of the fishery was open to all. No one was restricted to enter the

No one was restricted to enter the fishery and no one, according to the local communities, could claim exclusive ownership of the fish resources

fishery and no one, according to the local communities, could claim exclusive ownership of the fish resources. Although the Fisheries Authorities in the three countries introduced gear restrictions in the form of a) types of gears to be used, b) mesh sizes, c) fishing areas, d) closed seasons, and e) licensing, this did not restrict entry into the fishery, nor did it have any impact on the ownership of the fish resources. Although a), b) and c) have to all intents and purposes been enforced, especially on account of the declining fish stocks, e) has been implemented as a basis for revenue generation. However, these regulations have not been used for the purpose of ensuring an effective tenure system, but usually as a means of weakening the customary tenure system and strengthening the public property regime.

Grounds for establishing government management rights

As was the case in the previous traditional societies, post-colonial governance of fisheries tenure was vested in the new governments, who by simple fact of geography were required to share the lake. The state of fisheries as observed in physical and biological surveys carried out between 1898 and 1909 (Garrod quoted by Geheb, 1997) provided the foundation for state involvement in the fishery. These surveys revealed that the singidia tilapia (*Oreochromis esculentus*), a major fishery for the riparian communities, was reducing in number. Individual communities could not act independently to address the situation. Taking remedial action, the colonial governments agreed to recommendations by scientists that gillnets were the appropriate fishing gear (Worthington and Worthington, 1933) to help resolve the situation.

Post-Colonial governance of fisheries tenure was vested in the new governments, who by simple fact of geography were required to share the lake

Additional biological studies were carried out by colonial scientists, to identify specifically the lake's composition as far as targeted species were concerned. These studies (Ligtvoet *et al.*, 1995) revealed that the lake was still colonized by a large number of endemic fish species, comprising more than 28 genera with more than 350 species. Cichlids numbered about 300, and were mainly haplochromine species and two tilapiine species, especially *O. esculentus* and *O. variabilis*. The tilapiine species, which were the target species for gill-netters (Graham, 1929), constituted the main fishery at that time. Besides the cichlids reported, 38 other species belonging to other families were present in the lake (Graham, 1929). In the 1950s a decrease

in the tilapiine species and *Labeo victorianus* was observed. This decrease was attributed to intensive gill-net fishing. In order to boost the decreasing fishery the colonial government introduced five new fish species, namely: Nile tilapia (*O. niloticus*), locally known as *sato*, and Nile perch, *Lates niloticus* (Nile perch), locally known as s*angara* (Ligtvoet *et al.*, 1995).

The scientific surveys that were carried out in the lake, and the subsequent advice that followed them, ushered in a more comprehensive formal management of the fishery after 1908. This is when the first colonial legislation for the lake, known as the Fish Protection Ordinance, was enacted (Geheb, 1997). This law introduced licensing and boat registration rules for 'non-native Africans'. There were improvements in this law on account of a further observed reduction in singidia tilapia. This improvement introduced a 5-inch minimum mesh size for gill nets in 1933. Between 1908 and the 1940s there was no framework for enforcing both the 1908 and 1933 laws. Thus in 1947, colonial governments introduced the Lake Victoria Fisheries Service (LVFS). LVFS was a regional tripartite state institution. It was particularly focused on enforcing the laws and regulations of the fisheries. However, it collapsed in 1960. It was then transformed into the East Africa Freshwater Fisheries Research Organization (EAFFRO), which also ended with the collapse of the East Africa Community in 1978.

Fishery exploitation during this period was solely by small-scale fishermen who were very disorganized and could only be coordinated through government intervention. The total catch from the lake during the 1960s and 1970s remained quite stable. About 100 000 tonnes of fish were caught annually in the three countries. It was also estimated that some 50 000 fishermen operated from about 12 000 fishing vessels, usually canoes (Jansen, Abila & Owino, 2000). These canoes were operated by their owners who also owned all or some of the gears. Jansen (1977) reports that canoe ownership was highly decentralized, making for evenly distributed incomes. There was very little improvement in the fishing gears and use of the outboard engines: the latter were present from the 1950s onwards, but were specifically used for transport.

The fishery thus developed from a basis of traditional and subsistence activities to an industry characterized by a high level of commercialization

both in production and distribution. Abila & Jansen (1997) and Jansen (1997), observe that vessel and gear technology were affected when Nile perch (*Lates niloticus*) fishery became dominant. This led to abandonment of simple vessels such as the basket traps mentioned above. A wide range of gears are no longer in use and the fishing effort is less widely distributed, on account of the low diversity of harvestable stocks.

In the mid-1980s there was a boom in Nile perch. This boom accelerated efforts in the management of this fishery as exports of the fish proved to be very lucrative. The export demand led to licensing and establishment of about 35 fish processing factories targeting the Nile perch. This export market generated a number of income streams for the riparian states. For instance, the lake is calculated as contributing a gross economic product of about US$ 3–4 billion annually (GEF, 1996; World Bank, 1996; Governments of the Republic of Kenya, Republic of Uganda & United Republic of Tanzania, 1995). It supports approximately 25 million people with incomes in the range US$ 90–270 per capita per annum (ibid.). These figures inspired riparian governments to take full responsibility to manage the lake.

Various activities around the lake necessitated government involvement in the form of instituting and operationalizing a formal management regime. Others cultivate various agricultural crops through irrigation from the lake water. Moreover, the lake enables transport between and within these three countries. This sector contributed between 0.4 percent in 1993 and 1.8 percent in 1998 to the Tanzanian national economy (Kulindwa, 2005). The governments improved management in the lake region, enforcement was streamlined, and research activities gained momentum.

Various activities around the lake necessitated government involvement in the form of instituting and operationalizing a formal management regime

Overall in the three riparian countries, management of the lake's fisheries mainly involved territorial user rights. So when the governments took over management responsibilities of the fisheries, they created national territories that came under their control. The governments assumed all management rights. The management created regulations through which fishing was to be carried out. The management also allowed fishing and access rights in the lake without interference from others (Geheb, 1997; Owino, 1999).

In Tanzania, efforts in developing and managing fisheries commenced with the creation of the Fisheries Division in 1964 just after independence (Hoza

et al., 2005). This was followed by the enactment of the Fisheries Act No. 6 in 1970. Similar Acts were enacted in Kenya and Uganda. The Fisheries Act in Tanzania repealed and replaced the Trout Protection Ordinance. The Act was considered an enabling Act to take control of fisheries resources; it was flexible in that any management action required could easily be incorporated in the Fisheries Regulations made under it. This Act aimed at protecting, conserving, developing, and rationally exploiting the fisheries resources. It was guided by a policy strategy that focused on the promotion of sustainable exploitation, utilization and marketing of fish resources, to provide food, income, employment and foreign exchange earnings. It also aimed to be an effective protection of the aquatic environment to sustain development. In this Act the Fisheries Division had the sole authority to design, monitor, survey and control all the fisheries resources.

Co-management: sharing management rights between government and community

In the 1990s both the Fisheries Division and the fishers observed a decline in fish stocks and yield respectively (SEDAWOG, 2000). They were also concerned about an increase in the use of illegal fishing techniques including banned fishing methods. In addition, the Fisheries Division felt that they needed to make fishers responsible for management of the fisheries while also providing them with property rights to the fish resources in the lake. To the Fisheries Division, the non-involvement of the fishing communities in the management and ownership of fish resources created a weakness in enforcing the existing laws and regulations. They noted that the benefits accruing from the fishing sector in terms of food, income and employment, required an appropriate management strategy involving local fishing communities through a co-management system. To the Fisheries Division, co-management would ensure sustainability of the fisheries by reversing the declining trend in catches, biodiversity, and overall degradation of the catchment. Thus in 1999 the Fisheries Division, with support from the World Bank funded Lake Victoria Environmental Management Project (LVEMP), initiated a process of establishing a co-management regime. This was done by forming Beach Management Units (BMU).

The BMUs were established through a consultative process involving meetings and seminars on beaches along the Tanzanian part of the lake. These meetings and seminars involved village government officials, Division and Ward executives, fishermen, fish dealers, other traders at the beaches and some influential elders. At the end of each meeting, participants nominated and elected a technical committee of 20 members that formed the BMU. In other words, the Fisheries Division was basically going back to the customary or communal tenure system, except that this time it was being formed as a hybrid system involving communities on the one hand and the government on the other.

Beach management units were established through a consultative process involving village government officials, Division and Ward executives. fishermen, fish dealers, other traders at the beaches and influential elders

Once formed, the BMUs were charged with duties that included:

- monitoring boats, fishermen and nets on a daily basis;
- ensuring that fishermen have licences and other relevant documents required by the fisheries regulations;
- arresting fishermen for using beach seines and undersized meshes for Nile perch or *Dagaa* (a Dagaa seine is required to be at least 10 mm; minimum mesh size for gillnets is 5 inches);
- report to the Police or District Fisheries office any serious problems on the beach;
- arrest those poisoning fish and hand them over to higher authorities;
- write letters of introduction or recommendation for fishermen who wish to migrate from their beaches to other beaches;
- maintain cleanliness on the beach;
- ensure that fish is not put on the ground;
- ensure that nobody bathes in the lake;
- report suspicious-looking persons on the beach to relevant authorities.

Although the Fisheries Division gave the BMUs specific roles to execute, they were expected to come up with by-laws defining breaches of petty rules – for instance, parking boats in specific areas, delivering fish in the right manner, beach cleanliness – and the punishments that go with them. Such by-laws must be approved by the village government and then forwarded to the District Assembly to be made legal. The BMUs also had rules governing their daily operations, especially surveillance (Hoza & Mahatane, 2005).

Efforts to co-manage the lake have already been initiated and it promises great changes with regard to improving the fish resources. The approach, however, raises some questions as regards the involvement of participatory fishers. This is explained to the practice whereby the communities are expected to enforce government regulations formulated without an exhaustive community input. This kind of management approach, which does not address custody and use-rights through a collective agreement between government and fishers, puts at risk the viability and sustainability of the fishery. Such a regime does not recognize that lake users are the best group to take on the role of custodians of the fish resources. As long as the community is viewed as external to the lake, a sense of responsibility will not be achieved. To render the fisheries of Lake Victoria sustainable, a sense of responsibility must be generated through a transfer of ownership, or proprietorship, from the state to the community and therefore to the level of the resource user (Barrow & Murphree, 1998).

DISCUSSION: GOVERNANCE PRINCIPLES FROM THE TWO PERIODS

On the whole, it is evident that governance of tenure for the lake's fisheries can be understood from two different perspectives. On the one hand there is the traditional tenure system, like that of the Wakerewe, in which the lake and its resources belongs to everybody; on the other hand the lake is understood to belong to the state. These two systems have guided the manner in which fisheries resources have been owned and exploited. As the property of everyone, the Lake's fisheries resources have been used to supply fish to the Wakerewe without restricting others from obtaining the same. In other words, the governance of tenure of these fisheries resources has been based on the goals of food security and well-being for the Wakerewe. This is what their kingship and clan leadership – their institutions – guaranteed. Conversely, as a state property, fish resources have economic benefits beyond food security and well-being. They are a source of income, employment, a contributor to the national economy, and a foreign exchange earner.

So the complexities associated with governance of tenure of these fisheries resources are directly related to the lake's status as a common-pool resource. The lake has been described as a band of land and water on either side of the shoreline, and is defined in a different way in different localities and within national contexts according to physical, biological and cultural criteria (Steins, 1999). These kinds of definitions, and the values associated with them, have defined ownership of the lake and associated rights, as well as how governing institutions have allocated these rights. Traditional governing institutions have strived to allocate control, use and ownership rights through a system that promotes equity and legitimacy among the community members. However, whether current institutions have been grounded on the same is questionable, given the perpetual high levels of non-compliance with regulations.

Equity

The traditional governing institutions were focused on ensuring that every clan member not only participated in the fishing activity in various ways, but also that each family gained a share of the catch. In other words the sharing was seen as cultivating fairness in distribution of resources among various actors in the community. In essence, this created a mindset among the community members about how their institutions allocated equitable access and use rights to the lake. With the introduction of co-management it is not clear how this regime addressed equity. For example, should co-management focus on equity of access to the resource, or rent redistribution, or equity in the cost of management and transactions, or equity of participation in the decision-making process, or empowerment (Wilson, Nielsen & Degnbol, 2003)?

Should co-management focus on equity of access to the resource, or rent redistribution, or equity in the cost of management and transactions, or equity of participation in the decision-making process, or empowerment?

Legitimacy

In addition to equity, the Wakerewe traditional governing institutions also fostered the belief that their governance of tenure was the most appropriate and proper for their community. In other words, their institutions were legitimate (Jentoft, 1999). To them the tenure system was rational, reasonable and just. It was also coherent with their interests and coincided with the way they defined their own problems and needs: starting with the basic need to obtain fish for food and improve their well-being. In addition, it created room

for them to participate in different ways in the decision-making process. This may be the reason why compliance to their regulations was high.

On the other hand, one of the advantages of co-management is to legitimize government-created fisheries regulations. However, on account of their content, distributional effects, formulation and implementation, many of them have created a legitimation crisis in fisheries (Jentoft, 1999). In fact, successful fisheries management entails legitimizing fisheries regulations. This is what co-management is believed to achieve, as it is a model based on cooperation vertically, horizontally and diagonally. So, what is legitimacy and how is it achieved in a co-management set up?

Fisheries laws and regulations are legitimate so long as fishers as in keeping accept them with their interests. In addition, legitimacy makes fishers see management objectives as rational, reasonable and just. For these laws and regulations to be coherent with fishers' interests, the problems these regulations are formulated to address should first coincide with the way fishers define their own problems. Second, fishers should be involved in the decision-making process at all levels. Third, fishers must be involved in formulating and enforcing the laws (Jentoft, 1989). When laws and regulations are legitimate, the chances of complying with them are expected to be high. Although Thom (1999) argues that legitimacy is not a sufficient condition for compliance, it is nevertheless a first step towards realizing it. Compliance is therefore an outcome of legitimacy.

Although Thom (1999) argues that legitimacy is not a sufficient condition for compliance, it is nevertheless a first step towards realizing it. Compliance is therefore an outcome of legitimacy.

In the Lake Victoria fisheries, making the fisheries regulations legitimate was one of the concerns when BMUs were being established. There is evidence for this in the discussion programme of the consultative meetings of the Fisheries Division when BMUs were being formed, and in various questions pertaining to regulations in the co-management survey. The surveys sought fishers' perceptions on whether these regulations were good, and if they were obeyed. Over 50 percent of the respondents answered in the affirmative to both questions. However, when asked what the single most important problem on the lake was, illegal fishing techniques stood out as the leading response.

The BMUs suffered as a result of this a great deal. First, there were problems in the selection of those who would nominate or elect the BMU members, because this group did not have a mandate from the fishers and/or other

user groups. This raised questions about the legitimacy of the BMUs. Second, even after the formation of the BMUs, there was no deliberate agreement that suggested that the prior regulations brought under the remit of the BMUs were rational, reasonable and just, and met one of the legitimacy requirements. Third, the BMUs agreed to implement the fisheries regulations; among these regulations was one to stop beach seining. So it is surprising that beach seining still continued, and in some areas the numbers of beach seines even went up. There was therefore a discrepancy between what was agreed upon and what actually happened and happens in the lake.

An assumption that implementers of the co-management regime in Lake Victoria made was that, so long as communities are given an opportunity to participate in the management process of the lake, then the regulations will have been made legitimate. Such an assumption did not take into account that fishers' laws begin where state laws end (Bavinck, 1998). In addition, it did not fully consider whether co-management would make fishers believe that existing fisheries institutions are the most appropriate and proper approaches for their communities. The same is true with the BMUs, even taking into account the fact that to some extent the co-management survey also emphasized community participation. However, legitimacy alone does not necessarily produce compliance (Thom, 1999; Jentoft, 1999). In reality, any co-management regime established without jointly considering legitimacy and compliance is likely to fail and disappoint the implementers.

Property rights

Fisheries authorities felt that by establishing a co-management regime, they would have addressed the issue of property rights. Indeed, by establishing BMUs, fisheries managers did not doubt that they would transfer ownership of the lake from the state to the local communities. In this case there is what Geheb (2000) calls a 'jargon problem'. 'Co-management' as a term is on everyone's lips in much the same way as 'sustainable development' was several years ago. The point here is that co-management was talked of without necessarily specifying what exactly needed to be changed in order to achieve an effective property rights regime. Many assumptions were made regarding ownership of the fish resources through community involvement in fisheries management.

Lake Victoria, being a natural resource in Tanzania, is a state property. This is also the view held by communities living around the lake (SEDAWOG, 2000). Government ownership, however, is considered as open-access. This is so because the government is expected to protect the interests of everyone who wants to fish in the lake. It is with this as a background that the formation of BMUs took place. The government took the initiative and control of designing, implementing and operating the regime. Moreover, BMUs are responsible to the government through the Fisheries Division. BMU members are therefore seen as government workers fostering government interests. Onyango (2000) argues that within the framework of BMUs, co-management is seen to delegate ownership of management processes to local communities; ownership of the resource is not addressed. Indeed in 2007, an evaluation was carried out on the performance of these BMUs. One of the issues they were asked about was ownership of fish resources. BMUs perceive ownership of fish resources to be a government and a local community's property (SEDAWOG, 2000). This arrangement subjects the resource to a more intensive and expensive use, and it nurtures the notion that the resource is a free gift and inexhaustible. This increases the rate of exploitation to a level that exceeds the natural capacity of the resource to restore itself.

On the whole, the complexities associated with governance of tenure for Lake Victoria fisheries are therefore directly related to its status as a common-pool resource. The lake can be described as a band of land and water on either side of the shoreline, which is defined in a different way in different localities and national contexts according to physical, biological and cultural criteria (Jones, 1999; Sorenson, McCeary & Hershman, 1999). Second, perceptions of the lake present a challenging atmosphere for the development and implementation of management strategies. The lake is perceived as a 'free for all resource'. There is evidence for this in the attitudes of the local fishermen, who believe that either nobody or everybody owns the lake (SEDAWOG, 2000). When asked who owns the waters, 43 percent of the fishermen answered nobody and/or everybody. From the survey, however, it could also be deduced that government ownership is perceived to be the same as 'open access' by the local fishermen (SEDAWOG, 2000). Moreover, the fishermen believe that they can fish from anywhere on the lake. They

also believe that everybody should be allowed to fish: nobody at all should be prevented from fishing on the lake.

On the government side, the lake is perceived as a revenue generating resource. The local District Councils in Tanzania and Uganda, and the Fisheries Department in Kenya, generate incomes from licences charged on fishermen and fishing boats. So the more fishermen and boats that can be registered, the more income will be generated. Anybody in possession of the recommended equipment is allowed entry into the fishery.

The open access state of the lake is one of the reasons why local fishermen perceived an increase in the number of fishermen and boats in 1999 compared with 1994. Disobedience of regulations is yet another response of fishermen to open access. It is also possible that the impact of water hyacinth would not have reached the level that it did, if some form of property rights were attached to the lake. Transformation of the lake fishery from traditional to commercial form is another result of open access.

CONCLUSIONS

The information on the governance of tenure for the Lake Victoria fisheries discussed in this paper indicates that the lake's fishing communities established their institutions in a way that promoted openness and trust among the community members. In other words, the communities were concerned about upholding certain values that were important in guiding the relationship and utilization of the lake's resources between and among themselves.

To these communities, the most important part of any institution was its ability to uphold community values. Rights and responsibilities over the fisheries resources were only meaningful in as far as they were undertaken to ensure that community values were not diluted. Possession of fish resources or land adjacent to the fishing grounds was of no consequence if one did not uphold community values. Each community member therefore strived to show behaviour that ensured maintenance of his/her social standing in the community. Fishing, hunting and agriculture were all penetrated and customized by social relations that dictated the outcomes in each case. Two of

the most important values in this regard have been: cooperation and respect. Cooperation is a value in which the holder views interests as shared and not individualistic. In these fishing communities, human beings are entitled to food and therefore they should have a right to fish. Those who cannot fish have the right to be assisted to access fish so that they can obtain food and eat. Possessing the value of cooperation means that one agrees to work together with others and to defend others' rights as regards access to fishing grounds. Cooperation cultivates behaviour that ensures less free riding. This was evident in several community activities such as marriage ceremonies, agricultural practices and in fishing. By cooperating in their activities, fishing communities have addressed conflict and achieved peace among themselves. They have supported each other during bereavement and hardships, and have found a means through which they address their poverty status.

A definition of 'respect' is: a state of being regarded with high honour or esteem. Among the communities on the lake, to possess this value one has to be able to relate to others in a way that does not create anger, animosity, hatred and disunity in society. It is a value that knows no boundary of age, group, sex or clan in possessing it. Respect is both an input and an output in attempting to secure governance of tenure. As an input, respect is used when defining and negotiating how, when and who should use the fisheries resources. When fishers negotiate on how they should fish, where their fishing grounds are, and even when they should meet to resolve their conflicts, respect plays an important role.

Each fisher is expected to show respect by giving anybody who has a contribution to make the opportunity to speak up in a meeting. They are expected not to interfere while someone is presenting his/her ideas; they are expected to listen and pay attention to the contributor. Fundamentally, this involves respecting the procedure of meetings. During conflict resolution meetings, each party to the conflict is expected to respect each other. No physical confrontation or use of abusive language is allowed. It is also expected that the community leadership that arbitrates between the two parties will be respected. As an outcome, respect is seen when there is adherence to the agreements reached in meetings on conflict resolution.

Some lessons

1. The co-management regime already established in Lake Victoria has enabled fishers to participate in management of the fisheries, but has not given them ownership rights to the resource. The regime has enabled fishers and the government to develop an agreement that specifies their roles, responsibilities and rights in management. Co-management has ownership implications that are confined to the managerial roles and not to the resource base itself. It seeks equity in fisheries management and strives for more active fisher participation in the planning and implementation of fisheries management. Its major theme is that self-involvement in the management of the resource will lead to a stronger commitment to comply with management strategies and sustainable resource use. By delegating responsibilities such as the ownership of the management process to local communities, co-management is a first step towards property ownership.
2. Although questions emerged with the implementation of the BMU regime, this brought attention to how various actors act on their rights and responsibilities. It also showed how important it is to institute a sound governance system that demands participation, legitimacy, genuine involvement in decision-making, fairness and coherence. Such a system should uphold procedural rights and support rights-holders in making claims and meeting obligations.
3. The observed changes as regards fishing practices in the lake have led to thinking about security of tenure for the fishers. The observed levels of conflict, and BMU participation in conflict resolution, leaves no doubt that local fishers are particularly concerned about how they can achieve security of tenure.

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GOVERNING TENURE IN NORWEGIAN AND SAMI SMALL-SCALE FISHERIES
From common pool to common property?[1]

GOUVERNANCE FONCIÈRE DE PÊCHE ARTISANALE SAMI EN NORVÈGE
Mise en commun ou propriété commune?

LA GOBERNANZA DE LA TENENCIA EN LAS PESQUERÍAS EN PEQUEÑA ESCALA NORUEGAS Y SAMI
¿Del uso común a la propiedad común?

1 This paper was first presented at a FAO workshop on governance of tenure in Rome 3–6 July 2011.

ABSTRACT

COMMON PROPERTY

HUMAN RIGHTS

INDIGENOUS PEOPLES

THE SAMI PEOPLE

SMALL-SCALE FISHERIES

JUSTICE PRINCIPLES

Fundamental to fisheries governance in Norway is the principle that marine resources and territories are no one's property, that everyone from the outset has equal access, and that the management responsibility therefore rests with the state as the principal steward of marine resources. In recent years, the issue of indigenous (Sami) historical rights of tenure has challenged this governance arrangement. This paper discusses how Sami rights claims have been handled politically, institutionally and legally in Norway.

RÉSUMÉ

PROPRIÉTÉ COMMUNE

DROIT DE L'HOMME

PEUPLES AUTOCHTONES

PEUPLE SAMI

PÊCHE ARTISANALE

PRINCIPES DE JUSTICE

La gouvernance de la pêche en Norvège repose sur les principes fondamentaux suivants: les ressources et les territoires marins n'appartiennent à personne; tous y bénéficient d'un égal accès; l'Etat, principal gestionnaire des ressources maritimes, en assure l'administration. Au cours des dernières années, la question des droits fonciers légitimes historiques des populations autochtones (Sami) a remis en question ces principes de gouvernance. Ce document expose la façon dont la revendication

SUMARIO

PROPIEDAD COMÚN

DERECHOS HUMANOS

PUEBLOS INDÍGENAS

EL PUEBLO SAMI

PESQUERÍAS EN PEQUEÑA ESCALA

PRINCIPIOS DE JUSTICIA

En Noruega, la gobernanza pesquera se asienta en el precepto de que los recursos y territorios marinos no son propiedad de ningún individuo; que todos, desde el principio, gozan de iguales condiciones de acceso, y que, por consiguiente, las responsabilidades de la ordenación competen al Estado, que es la entidad primaria encargada de la gestión de los recursos marinos. En los últimos años, la cuestión de los derechos indígenas (sami) tradicionales ha puesto en tela de juicio este acuerdo de gobernanza. El presente trabajo

The recent proposal to secure Sami fisheries tenure in Finnmark County is described, to illustrate the need to communicate and deliberate on basic meta-governance principles as to what constitutes justice where tenure rights are concerned. Justice principles may align well with common property and tenure of the Sami, but such principles may also be supportive of common pool access and open access. The challenge is to find mechanisms that can reconcile conflicting principles.

foncière Sami a été conduite sur les plans politique, institutionnel et juridique. La proposition récente de sécurisation du régime foncier de pêche Sami dans le Comté de Finnmark est exposée pour illustrer la nécessité de communiquer et débattre sur les principes de méta gouvernance en matière de justice foncière. Les principes de justice foncière peuvent s'accorder avec la propriété collective et les régimes fonciers Sami peuvent également s'appliquer à un accès partagé et ouvert. Tout l'enjeu consiste à trouver les mécanismes susceptibles de concilier ces principes contradictoires.

analiza cómo las reivindicaciones de derechos de los sami han sido manejadas en el ámbito político, institucional y jurídico en Noruega. La reciente propuesta para asegurar la tenencia pesquera de este pueblo en el condado de Finnmark, que se describe en el artículo, ilustra la necesidad de comunicar y deliberar acerca de los principios de meta-gobernanza relacionados con la justicia cuando entran en juego los derechos de tenencia. Los principios de justicia pueden muy bien estar alineados con la propiedad común y con las prerrogativas de tenencia de los sami, pero pueden también respaldar las condiciones que rigen el acceso colectivo y el libre acceso a los recursos. El desafío consiste en encontrar mecanismos que equilibren los varios principios antagónicos que están en juego.

INTRODUCTION

In Norway fishing has traditionally been governed by the 'common pool' principle: ocean territories and fish resources are the property of no one in particular.[2] No individual, group or community could therefore claim ownership or exclusive use rights to these assets, or deny others from enjoying them. Anyone could register, enter and create a livelihood by fishing. This principle, the affluence of fisheries resources, and low entrance costs, attracted people in large numbers to the small-scale fishery, which they typically combined with subsistence and commercial small-scale farming. Men fished in the winter while women cared for the farm and household. In the summer, when the fishery was low, the men turned their attention to family farming.

In Norway fishing has traditionally been governed by the 'common pool' principle

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

The individual vessel quota system - introduced in 1990 as an urgent response to a resource crisis in the cod fishery - challenged the common pool principle

Although it is a sound governance principle that tenure and spatially-based resource management systems[3] always need to be designed to fit the diverse political, social and cultural context within which they are introduced (McGoodwin, 1990), the governance principles and rights perceptions

2 The distinction between common pool and common property is from Ostrom (1990).

3 According to Cordell (1989, p.5), sea tenure refers to "any system of informal, relatively closed, communal, shared, collective or even private property in fishing."

underpinning such arrangements may apply everywhere. This is also the case for tenure systems such as those that were put forward for discussion regarding Sami fisheries in Norway. General lessons to be learned from the Norwegian and Sami experience will be highlighted below. A particular emphasis will be placed on the justice implications of different governance principles, such as those pertaining to fishing rights and tenure.

RIGHTS-BASED FISHERIES

Property rights

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

After a decade-long political process, commencing with the vessel quota system introduced in 1990 as a solution to the crisis in the cod fishery (cf. Jentoft, 1993), Norway now has a system where quotas follow the vessel when sold; as a consequence quotas are concentrated on fewer vessels. Vessel owners can receive their quotas for a 20–25 year time period after which they are likely to be renewed. Despite this arrangement, which many in Norway argue is tantamount to privatization, the Marine Resources Act of 2009[4] states that wild living marine resources ('*fish, marine mammals that spend part or all of their life cycle in the sea, plants and other marine organisms that live in the sea or on or under the seabed and that are not privately owned*') *'belong to Norwegian society as a whole'* (Section 2). The law leaves it to the Ministry to *'evaluate which types of management measures are necessary*

The Marine Resources Act of 2009 states that wild living marine resources belong to Norwegian society as a whole.

4 Full name: Act related to the management of wild living marine resources. The law came into force 1 January 2009.

to ensure sustainable management of wild living marine resources' and to appoint a Council for Regulatory Advice that can give its opinion before regulations are made. Section 19 authorizes the Ministry to establish marine protected areas, whereas Section 20 is about the *'prohibition on harvesting with trawls and other types of gear in certain areas, inside the territorial limit around the Norwegian mainland, except when trawling for kelp, shrimps or Norway lobster.'* The Ministry may also *'prohibit harvesting using other vessel or gear groups inside the baselines, inside lines drawn at a certain distance from the baselines or within specified positions.'* From these basic principles follows a range of regulations concerning quota management, access rights and decision-making, many of which are mandated by other laws. Their numerous details and intricacies will not be mentioned here.

Management rights

One issue, however, is of special relevance here. Marine spatial planning in Norway is mandated by the Plan and Building Act (2009) and is decentralized to the municipalities, which regulate activities in the sea out to one nautical mile beyond the baselines.[5] Responsibility and leadership rests with the municipal assembly. However, municipalities have not been equally as active in planning for their ocean territories, which in many instances is caused by the elevated level of real conflict pertaining to aquaculture that has made spatial zoning a matter of urgency (cf. Buanes and Jentoft, 2005). Many municipalities got their act together in a rush when the government announced that they would not be considered for new aquaculture licences unless they had developed a coastal zone management plan.

It is noteworthy as a prelude to the discussion below that the Act also states that the plan shall help to *'secure the natural foundation for Sami culture, economic activities and social life'* (paragraph 3–1). The law (paragraph 5–1)

5 This follows the low water line, but when the coastline is deeply indented or has fringing islands as is typical of Norway or is highly unstable, the baseline is drawn straight between outer points (http://webcache.googleusercontent.com/search?q=cache:3z040l7fN2kJ:en.wikipedia.org/wiki/United_Nations_Convention_on_the_Law_of_the_Sea+baseline+definition+fisheries&tcd=2&thl=no&tct=clnk&source=www.google.com).

stresses a number of 'good governance' principles such as transparency, consistency, and participation of relevant stakeholders. Thus, on concerns pertaining to the indigenous Sami, the Sami Parliament has both a right and a duty to participate and to provide information of relevance to the planning process. (The Sami Parliament has developed a guide on how to implement the Act in Sami dominated municipalities).

The Sami Parliament has both a right and a duty to participate and to provide information of relevance to the planning process

Human rights

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

Fishing rights that indigenous peoples such as the Sami are claiming also have a human rights foundation

In 2007, the UN General Assembly adopted a Declaration on the Rights of Indigenous Peoples. In the final Declaration, the language pertaining to rights to marine resources and sea space was watered down considerably, compared to what was stated in the draft Declaration that had been circulating in the years prior. Nevertheless, it still contains paragraphs that are relevant to small-scale fishers regardless of ethnic status. In the drafted text, paragraph 26 reads: *'Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora, fauna and other resources which they have traditionally owned, otherwise occupied, or used.'* In the wording that was finally approved, the direct reference to the ocean was removed. The same paragraph now reads: *'Indigenous peoples have the right to own, use, develop, and control the lands, territories and resources that they possess*

by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.'

The revised language may have been seen as a necessary compromise in order to save the Declaration. It proved to be a hard bargain, with the USA, Canada, Australia and New Zealand voting against it.[6] Nonetheless, the Declaration does contain important principles regarding indigenous peoples' rights to livelihoods, culture, natural resources and self-determination. Although the term fishing rights was deleted in the final text it might be assumed under 'territories and resources'. Notably, in the negotiations leading up to the Declaration, the letter *s* in *peoples* was a point of contention – because it defines the distinction between individual and collective rights. In the final text, the *s* stayed. The Declaration took decades of struggle by the international indigenous movement, within which the Sami of Nordic countries played an active role. In Norway, the Declaration has emboldened the Sami in raising claims pertaining to fishing rights and marine tenure. But it was the vessel quota system introduced in 1990 that first released the Sami fisheries initiative.

In Norway, the Declaration has emboldened the Sami in raising claims pertaining to fishing rights and marine tenure

SAMI FISHERIES RIGHTS

Fisheries and Sami culture

It was the newly established (1989) Sami Parliament that first raised the rights issue, when they realized that very few Sami fishers had qualified for an individual vessel quota, but were relegated to the far less attractive and much less secure competitive quota. At the end of the 1990s the inshore Sami cod fishery was very low, partly because of the intrusion of harp seals into the fjords of Finnmark in northern Norway, where their fishery for the most part takes place. Sami fisheries are typically small-scale, part-time, and seasonal, but a central element of a traditional, rural livelihood, which

6 Their arguments for rejecting the Declaration can be found at http://www.en-wikipedia.org/wiki/Declaration_on_the-Rights_of_Indigenous_Peoples

combines fishing with other natural resource extraction activities, such as small-scale farming and hunting (Jentoft, 1998). However marginal and as such unqualified for quotas, fishing is still important for maintaining Sami livelihoods. It is also integral to the material basis of Sami culture, which Norway has committed itself to securing in accordance with both domestic and international law on minority and civil rights. In fact, this assurance is written into the Norwegian Constitution. As paragraph 110a reads: *'It rests on state authorities to create the conditions needed for the Sami people to secure their language, their culture, and their societal life.'* Could it be, the Sami Parliament asked, that Norway's new fisheries quota system was not living up to its legal commitments?

Paragraph 110a of the Norwegian Constitution reads: 'It rests on state authorities to create the conditions needed for the Sami people to secure their language, their culture, and their societal life.'

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

Prominent law professor Carsten Smith considered in his report that Sami fisheries were in a precarious state - in a 'five to twelve situation' as he expressed it - that required immediate attention

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

A Sami fisheries tenure?

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

The question of Sami marine tenure was discussed in consultations between the Sami Parliament and the Justice Committee of the Norwegian Parliament prior to the 2005 Finnmark Act.[7] The Committee was of the opinion that the issue deserved more thorough scrutiny. To this end the government appointed a new commission with Sami and Norwegian representation in 2006, again with Carsten Smith in a prominent role as leader. Its mandate was to assess the marine inshore fisheries rights of Sami and other residents of Finnmark County, the northernmost and largest of the Norwegian counties and where most of the Sami reside. A further mandate was to examine fishing in a historical perspective, including its economic and cultural importance for the Finnmark population. Legal issues that Norway has ratified and incorporated into domestic law were to be discussed within the context of international

The government appointed a new commission with Sami and Norwegian representation in 2006 to assess the marine inshore fisheries rights of Sami and other residents of Finnmark county

7 The Finnmark Act transferred to a separate institution property rights and management authority over land, sweet water and natural resources, previously held by the state, with the main purpose of securing traditional Sami rights. (http://www.regjeringen.no/nb/dep/jd/tema/lovarbeid/finnmarksloven.html?id=1269).

law, in particular the International Labour Organization's Indigenous and Tribal People's Convention (ILO 169) and the UN's International Covenant on Civil and Political Rights, international experiences of relevance to the issue, and domestic customary rights. The commission was asked to suggest new law proposals as well as discuss how they would relate to existing fisheries management practice. The commission (hereafter called the Coastal Fishing Commission or Commission) published its report in 2008, after carrying out an extensive consultation process including many public meetings in the relevant communities.

Within the Sami community the report was well received, and perceived as a logical continuation of the legal process that led to the above mentioned Finnmark Act. In the Norwegian community, however, the sentiment was largely negative; in particular, the fishing industry responded with harsh criticism. The leader of the Norwegian Fisher Association observed: "It is unbelievable that so many highly educated people can sit down and think up so much nonsense."[8] He predicted a "full conflict in Norwegian fisheries if the Commission's proposals are accepted" and expressed hope that the Norwegian Parliament would reject it. What, then, did the Commission actually propose? Here is a brief summary.[9]

First, the Commission states that the Sami indeed have a historical right to fishing, and recommends that everyone who lives on the coast and in the fjords of Finnmark should be able to fish for their own consumption, to start a fishing career, and to secure an economically viable household livelihood. A quota should be free of charge, personal and non-tradable. Second, this right is supported by international law and legislation pertaining to indigenous peoples. This right exists regardless of fisheries management regulations, and coastal Sami fisheries should be the last to have their quotas cut when the fish harvest must be reduced (though considerations regarding sustainable harvest must be taken into account). Third, these rights should be formalized in terms of a separate law, which secures that those who live along a fjord

8 http://www.nrk.no/nyheter/distrikt/troms_og_finnmark/1.4858788

9 Steinar Pedersen provides a summary in English in Samudra, November Issue, 2008.

have stronger protection than others who might occasionally visit the fjord to fish. However, fishers from other regions should have access to fishing grounds in Finnmark outside the fjords. Fourth, regarding management, the Commission proposed a Finnmark Fishery Agency (similar to the one that manages inland resources in accordance with the Finnmark Act) that should have the authority and capacity to regulate the fishery out to four nautical miles from the baseline in so far as size of vessels, gear usage and quotas are concerned. The Commission argues that the state must therefore provide the resources (funding, quotas, and licences) necessary for the Agency to carry out this function.

Government response

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

So why has the Norwegian government been hesitant in embracing the proposals of the Coastal Fishing Commission? This can partly be explained by the fact that in the Norwegian context it is breaking new legal ground. As mentioned, there is hitherto no history of any system of marine tenure being formalized by law in the country. Neither is there any tradition distinguishing between fishers according to residence and ethnicity. The basic perception within legal circles and within government is that marine resources and territories are owned by no one in particular. But its dithering must also be explained by political opposition in Norwegian society to the Commission's proposal, not only among the general public but also among fishers of Norwegian ancestry and their main interest organization.

'Positive discrimination' along geographical and ethnic lines does not sit well with these groups. Judging from the public opinions expressed in numerous letters to newspapers in northern Norway and in Finnmark in particular, not all seem to agree that the Sami deserve special treatment to correct historical discrimination. Thus, the proposal of the Commission proved to be both legally and politically controversial. When the Commission chair, Professor Smith, presented the proposals in February 2008, the Coast and Fisheries Minister Helga Pedersen (who is herself a coastal Sami from Finnmark) repeated what her predecessor had stated before: that "in the government's opinion, there are no special Sami rights for these areas".[10] This was also the view expressed by the government lawyer in the hearing, who disputed both the idea of historical Sami fisheries rights and the Commission's claim pertaining to international law (Regjeringsadvokaten dated 9 March 2009). One of the lawyer's arguments was that ILO 169 does not mention ocean territories.

What has the Norwegian government offered as of May 2011? A Ministry press release on 9 May 2011,[11] following consultations with the Sami Parliament Council, announced that agreement had been reached on the following points:

a. The state commits itself to consult with the Sami Parliament on issues of particular concern to Sami fisheries.
b. All residents of Finnmark and in Sami areas in the counties of Troms and Nordland counties[12] will obtain a legal right and a quota to fish cod, saith and haddock, provided that they fish with vessels less than 11 metres.
c. A new paragraph in The Marine Resources Act will emphasise the need to consider Sami resource use and the impact on Sami local communities, when quotas are allocated.

10 http://nrk.no/nyheter/distrikt/troms_og_finnmark/1.6801164

11 http://www.regjeringen.no/nb/dep/fkd/pressesenter/pressemeldinger/2011/kystfiskeutvalget-for-finnmark-.html?id=642503

12 These are the counties to the south of Finnmark, which also have a coastal Sami population.

d. A committee for fjord fisheries in the three northern counties shall be established to serve as advisor to national authorities.
e. Vessels larger than 15 metres shall be banned inside the fjord line, although exceptions to this rule can be made.
f. Rights claims to fishing grounds that today can be raised in court can now be presented to the Finnmark commission.[13]

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

Views on settlement

Whether these points of consent are to be considered minor or major, positive or negative, is tin the eyes of the beholder. While Smith expressed "deep disappointment" regarding the government's response, those within the Sami community that have rejected the agreement have talked about "betrayal".[14] The editor of the newspaper Finnmarken invoked the ancient aphorism of Horace when she characterized the government's answer to the Commission's proposal as "the mountain that gave rise to a mouse." She concluded that "the Sami Parliament has lost on the legal issue". According to those who endorsed the agreement on the other hand, like some local mayors, perceptions are more positive. One mayor even characterized it as a "victory for the fjord population."[15]

13 The Finnmark Act of 2005 authorized the establishment of this commission to investigate existing rights to land in this county.

14 http://nrk.no/kanal/nrk_sapmi/1.6808030

15 http://troms.arbeiderparti.no/-/bulletin/show/649078_en-seier-for-fjordbefolkningen

The editor of the Sami newspaper *Ságat* recommended the Sami Parliament "to say a clear no to those parts of the agreement that do not acknowledge important parts of the Coast Fishery proposal."[16] On 17 May 2011 in the Permanent Forum on Indigenous Issues of the United Nations, the representative of the Nordic Sami Council – a Sami non-governmental organization (NGO) founded in 1956 – asked the Norwegian government to "withdraw its proposal to supplement the Marine Resources Act and instead accept the rights that Sami coastal communities have to their traditional fishing territories." This individual also warned the Nordic Sami Parliaments against compromising with their respective governments regarding fundament rights.[17] Professor Carsten Smith himself said that he had expected more: "If this is the final result, I assume that the Sami Parliament will continue working on the rights to fishing."[18]

The leader of the Norwegian Fisher Association has different expectations. He thinks that the agreement is "unproblematic"[19], and recommends the Sami Parliament to stop demanding local fisheries rights. He also expressed doubts that the Sami Parliament knows enough about Norwegian fisheries.[20] When the Sami Parliament discussed the negotiated settlement on 6 June 2011, the Norwegian Sami Association (Norske Samers Riksforbund) had already announced that they would vote against it, but they do not have the majority of delegates.[21] They also tried to convince other delegates to vote against it too. The Minister of Fisheries and Coastal Affairs suggested that it was important for the Sami Parliament to unite in this matter. However, the Parliament was split almost in half, with a slight majority supporting the deal. No one seemed to think that it was a good deal, but many saw it as a potentially viable second option.

16 http://www.sagat.no/sak&tarticle=28979

17 http://www.galdu.org/web/index.php?odas=5214&tgiella1=eng

18 http://www.nrk.no/kanal/nrk_sapmi/1.7627780

19 http://www.nrk.no/kanal/nrk_sapmi/1.7629303

20 http://www.nrk.no/kanal/nrk_sapmi/1.7562712

21 http://www.nsr.no/website.aspx?displayid=48958

Meanwhile those who spoke for the majority insisted that they had not given up on the historical rights issue, but that the deal was a step in the right direction. The President of the Sami Parliament (representing the Labour Party) who negotiated the settlement argued that it was the best they could get, and that he "had hit the wall" when raising the issue with the Ministry. The debate, which one could follow via the Internet, revealed strong emotions among the delegates. Many expressed disappointment, even bitterness. As well as disappointment at the Ministry's attitude, they also articulated frustration that the Sami Parliament could not reach a consensus on the matter. As one delegate stated "We cannot easily correct an injustice that we commit against our own people." There is widespread fear that by agreeing to the settlement, the Sami have weakened their position, even if the case should be brought before the United Nations. Still, the Vice-President of the Sami Parliament was optimistic: "In the struggle for coastal Sami rights, the government is at some stage deemed to lose." After the vote, a law professor specializing on Sami fisheries suggested that the issue is too important to leave it to a political process and that it should instead be settled in court.

DISCUSSION

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

Common pool vs. common property

Few would challenge the view that eco-system health is fundamental to sustainable fisheries livelihoods. Thus, the Coastal Fishing Commission does not dispute the need to curb fishing pressure, but it insists on the need to consider the consequences of property rights and tenure in terms of

justice. Judging from the current trend in Sami fisheries, there can be no doubt that they are on the losing side. Recent measures to compensate for this development by giving extra cod quotas (3 000 tonnes as part of the settlement described above) may have come too late and be too little in order to save Sami fisheries from extinction. It therefore seems increasingly difficult to sustain small-scale fishing as a "material basis for Sami culture" (Smith, 1990).

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

Without formalizing fishing tenure rights and operationalizing Sami self-determination in fisheries via co-management arrangements revitalizing Sami fisheries will be more difficult

Property rights such as tenure have symbolic value. For the Sami they are seen as integral to Sami indigenous self-determination, which for them is also a value in itself. It is part of the global indigenous agenda, as can be seen from the UN Declaration on the Rights of Indigenous Peoples. However, it seems to be very difficult to get the ethnic Norwegian fishing population – and even some within the Sami community – active in the public debate and acknowledging this aspect. The Norwegian government shares this reluctance. Neither does it agree that ILO 169, or the UN Declaration on the Rights of Indigenous Peoples, or other international law such as Article 27 of the International Covenant on Civil and Political Rights, applies to Sami fisheries rights.

Nevertheless, the Finnmark Act pertaining to Sami land tenure was enacted in 2005 and is now in the process of being implemented, albeit with some regional and local resistance. In so far as fisheries resources and marine tenure

are concerned, there is more resistance. One reason is the well-established principle that marine resources and territory are no one's property. In contrast, inland Finnmark was state property that was historically colonized (Minde, 2003). But the situation also differs in the sense that Sami reindeer pastoralists, the major *inland* resource users, do not have to confront a strong competitor. Compare this group to Sami fisheries, who must compete with a powerful, well-organized fishing industry, fully determined to defend its interests, principles and privileges. The Norwegian Fisher Association was never very attentive to Sami fisheries' concerns to begin with (Eythorsson, 2003). With the quota system and the privatization of fishing rights, it has become less of a civil society organization defending the interests of the coastal population and more an interest organization bent on defending the benefits of quota holders (Mikalsen *et al.*, 2007). If there was ever a concern for Sami interests within that organization, there is less of this in the present situation.

The proposals of the Coastal Fisheries Commission represent a different governance paradigm from the current one. If implemented they may take both the Sami fisheries and the Norwegian fisheries governance system in a different direction: away from a centralized, corporatist system towards a regionalized, co-management model. No wonder the Norwegian Fisher Association is determined to block it and the government is rather unhappy with the Commission's proposals. The idea of a Sami marine tenure in Finnmark is easily transferable to Sami fisheries in other parts of Norway – particularly Troms and Nordland, both major fisheries counties – and also to Norwegian fisheries as whole. If the Sami communities can claim a common property right resulting from age-old usage, so can other ethnic communities. In Norway it does not take too many decades to assert historical rights: about 50 or so years.

The Sami marine claims, if they are accepted and implemented, will therefore create a precedent that might disrupt the existing governance system. In 1993, the state won a court case where the plaintiffs (two fishers) argued that the Lofoten cod fishery was based on a historical common property right, while the state defended the common pool principle. The sense of relief within the Norwegian Fisher Association at this victory was palpable. It is fair to say that when the Association disagrees with the Coastal Fishing Commission, it is at least being consistent in its approach.

Whose justice?

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

With pressure coming from the Sami Parliament – as well as external pressure coming from the UN Declaration of the Rights of Indigenous Peoples, the UN Permanent Forum, and ILO 169 – the pressure is on the Norwegian government to deliver on its commitments. In 2010, the Special Rapporteur to the UN Human Rights Council, Dr James Anaya, recommended that Norway "finalize the process of clarifying Sami land and resource rights" and that "Norway give close consideration to the Coastal Fishing Commission and take effective measures to secure fishing rights for the Sami coastal population."[22] The Norwegian government apparently thinks that those commitments are now sufficiently fulfilled. But despite their internal divide, a great majority within the Sami Parliament does not seem to agree with this and thinks that there is still a way to go until the government has fulfilled its commitments according to international and domestic law.

The Norwegian Fisher Association as an interest organization is, on the other hand, largely free of such political pressure, and that includes from within its own ranks. Within the Association the power of small-scale fishers

22 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people to the UN Human Rights Council, Eighteenth Session, Agenda item 3. 12 January 2011.

in general and the Sami in particular is weak relative to large-scale vessel owners. Thus, the Association can exert its own pressure on the government to dismiss the Coastal Fishing Commission's proposal without meeting much resistance among its own members.

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

Rather than having to fundamentally restructure the management system, the government prefers a marginal adjustment by adding some new language to the current legal framework to accommodate Sami rights

From a justice perspective, the open access, common pool institution is certainly not without merits. Common property involves exclusion to a degree that common pool does not. Even if the current management system and the privatization process have eroded freedom of access in the Norwegian fishery, the common pool principle seems legally intact and still has considerable symbolic value, as can also be seen in the dispute regarding individually transferable quotas (Hersoug, 2005). The boundaries that follow the common property regime can be anticipated to reduce this freedom, which is necessary for a mobile fleet that is used to operating along the entire Norwegian coasts and fjords, pursuing stocks that are migrating. Not only will such mobility become more complicated, but when people fence themselves in they also risk fencing themselves out. With management rules specific to a local area, the management system as a whole gets more complex. It requires that fishers become informed about the different rules and regulations that apply where they happen to fish. Thus they run the risk of breaking rules that they do not know exist (Jentoft and Mikalsen, 2001). The criticism by the Norwegian Fisher Association of the proposals advanced by the Coastal Fishing Commission therefore makes sense from a practical fishing point of view, e.g. mobility.

The Association also criticizes the proposals from a fairness perspective. Positive discrimination is still discrimination, and for most people this concept

has negative connotations. The Commission is well aware of this, which is also why it does not want its law proposal to discriminate between Sami and non-Sami in Finnmark. Instead, it wants the same rights for both groups while making residence the distinguishing criterion. Given that Sami, Norwegian and Finnish people live and fish together, and that many have mixed heritage, a distinction on ethnic lines would also not be practical. But even if this selection principle contributes to sweeten the pill for Finnmark residents, it does not necessarily have a similar effect on people outside the county. In contrast to the Sami position on fisheries tenure, for them and for the Norwegian Fisher Association, the issue is not about 'indigeneity' (Guenther, 2006) but territoriality and distributional justice.

CONCLUSION

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

However, fisheries and coastal governance rarely commence with a deliberation on what constitutes social justice, what meta-principles should be central, what is negotiable and non-negotiable, and what are the social and cultural thresholds (Kooiman and Jentoft, 2009). The current political process pertaining to the Coastal Fishing Commission proposal is no exception to this rule. Here, justice principles do play an important role, albeit a very implicit one.

With a few exceptions (Coward *et al.*, 2000; Hauck, 2008; Allison *et al.*, 2012; Gray, 1998; and Hernes *et al.*, 2005), fisheries scientists tend to concentrate on the instruments of management and rarely reflect on their justice implications. Marginalized coastal peoples, be they indigenous or non-indigenous, would benefit from a shift in focus. For them, common property rights and tenure are human rights and thus about social justice

With a few exemptions, fisheries scientists tend to concentrate on the instruments of management and rarely reflect on their justice implications

and therefore law. Still, it cannot be denied that community tenure may also be a useful management instrument, because it encourages collective responsibility and environmental stewardship. By contrast, common pool rights, open access and central government responsibility do not do this to the same degree.

Importantly, social justice does not relate solely to distributive outcomes. It is also an issue that relates to institutions and their governing principles, processes and procedures (Sen, 2009). Miller accordingly argues that justice "must include aspects of social relations that do not fall readily under the rubric of distribution" (1999:14–15). Procedural justice, for instance, pertains to representation, decision-making and the right to be involved. Governing institutions and procedures must therefore be subject to similar scrutiny as property rights and distributional outcomes. Are minority and indigenous stakeholders recognized? Are their voices being heard? Among the measures that the Coastal Sami Commission is proposing is a mechanism that will strengthen the Sami authority and voice in fisheries governance. Here, the Commission is basically proposing the same solution that is now in place for the management of land and terrestrial resources in Finnmark. Notably, this is a precedent that does not seem to carry over to the fisheries, for reasons that have much to do with the distribution of power internally within the Sami community as well as externally, relative to well-organized Norwegian fisheries interests.

When different justice principles collide, some compromise must be reached. The Coastal Fishing Commission has proposals that aim to facilitate such a compromise, but there is some distance to go before consensus is reached. This requires a different political process than has hitherto been the case, one that is more interactive, more communicative, and less antagonistic. If not, then whatever the outcome may be, it is likely to be disputed by the losing party and the conflict is not likely to be resolved any time soon.

EPILOGUE

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

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EMERGING PROPOSALS FOR TENURE GOVERNANCE IN SMALL-SCALE FISHERIES IN SOUTH AFRICA

NOUVELLES PROPOSITIONS DE GOUVERNANCE FONCIÈRE DANS LE SECTEUR DE LA PÊCHE ARTISANALE EN AFRIQUE DU SUD

NUEVAS PROPUESTAS PARA LA GOBERNANZA DE LA TENENCIA EN LAS PESQUERÍAS EN PEQUEÑA ESCALA EN SUDÁFRICA

ABSTRACT

CUSTOMARY FISHING PRACTICES

LIVING CUSTOMARY LAW

GOOD GOVERNANCE

The advent of democracy in in 1994 catalysed a radical law reform process resulting in new forms of governance that sought to address past injustices. However, despite a progressive Constitution that requires the recognition of a range of socio-economic and environmental rights, and the recognition of living customary law, the small-scale fisheries sector continues to be marginalized; meanwhile decisions regarding rights of access to resources, and the use of these, remain centralized.
A new policy was gazetted in June 2012 but has yet to be given effect through implementation. During recent policy deliberation processes, small-scale fishers have referred to customary practices and taken

RÉSUMÉ

PRATIQUES DE PÊCHE COUTUMIER

DROIT COUTUMIER INFORMEL

BONNE GOUVERNANCE

L'avènement de la démocratie en Afrique du Sud en 1994 a déclenché un processus radical de réforme des régimes fonciers, visant à réparer les injustices passées. Cependant, malgré l'existence d'une constitution progressiste prônant la reconnaissance de toute une série de droits socioéconomiques et environnementaux, la pêche artisanale continue à être marginalisée et les décisions relatives aux droits d'accès et à l'utilisation des ressources restent centralisées. Une nouvelle politique a été promulguée en juin 2012 mais elle n'a pas encore été mise en œuvre. Les débats politiques récents ont fourni aux pêcheurs l'occasion de faire connaitre leurs propositions pour un nouveau système de gouvernance

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LEY CONSUETUDINARIA VIVA

BUENA GOBERNANZA

El advenimiento de la democracia en Sudáfrica en 1994 impulsó un proceso de reforma radical que desembocó en nuevas formas de gobernanza con las cuales se buscó abordar el problema de las injusticias que habían sido cometidas en el pasado. Sin embargo, pese al establecimiento progresivo de una Constitución que exige dar reconocimiento a un conjunto de derechos socioeconómicos y medioambientales y a la «ley consuetudinaria viva», el sector de la pesca en pequeña escala sigue estando marginado; mientras tanto, las decisiones respecto de los derechos de acceso a los recursos y su uso se mantienen centralizadas.
En junio de 2012, una nueva política pesquera fue publicada en la gaceta oficial del Estado, pero esta política

inspiration from international policy instruments in articulating their vision for a new system of fisheries governance. This paper outlines the processes that have shaped tenure relations in the past and assesses the debates on 'good governance' that are influencing the emerging policy framework in South Africa. The authors argue that, if the twin objectives of social equity and environmental sustainability are to be achieved, constitutional recognition of 'living customary law' is central to fisheries governance. Drawing on insights from local case studies, the authors suggest that an understanding and utilization of the 'emancipatory potential' of living customary law can guide and enhance the interpretation of new governance proposals outlined in the small-scale fisheries policy. It is suggested that this could be used to facilitate forms of tenure governance that are locally appropriate, legitimate and sustainable.

de la pêche, celui-ci devant à la fois s'appuyer sur leurs pratiques coutumières tout en s'inscrivant dans les principes des instruments politiques internationaux.
Ce document rappelle les processus qui ont façonné les relations foncières au fil du temps et mesure l'importance du débat sur la 'bonne gouvernance' dans l'élaboration des nouveaux cadres politiques en Afrique du Sud. Les auteurs estiment qu'une reconnaissance constitutionnelle du « droit coutumier informel » est indispensable pour réaliser le double objectif d'équité sociale et de durabilité environnementale en matière de gouvernance de la pêche. Les études de cas locales montrent à l'évidence le rôle que peut jouer le « potentiel d'émancipation » du droit coutumier informel pour bâtir une nouvelle gouvernance de la pêche artisanale. Les enseignements tirés de ces études de cas pourraient être mis à profit pour créer des régimes fonciers localement appropriés, légitimes et durables.

aún no ha entrado en vigor. Durante la celebración de las recientes deliberaciones, los pequeños pescadores se han referido a las prácticas consuetudinarias y se han inspirado en instrumentos internacionales para articular una argumentación con vistas a la creación de un nuevo sistema de gobernanza del sector pesquero.
Este artículo bosqueja los procesos que han configurado las relaciones de tenencia en el pasado y aborda los debates sobre la buena gobernanza que están influenciando la construcción del marco de políticas en Sudáfrica. Los autores sostienen que para lograr los objetivos hermanados de la equidad social y de la sostenibilidad ambiental, es necesario dar reconocimiento a la ley consuetudinaria viva como elemento central de la gobernanza pesquera. Cimentándose en los estudios de caso locales, ellos sugieren que la comprensión y utilización del «potencial emancipador» de esta ley pueden guiar y mejorar la interpretación de las nuevas propuestas de gobernanza recogidas en la política que reglamenta la pesca en pequeña escala; y proponen que esto facilitaría la creación de modalidades de gobernanza localmente idóneas, legítimas y sostenibles.

INTRODUCTION

The advent of democracy in South Africa in 1994 precipitated a law reform process resulting in new forms of governance that sought to address past injustices and give voice to marginalized communities. However, despite a progressive constitution that requires the protection and respect of a range of socio-economic and environmental rights, and the recognition of customary law, the traditional small-scale fisheries sector in this country continues to be marginalized. The constellation of power relations arising from the legacy of colonial and apartheid fisheries and conservation have shaped, and continue to shape, the governance of marine resources in the country. Decisions regarding rights of access, use of resources and institutions for management of marine resources remain centralized, and a powerful, market-based ideology influences the governing system in favour of commercial fishing interests (Van Sittert *et al.*, 2006).

Increasingly, small-scale fishing communities[2] in South Africa have protested against this system of fisheries governance (Masifundise, 2003; Jaffer and Sunde, 2006). These fishers argue that past and current policy regimes failed to acknowledge their pre-existing tenure rights and practices, thus undermining the basis of socio-ecological relations in coastal communities. Despite this, local customary forms of tenure persist and it is increasingly apparent that a de facto, plural system of fisheries governance is in place. South Africa's fisheries legislation overlaps with systems of 'living' customary law along the entire coastline. 'Living customary law' is the term used by the Constitutional Court in South Africa to refer to customary law that is "actually observed by the people who created it", as opposed to 'official' customary law that is the body of rules created by the State and legal profession. (Bennett 2008: 138)[3].

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(Bennett 2008: 138)

2 In the context of South Africa 'small-scale fisheries' includes a continuum of fishers from artisanal, small-scale commercial fishers to those fishing as a means of subsistence.

3 Although the term 'living customary law' gives the impression of a singular, unified legal system being the referent, this term actually points to a conglomerate of varying, localized systems of law observed by numerous communities. (Mnisi, 2007).

Small-scale fishers have successfully challenged the existing fisheries regime, such that in 2007 the Equality Court of South Africa ordered the Minister to develop a new policy that would accommodate the 'socio-economic' rights of these fishers[4]. A new policy has recently been gazetted (DAFF, 2012) but has yet to be implemented. During the policy deliberation processes, small-scale fishers have referred to customary practices in demanding recognition of their rights, and have taken inspiration from international policy instruments in articulating their vision for a new system of fisheries governance (Masifundise, 2010).

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This paper assesses the debates on what constitutes 'good governance' that are influencing the emerging policy framework in South Africa. The authors argue that, if the objectives of social equity and environmental sustainability are to be achieved, the constitutional recognition of 'living customary law' is central to governance of tenure. The concept of 'tenure' has often been restricted to discussions on the rules relating to the access, use and management of land and land-based natural resources. Increasingly, however, its applicability to the relations and practices governing certain aspects of marine resource use has been recognized (Johannes, 1992; Aswani, 2005; Cinner and Aswani, 2007; FAO, 2012).

The constitutional recognition of 'living customary law' is central to governance of tenure

The concepts used in this paper draw on the FAO working definition of 'tenure' as rules invented by societies to regulate behaviour. The rules of tenure define how rights to land and other natural resources are assigned within societies. They define how access is granted to rights to use, control and transfer these resources, as well as associated responsibilities and restraints. In simple terms, tenure systems determine who can use what resources, for how long, and under what conditions (FAO, 2011:1).

In this paper the concept of customary tenure systems follows the interpretation of the South African Constitutional Court as regards 'living customary law'. This is a system that does not rely on tradition for its definition but rather sees tradition as one aspect of the community's current practice. Living customary law has evolved and continues to evolve as communities

4 *Kenneth George v. the Minister.* 2007, EC 1/05.

adapt to the changing circumstances of scarce resources, new state imposed management regimes, new market pressures and the changing needs of the community. While a narrow interpretation of the Constitution provides an imperative to recognize the rights derived from customary law, the authors argue that the recognition of living customary law should extend further, to give substance and content to the good tenure governance of small-scale fishing communities. Drawing on fieldwork conducted in three customary fishing communities during the period November 2010 to June 2012 (Sunde, 2010a; Sunde, in preparation 2012), the authors suggest that the expressions of living customary law evident in these and other fishing communities highlight the potential that customary tenure systems have to give effect to a commitment to good governance. The importance of ensuring that these systems are understood and that they then inform management processes is also emphasized.

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BACKGROUND AND HISTORICAL OVERVIEW OF MARINE GOVERNANCE SYSTEMS IN SOUTH AFRICA

The systems of fisheries tenure that have developed along the South African coastline differ considerably from region to region, on account of the different histories of the peoples of the region and the distinctive ways in which their customary legal systems interfaced with colonial and apartheid governance. There is archaeological evidence of pre-historic shore-based harvesting and consumption of shellfish along the entire coastline (Clark *et al.*, 2002) and pre-colonial consumption of certain fish species in several regions (Deacon and Deacon, 1999). However, very little is known of the customary tenure systems of these pre-colonial coastal dwellers.

Since the 1600s, an artisanal, boat-based small-scale fishery has emerged along the western seaboard. The system was shaped by the influences of Malay slaves brought to the Cape, European sailors, and the indigenous Khoisan peoples who had extensive knowledge of the coastline. Responding to the demand for fish from the Dutch controlled station at the Cape, fishing

communities sprung up along the Western Cape coast (Van Sittert, 1992; Dennis, 2010). As early as 1652, these fishing settlements were soon subject to the fisheries governance arrangements of the Dutch, when van Riebeeck announced that "*no fishing and no thawing of nets therefore, shall be allowed except by consent of the Commander after having consulted with the Council*" (Thompson and Wardlaw *in* Dennis, 2010:18).

Notwithstanding this early attempt at regulation, it appears that local customary rules of access and use soon evolved in response to the contours of local fishing practices, closely entwined with the net of social relations that spanned these early settlements. By the late 1800s, fishing had become an established way of life for many coastal dwellers. From archival work conducted on the fisheries (Van Sittert, 1992), it can be ascertained that a complex array of marine tenure arrangements emerged in the coastal and estuarine waters of the Cape. In contrast to the Cape, the majority of the coastal communities along the eastern seaboard[5] of the country continued to access and use marine resources in accordance with the African customary legal systems that predominated in these parts of the country (Hammond-Tooke, 1974; Hunter, 1936). By the 1890s, the provincial authorities had begun to issue various fisheries proclamations that shaped access rights, restricting the type and quantity of species harvested and the gear used. Many customary practices remained largely unaffected and hence a de facto plural fisheries governance system gradually emerged, in part because of the difficulty of enforcing these regulations in communities far from the main towns.

Taking into account systems of customary law, rules relating to the use of resources and access to these resources were not explicitly recognized in the various fisheries statutes of this period, but neither were the rules extinguished. Reference was made to customary fishing rights in the case of *Van Breda and Others v. Jacobs* in the Appeal Court in 1921. The judge recognized that both parties to the action had operated within a prior fishing custom that regulated the rights of the parties in terms of recognized fishing grounds and practices. Archival evidence suggests that the provincial fishery authority in the Cape respected the Van Breda judgment: its confirmation

5 The term 'eastern seaboard' refers to the section of the coast in Figure 1 covering the now established Eastern Cape and KwaZulu-Natal Provinces. The term 'western seaboard' refers to the coastline of the Northern and Western Cape provinces as indicated in Figure 1.

of the existence of fishing grounds and customary practices informed the subsequent approach to the management of net fishing up and down the coast for several decades (Sunde, 2010b; 2012).

From the mid-1930s, the authority to manage marine fisheries shifted from the provinces to the State, as the State attempted to gain a measure of control over the lucrative and rapidly expanding commercial fishing sector located along the western seaboard (Van Sittert, 1992). Fisheries management has remained a national mandate since this time, with very little devolution of responsibility.

TENURE SYSTEMS: PAST AND PRESENT

Systems of tenure in the Western and Northern Cape

At the end of the 19th century, the Union Government of South Africa found a very diverse set of fishing practices in the small-scale fisheries. There was a growing artisanal, largely boat-based sector on the western seaboard, and a predominantly shore-based subsistence sector along the remainder of the coast. In many instances these operated within well-established customary African legal systems, with a set of entitlements and layered decision-making structures that differed vastly from statutory ideas about the origins of rights and authority.

In the Western Cape, distinctive tenure patterns and rules emerged, as use of and competition over marine resources intensified with the growing commercialization of the fisheries. Local fishing communities defended their traditional fishing grounds against newcomers, and in so doing gave expression to a range of customs regarding territory, entry and gear. Inshore fishers in Table Bay, Mossel Bay and Kalk Bay (*see* Figure 1) all asserted their tenure rights, and fought to ban the new steam trawlers arriving at the Cape after 1890 from fishing in their waters (Van Sittert, 1992: 79).

Clashes between local beach-seine net fishers at St Helena Bay and the Italian immigrant set net fishers have been well documented from archival material by Van Sittert (1992). An interpretation of archival material on the negotiations between different groups of fishers in Langebaan in the 1920s, and between these fishers and the provincial fisheries authority, suggests that

Figure 1
Country map of South Africa showing the four coastal provinces and Marine Protected Areas (MPAs)

a collective system of rules appears to have been established on the basis of a combination of the fishers' use of particular nets, their traditional fishing grounds and their knowledge of the resource (Sunde, 2012).

A series of state interventions in the 1940s aimed to industrialize the inshore fisheries and increase the competitiveness of white fishers in the market by facilitating access to finance, infrastructure and boats (Van Sittert, 2002). Simultaneously, a number of regulations and prohibitions placed increasing restrictions on subsistence and artisanal fishers in the Western and Northern Cape, and brought them under the control of the industrial sector, eroding the customary rights of access and use of these local fishers.

The industrial sector came to dominate the fisheries in these two provinces, pushing the local practices of these predominantly black fishing communities to the margins and rendering them near invisible to the formal legal system.

Living customary law

In the Eastern Cape and KwaZulu Natal, large sections of the coastline were designated part of the apartheid 'Bantustans', the areas reserved for residence of African people during Apartheid. These areas were governed by tribal authorities and supervised by government commissioners. In these two provinces, however, where customary tenure systems predominated, fishing rights derived from these systems were not recognized (Sowman, *et al.*, 2006). Many fishers continued to harvest according to these customary practices, running the risk of being caught (Harris *et al.*, 2007). In these systems of living customary law, tenurial rights relevant to the use of marine resources appear to have been inextricably linked to relations of land tenure which provided the social and institutional framework for marine resource tenure relations, rather than the existence of distinctive fisheries institutions and processes (Sunde, 2011a)[6]. As such, rights to access and use these resources were embedded in local social relations that varied greatly along the coastline. Within this context, rights emerged through local systems of shared access and use within membership of specific groups. These rights were a function of one's membership of and status within the group, and as such were governed by the layered mechanisms for decision-making and accountability that mirrored the layered nature of the rights (Okoth-Ogendo, 2008).

In the customary systems that have generally prevailed (albeit in slowly evolving forms) several key characteristics identified by anthropologists and land tenure experts also apply to fisheries (Cousins, 2008; Bennett, 2008; Okoth-Ogendo, 2008), of which the authors list five here.

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6 The history of these varied African customary systems of marine resource use has not been systematically documented in South Africa to date. So to a large extent, understanding these systems is dependent on the rich literature from the land sector, which explains the features of customary tenure within living customary law (Smith and Wicomb 2010, 2010b; Claassens and Mnisi, 2009; Claassens and Cousins, 2008).

Tenure rights to access and use of resources are a function of membership and the relations within the group

Tenure relations are often kinship-based but in some instances are derived from other social ties, affiliations to a group and its political authority, or other transactions of various kinds (Cousins, 2008: 111; 129). For example in Dwesa-Cwebe, the right to harvest mussels from the inter-tidal zone is based primarily – but not solely – on membership of a locality, which in turn is defined through land tenure in this locality. The social boundaries of these groups are not fixed and tenure rights may change as they adapt to changing circumstances. There is evidence for this in Kosi Bay, where the proximity to the Mozambique border has allowed the system to adapt sufficiently to grant tenure rights to the Mozambicans, who are often from similar linguistic communities (Sunde, 2010a).

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Rights are shared and relational

Cousins (2008: 129; 133) notes that rights are embedded in a range of social relationships and units including households, kinship networks and various levels of 'community'. The relevant social identities are multiple and overlapping, and therefore nested or layered in character. While the male head of household within Kosi Bay may be considered the 'owner' of a fish trap, and as such has 'individual' rights, these rights are nested within his household, which in turn is nested in a distinctive clan system upon which the 12 villages surrounding the lake have developed (Sunde, 2010a). In this way, tenure is characterized as being simultaneously communal and individual in character and may have both individual and communal features. Common property rights and different forms of individual property rights are both accommodated in a customary system. Bennett has observed that rights can be seen as 'a system of complementary interests held simultaneously' (Bennett, 2008: 381). This relational component provides a framework for local, horizontal accountability between users that is not present in current statutory systems of individual rights.

The system of administering rights within living customary systems is nested within layered communal systems

In many traditional authority areas, rights are administered by a sub-headman acting at local village level. He is, however, advised by a group of elders from the village and his authority to make decisions is entirely derived from this group of elders. For example, interviews with residents in Ntubeni, Dwesa-Cwebe reveal that the Chief, known as the *Nkosi,* is merely informed of developments and actions and his permission is not specifically sought. In Kosi Bay, tenure rights have historically been derived from membership of a particular clan, living adjacent to the lake. This clan is part of the larger Tembe-Tsonga people, living under the authority of the Tembe chief. Rights to access and use the fishery resources of the lake are derived from the authority of the *Nkosi,* which is devolved to the local *Induna* or headman.

In some instances, the administration of rights is located at the level of the users. For example, women harvesting mussels at Dwesa-Cwebe report that they have a system of rules among themselves that relate to how they conduct themselves when they go to harvest mussels. This layer of administration is further embedded in the local institutions of tenure that exist at village level, where membership derives from a combination of kinship and other social ties. The sub-headman and a group of household heads have authority at this level of administration. It would appear, however, that it is rare for the administration of mussel harvesting, which is a gender-specific role, to require intervention at this level. Interviews with female harvesters indicate that they have not needed explicit rules relating to sanctions, nor have they had to enforce any rules relating to entry and exit, as they have not perceived any internal threats to their tenure. Threats to their tenure have come from external sources: the imposition of a no-take MPA along the coastline where they have traditionally harvested, and their subsequent restriction to a smaller area for harvesting (personal communications of female Ntubeni harvesters, 2011).

Dispute resolution processes are embedded in local layers of accountability

In systems of living customary law, disputes are resolved at different levels depending on the level at which the right is vested and the extent to which the dispute impacts other levels. Claassens has noted that, *'in most areas decisions concerning the deprivation of rights must first be debated at various levels, for example at clan and village level, and finally at a* pitso*, or general meeting of the entire community'* (Claassens, 2011:190). The layered nature of rights gives rise to a similarly layered system of institutions for accountability and dispute resolution. *'Leaders are forced to take into account the views and deliberations of other levels of authority which provide people with alternative forums in which to express their views. The power of different levels in the traditional hierarchy expands and contracts depending on the confidence people have in leaders at the different levels'* (Claassens, 2011: 190).

Rights and their administration are evolving, not fixed

In these living customary systems, the community or group does not derive rules from external regulatory frameworks; rather, the rules emerge from the cultural and social context. Differing as they do from statutory and common law legal systems, the rules are not separate from the social, economic and political spheres of the community. They were and are all part of the community's system of engaging with and adapting to their immediate life circumstances. The devolution of administration of rights to the level of primary users appears to facilitate flexibility and enhance people's ability to adapt to changing circumstances. For example, the local headmen and male owners of the Kosi Fish traps have granted permission for a young widow to use her deceased husband's fish trap, contrary to tradition. They are aware of the fact that her son is too young to take over ownership and use of the trap, but the household is in dire need of food. A local leader acknowledged that this shift in the gender bias of the local rules was unusual, but was seen as legitimate by the other male trap owners: "we know the needs of this household" (personal communication of a Kosi Bay fisher, 2010a).

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PRIVATIZATION, LEGAL REFORMS AND THE CONSOLIDATION OF INDIVIDUAL TENURE

In the 1930s the State introduced the individual quota system as a mechanism for allocating access rights to high value species, predominantly located on the western seaboard. This enabled the steady privatization of the marine commons as a select group of commercial companies gained control over the most lucrative resources through this quota system (Van Sittert, 2002). Significantly, this statutory system ushered in a new approach to governance that was no longer directly coupled to local systems of decision-making and accountability. In contrast to the dynamic nature of living customary law systems, the state imposed fixed rules and regulations upon the fishers that reflected the alliance between the State and white capital during the Apartheid years. This primarily impacted the small-scale, artisanal fishing communities in the Western and Northern Cape, while some shore-based customary fishing continued in the other two coastal provinces.

This statutory system ushered in a new approach to governance that was no longer directly coupled to local systems of decision-making and accountability

With the election of a democratic government in 1994 there were high hopes that the legal reforms of the new state would lead to a new paradigm for governing marine resources. In 1998, the Marine Living Resources Act (MLRA) was promulgated to protect and manage living marine resources. Following the introduction of the MLRA, the Chief Directorate that was responsible for fisheries management at the time – then the Department of Environmental Affairs and Tourism (DEAT), now the Department of Agriculture, Forestry and Fisheries (DAFF) – introduced a series of different policy mechanisms to allocate tenure rights in both the inshore and off-shore fisheries. A system for individual permits was introduced in 1999 for the subsistence sector, followed by a new process of rights allocations in which the state allocated 'limited commercial' rights for four years to selected individuals and registered associations.

The rights application process was very complex and discriminated against fishers with low literacy levels. Furthermore, the verification process was regarded as illegitimate by the fishers, and the appeal processes were complex and costly (Masifundise, 2005). Many traditional small-scale

fishers were therefore excluded from gaining access to resources, or to what they considered to be their traditional fishing grounds. In 2006 the department again allocated individual, commercial rights, de-coupled from any community-based context of decision-making or accountability (DEAT, 2006). In response to the failure of the new policy to accommodate their rights, the fishers of the Western and Northern Cape embarked on a series of actions to advocate for a more equitable policy (Jaffer and Sunde, 2006; Isaacs, 2006). A group of traditional fishers embarked on legal action against the minister responsible for fisheries management (*K. George and others vs. the Minister of Environmental Affairs and Tourism,* 2005).[7]

In May 2007, an order of the Equality Court[8] required the Minister responsible for fisheries to develop a policy that would address the needs of this hitherto excluded group and provide 'interim relief' through access to marine resources until such time as the policy was finalized (*Kenneth George vs. the Minister*, EC1/05). A National Task Team (NTT) was appointed in 2007 and included representatives from government and fisher communities in all four provinces, as well as researchers, Non-Governmental Organizations (NGOs) and Community Based Organizations (CBOs). Its brief was to develop a small-scale fisheries policy for South Africa that would address the socio-economic rights of this fisher group and ensure equitable access to marine resources. In the meantime, with support from NGOs and CBOs, fishers across the country were meeting and developing proposals for this new policy. A key issue emanating from this series of meetings was the demand from fishers for an alternative approach to the governance of tenure, one that resonated as a 'community-based approach' that recognized their pre-existing customary rights (Masifundise, 2010).

7 Throughout this period annual individual exemption permits continued to be allocated in the other two provinces.

8 The Equality Court denotes a sitting of the High Court of South Africa that hears matters argued in terms of the 'Promotion of Equality and Prevention of Discrimination Act' – the statute that gives effect to the equality clause of the Constitution. The Constitution provides for the creation of the Act as an expression of the central importance of equality to the South African Constitution.

TOWARDS AN ALTERNATIVE APPROACH TO GOVERNANCE OF TENURE

The call for a new approach to governance has been based on extensive discussions with fishers at local level on what would constitute 'good governance' of small-scale fisheries (Masifundise, 2010). These debates and discussions have been influenced by the knowledge that the tenurial landscape in South Africa today is a confused mix of community systems that have suffered to a greater or lesser degree from the imposition of conflicting regulatory systems, resulting in a de facto system of legal pluralism. Notions of what constitutes 'governance' and what might be 'good' are highly contested in this context in which, communities have little trust in externally imposed measures that claim to be 'equitable, 'sustainable', 'participatory' and 'accountable', because of their past experiences of discrimination. This is the context within which South African fishers have advocated for a recognition of communities as responsible for their own systems of governance.

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This call resonates with much of the theoretical work undertaken over the past two decades on governance of small-scale fisheries. Many studies have explored the characteristics of marine resource use and management systems, in order to assess where these appear to contribute to more sustainable and equitable outcomes (Ostrom, 1990; Berkes *et al.*, 2003; Aswani, 2005; Cinner and Aswani, 2007; McConney and Charles, 2009; Sowman, 2011). This body of work has highlighted the importance of the nature of social organization at local level in shaping sustainability outcomes (Ostrom, 1990, 2008; Berkes *et al.*, 2003; Armitage, 2008), and the 'design principles' that increase resilience and adaptability to environmental change, in turn strengthening the potential for increased efficiency and equity (Kooiman *et al.*, 2005; Sowman, 2011).

The authors argue that a recasting of the demand for recognition of fishing rights within the context of living customary law points to alternative paths for the governance of tenure, in those communities that have customary systems. The development of a new policy provides an opportunity to draw on the 'emancipatory potential' (Smith and Wicomb, 2010a) of living customary law to create a new form of tenurial governance, one that is radically different

to the past and current system in both content and process.[9] This potential of living customary law is evident in locally grounded and articulated customary tenure systems. These systems develop through the dynamic expression of context-specific interactions between social, ecological and economic relations, regulated through a range of local level accountability mechanisms.

What would 'recognition of rights' mean for the governance of tenure within this legal context? First, an interpretation of the principle of 'recognition of rights' would require the recognition of pre-existing rights in terms of customary law. This would include recognition that many communities had access to and control over near-shore marine resources through collective forms of tenure, and that the origin of these rights, and the community's right to their culture, is inextricably linked to their systems of customary law. Internationally, the struggles of indigenous peoples and customary communities have helped to deepen the interpretations of normative human rights principles, to elaborate on what recognition of collective rights and securing control over resources might mean for these communities (Davis and Jentoft, 2003). In many instances these struggles have resulted in significant judgements about their customary rights.[10]

An interpretation of the principle of 'recognition of rights' would require the recognition of pre-existing rights in terms of customary law

The authors suggest that the recognition of customary tenure and of customary law as a source of tenure rights should extend to the recognition of customary governance systems. Thus, in addition to compliance with constitutional requirements, together with international norms on fishers' rights to participate in fisheries management, it would require that the policy be implemented in compliance with emerging principles of international law and general tenets of African customary law that require inclusion of other principles and procedural rights. These include recognition of and integration

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9 The content of this call for the recognition of living customary law draws extensively on the work undertaken by human rights lawyers, researchers and activists in the land sector, and is informed by legal precedent in this sector (see Smith and Wicomb, 2010a, 2010b; Claassen and Mnisi, 2010; Claassen, 2010).

10 For example, the 2009 ruling of the African Human Commission in favour of the Endorois people of Kenya set an important precedent. It noted that consultation with the Endorois people regarding the establishment of a nature reserve on their land – which led to their dispossession – was not adequate, and that they did not fully understand the process (*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Endorois Welfare Council v. Kenya*, 2009).

of indigenous and local knowledge, recognition of customary institutions and practices, and free and prior informed consent when changes to tenure rights are being proposed (Legal Resources Centre, 2011b). These guiding principles pertain to any decision about customary property rights and the development or change of resource use affecting rights to common property.

Second, this recognition of rights extends to the recognition of rights lost resulting from past discrimination. The property clause in the South African Constitution provides guidance in this regard.[11] The land tenure reform provision in the property clause is explicit: '*a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled … either to tenure which is legally secure or to comparable redress.*' Property is not limited to land in this context. This clause, in subsection 8 of the Constitution, makes it clear that the property clause is not meant to limit or restrict the state to address past discrimination with regard to land-related reform. Reform of tenure in fisheries systems may include:

- Recognition of customary tenure systems
- Support and maintenance of customary tenure systems
- Redress and provision of tenure security, which may include protection against unauthorized use where consent had not been given
- Restitution for the loss of tenure rights resulting from past discriminatory laws and practices

Third, turning to an interpretation of the term 'community-based governance', the authors argue that good governance of tenure requires that local fishing communities themselves define their own rules of governance. The authors suggest that this conceptualization of a 'community-based approach' needs to include the local, layered processes of rulemaking, rights recognition, accountability and dispute resolution as reflected within systems of living

This conceptualization of a 'community-based approach' needs to include the local, layered processes of rulemaking, rights recognition, accountability and dispute resolution as reflected within systems of living customary law

11 Meetings for rights holders affected directly; input and meetings by rights holders and stakeholders affected by indirect and/or cumulative impacts; reporting about meetings and other expressions dealing with the issue of consent; facilitation and conciliation to seek consent, and equality of arms in negotiations and preparation of binding agreements.

customary law. Thus, governance of tenure comprises the recognition of rights and their administration. Indeed, the authors have argued that customary law is an inextricable aspect of the 'functioning' of customary communities: it is therefore impossible to separate the rights arising from the law without also recognizing the community's governance systems.

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A fourth aspect requiring consideration is the role of the state. While the authors have argued that the community should be allowed to develop and continuously adapt its own systems of tenure, there does need to be evidence of a successful negotiation between state law and customary/local/community law. In terms of Section 24 of the Constitution, the role of the state is to regulate the ownership and use rights of communities in terms of reasonable state law in order to secure ecological sustainability, but also to ensure that local coastal communities are not bearing the burden of conservation and that regulation is fair and equitable across all resource users. The role of the state in tenurial governance as noted above therefore centres on engaging in a participatory process to identify resource allocations and use outcomes. In this way the state, in conversation with users of the resource, is able to assert the protection and promotion of the rights contained in the Constitution, including those of the environment. Here the state is able to draw on the Bill of Rights in the Constitution for guidance, in addition to the wide range of international legal and other instruments mentioned above. The contrast with the current tenure regime is that the process starts with community articulation of these outcomes, and how they might be achieved. It then becomes a conversation with the state, in the context of the broader national need, rather than a top-down imposition of rules that starts with the global and national but denies the local.

The characteristics of living customary law referred to in Section 3 resonate with key insights from the international literature on the enabling factors that maximize opportunities for such a system of management to achieve sustainable and equitable management (Ostrom, 2008). However, tenure systems are not the outcome of neutral rules, but are shaped by power relations in communities. The existence of the characteristics identified above do not necessarily preclude abuses of power at local level. Evidence suggests, however, that they do open space for some of these issues to be contested

Tenure systems are not the outcome of neutral rules, but are shaped by power relations in communities

and resolved (Claassens and Mnisi, 2010). It is the very contestation itself that provides the emancipatory potential for living law, in conversation with the framework provided by the Bill of Rights and other human rights instruments, to create adaptive, robust systems of rules and associated actions that aspire to achieve the principles of good governance.

The community-based approach advocated in this paper therefore suggests that a process of 'good governance of tenure' in fisheries starts with the recognition of living customary law as providing content to the local rules of resource access and use, including how to use these resources, to what extent, and to what ends (Legal Resources Centre, 2011a). This process of local law-making would then be augmented with statute law derived from the Constitution.[12] A precondition to the involvement of statutory systems of regulation is the necessity of sharing information between the local community and the state in order to reach a negotiated set of outcomes. Given the very different epistemological basis of western and African law and cosmology, this is no easy task. It requires a facilitated negotiation of shared understanding about the resources to be harvested, and the equity and sustainability outcomes that need to be achieved. It is only at this point that a participatory process of setting objectives for resource management can be considered.

A process of 'good governance of tenure' in fisheries starts with the recognition of living customary law as providing content to the local rules of resource access and use, including how to use these resources, to what extent, and to what ends

Based on the above, the authors suggest that a new small-scale fisheries policy should be read as prescribing not only the principles underpinning the governance of these fisheries but also the *outcomes* expected of communities in their governance of their own resource tenure: for example, gender equity, or sustainable use of the resource. These outcomes should be defined at the outset of the process to enable the community to adapt its rules so as to

12 In the words of the Constitutional Court, '*The courts are obliged ... to apply customary law when it is applicable, subject to the Constitution*' (Constitution of South Africa, Section 39(2)). The Constitution '*... does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill [of Rights].*' Section 39(3) of the Constitution, South African Constitutional Court, *Alexkor Ltd and the Republic of South Africa v. The Richtersveld Community and Others*, (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003), para.51, 62.

ensure compliance with the expected outcomes. What the policy should not do is prescribe how these governance systems should be constituted: that should remain the prerogative of the community. This understanding allows for appropriate governance systems to emerge at a local level and for the tenure rights of these communities to be secured – not by the state granting those rights, but rather through the recognition of their existing rights as they emerge through dynamic, adaptive processes.

A SEA CHANGE – THE NEW SMALL-SCALE FISHERIES POLICY

A new policy was finally gazetted in June 2012 (DAFF, 2012). The principles included in it suggest a significant shift in approach to the small-scale fishery sector and its governance. Of particular significance for a new system of tenurial governance are the following principles and requirements:

- The policy recognizes the existence of any rights conferred by common law, customary law or legislation to the extent that these are consistent with the Bill of Rights (3.1(a)).
- It recognizes rights guaranteed by custom and law, and access to and use of natural resources on a communal basis, in so far as these are consistent with the Bill of Rights (3.11(b)).
- It requires that these fishers be granted preferential access to marine resources, especially where such communities have depended historically on marine resources (3.1(l)).
- It promotes a community-orientated approach to fisheries governance that is responsive to the local context (3.1(n)).

The current fisheries legislation reflected in the MLRA does not recognize customary fishing rights, hence the new policy has catalyzed a need to amend the MLRA in this regard (Legal Resources Centre, 2012). This need has also been given impetus by a recent court ruling recognizing that the Dwesa-Cwebe fishers have a system of customary rights. In 2010 three fishermen from Dwesa-Cwebe MPA were charged with intent to fish illegally in the MPA. The magistrate in the matter recognized that the fishing communities of Dwesa-

Cwebe had a customary system of resource use (*State v. Gongqose and two others*, E382/10). In his judgment in May 2012, the magistrate stated "[t]his custom of fishing has, subsequent to the enactment of the Marine Living Resources Act 18 of 1998, found itself in conflict with national legislation". He noted that the South African Constitution provides the legal framework for the recognition of fishing customs developed in terms of customary law, in so far as these are consistent with the Bill of Rights. As it was not within his powers as a magistrate to pass judgment on the constitutional validity of the MLRA, he was required to find the provisions of the Act in force and therefore to find the fishermen guilty in terms of the Act. He noted, however, that the constitutional validity of the Act in this regard was highly debatable. This matter will now be appealed in the High Court where the fishers will argue that the MLRA is unconstitutional and that, in accordance with the new policy, it must recognize their rights.

CONCLUSIONS

The development of a new policy for small-scale fisheries in South Africa has created an opportunity to interpret the emancipatory potential of living customary law to give substance to good governance of tenure. Emerging from a top down, state-centric system of governance within which many traditional fishing communities have been dispossessed of their use and access rights, these communities are arguing that past and current governance regimes have undermined their pre-existing tenure rights. Most significantly, the current regime has failed to recognize tenure rights and relations derived from living customary law. Instead, it has imposed a one-size-fits-all system of tenure governance, based on the allocation of individual rights, outside of a community frame of reference. A recognition of tenure rights systems derived from living customary law reveals several characteristics that collectively give content to the key principles enshrined in the Constitution, and in emerging regional and international norms and legal instruments.

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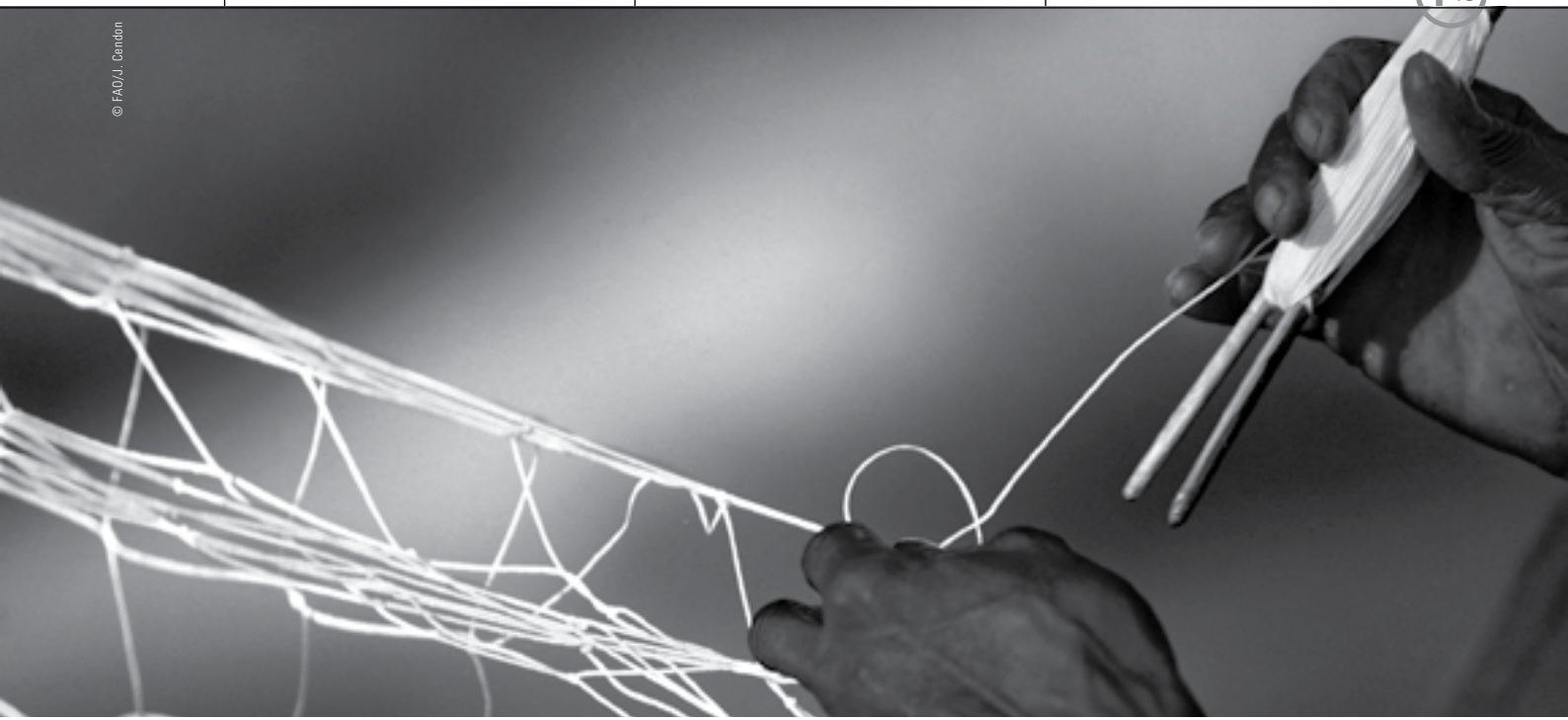

In these systems, access to the use of and governance of marine resources is interlinked and located within a complex mix of socio-ecological, economic and political relations. However, rather than restricting the space within which resource users can operate, research in several customary communities suggests that these nested relations appear to foster new freedoms. These freedoms enable a local responsiveness and adaptation to the changing socio-ecological context of marine resource use in many communities, creating space for the infusion of 'bottom-up' democratic practice and attention to local needs. The authors conclude that the challenge of developing good governance of tenure therefore requires a reinterpretation of what 'recognition of rights' means, and an engagement in weaving finely textured systems of living customary law as part of regional and international human rights norms and legal frameworks.

The challenge of developing good governance of tenure therefore requires a reinterpretation of what 'recognition of rights' means, and an engagement in weaving finely textured systems of living customary law as part of regional and international human rights norms and legal frameworks

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TENURE IN THE GRENADA BEACH SEINE FISHERY

ASPECTS FONCIERS DE LA PÊCHE À LA SENNE LITTORALE À GRENADE

LA TENENCIA EN LA PESQUERÍA CON CHINCHORROS DE PLAYA EN GRANADA

ABSTRACT

In this paper we describe a tenure system of fishing rights practised by the important traditional beach seine fishery on the small island state of Grenada, eastern Caribbean, and report on an attempt to introduce an adaptive co-management arrangement. The setting of the case study is Gouyave, a west coast town known as the fishing capital of Grenada, where beach seining for coastal pelagics and small-scale pelagic longlining for tuna are integrated fisheries. Fishers called for a co-management intervention to address the variety of conflicts

ADAPTIVE CO-MANAGEMENT

BEACH SEINE

CONFLICT

GOVERNANCE

LEGALIZATION

RULES

RÉSUMÉ

Ce document décrit un système foncier de droits de pêche pratiqué par les pêcheurs traditionnels à la senne littorale dans le petit État insulaire de Grenade dans les Caraïbes orientales et relate notamment une tentative d'introduction d'un accord adaptatif de cogestion foncière en ce secteur. L'étude de cas sur laquelle s'appuie ce document a été réalisée dans la ville de Gouyave située sur la côte ouest et principal port de pêche de Grenade. La pêche de petits pélagiques à la senne littorale et la pêche artisanale du thon à

COGESTION ADAPTATIVE

PÊCHE À LA SENNE LITTORALE

CONFLITS

GOUVERNANCE

LÉGISLATION

RÈGLES

SUMARIO

En este artículo se describe un sistema de tenencia de derechos pesqueros que es practicado en la importante pesquería tradicional con chinchorros de playa en el pequeño Estado insular de Granada, en el Caribe oriental, y se informa acerca de los intentos de introducir un acuerdo adaptativo en materia de cogestión. El lugar del estudio de caso es Gouyave, un pueblo situado en la costa oeste de la isla y conocido como la "capital pesquera" de Granada, donde la captura de especies pelágicas litorales con chinchorro de playa y la pesca de atún con palangre en pequeña

COGESTIÓN ADAPTATIVA

CHINCHORRO DE PLAYA

CONFLICTO

GOBERNANZA

LEGISLACIÓN

REGLAS

that occurred following the recent erosion of traditional beach seine rules and intensified competition for coastal space with other non-fishery users of the sea. The case describes the rules of tenure and the process of developing recommendations to reduce conflict over contested resources and space. The study allows us to evaluate criteria relevant to the success of tenure governance for responsible capture fisheries.
Beach seine fishers, through consultations with the fisheries authority and others, devised an adaptive legal process to strengthen (but not entirely replace) a system of informal tenure rights and rules. A critical factor was the extent to which legislation would allow local level interpretation and development of the beach seine rules to continue through existing informal institutions, rather than be completely replaced by the formal judicial system for adaptive governance of tenure. However, a number of factors resulted in the process not reaching implementation, especially the lack of strong leadership within the seine fishing community. Important lessons to draw from this case include the need for increased adaptive capacity

la palangre sont deux formes de pêche associées. Les pêcheurs ont souhaité instituer une forme de cogestion pour gérer les nombreux conflits survenus avec d'autres utilisateurs de la mer, conflits dus à l'érosion des règles de la pêche traditionnelle à la senne littorale et à l'émergence d'une concurrence de plus en plus importante sur les ressources de l'espace côtier. L'étude de cas examine les règles foncières et le processus d'élaboration de recommandations destinées à réduire les conflits sur les ressources et les espaces contestés. Elle propose également une évaluation de la pertinence des critères de gouvernance foncière pour une pêche de capture responsable.
A l'issue d'un certain nombre de consultations avec les autorités de la pêche et autres types d'acteurs, les pêcheurs à la senne littorale ont élaboré un processus juridique adaptatif susceptible de renforcer (sans s'y substituer) un système informel de règles et de droits. L'intérêt majeur de la démarche a été de trouver un point d'équilibre entre la législation formelle proposée et l'interprétation locale qui pouvait en être faite, le but étant de continuer à s'appuyer

escala son dos pesquerías integradas. Los pescadores pidieron una gestión basada en la comunidad para hacer frente a los múltiples conflictos que estallaron tras la reciente erosión de las reglas tradicionales que gobiernan la pesca con chinchorros de playa y la intensificación de la competencia por el uso del espacio marítimo costero por agentes ajenos al sector.
En el caso de estudio se describen las reglas que rigen la tenencia y el procedimiento de elaboración de recomendaciones para reducir los conflictos relacionados con los recursos y el territorio en disputa. El estudio permite evaluar los criterios que miden el éxito de la gobernanza pesquera en lo relativo a una pesca de captura responsable.
Mediante consultas con las autoridades pesqueras y otros oficiales, los pescadores que practican la pesca con chinchorros de playa idearon un procedimiento jurídico adaptable gracias al cual es posible reforzar (pero no reemplazar enteramente) el sistema informal de derechos y reglas de tenencia. Un factor determinante que hubo que considerar fue la medida en que la legislación toleraría que las reglas que rigen esta pesquería pudiesen ser objeto de interpretación

within the seine fishing community to lead the transformation of governance arrangements, the need for fishery managers to pay more attention to the social and cultural dimensions of their responsibility, and the need to strengthen the legal provisions and institutional arrangements that empower the fishing industry to be active partners in co-management.

sur les institutions informelles existantes et permettre une gouvernance foncière adaptative de la pêche. Ce processus n'a toutefois pas pu être conduit jusqu'à sa mise en œuvre en raison d'une absence de leadership fort au sein de la communauté des pêcheurs. Cette étude de cas permet à tous les acteurs de tirer d'importants enseignements pour l'avenir: les communautés de pêcheurs devront renforcer leurs capacités à prendre en charge la transformation des accords fonciers et les administrateurs du secteur de la pêche devront mieux assumer leurs responsabilités sociales et culturelles. Cette étude souligne également la nécessité de mettre en œuvre des dispositions juridiques et institutionnelles qui identifient le secteur de la pêche comme un partenaire actif en matière de cogestion.

y de elaboración local, y pudiesen seguir funcionando a través de las instituciones informales y no ser reemplazadas en su totalidad por el sistema jurídico oficial al implantarse una gobernanza de la tenencia de carácter adaptable. Sin embargo, en este proceso varios elementos no pudieron ser realizados, en especial porque dentro de la comunidad pesquera se carecía de una fuerza de liderazgo poderosa. Este caso permite sacar algunas lecciones importantes, a saber: que existe la necesidad de una mayor capacidad de adaptación por parte de la comunidad pesquera para tomar las riendas de la transformación de los acuerdos de gobernanza; que es imperativo que los gestores pesqueros presten más atención a los aspectos relacionados con la responsabilidad social y cultural de sus actuaciones; y que es preciso robustecer las disposiciones jurídicas e institucionales gracias a las cuales el sector pesquero puede desempeñar un papel activo como socio cogestor plenamente habilitado.

INTRODUCTION

Tenure can be considered to be an institution, the rules of which define how rights to use, control and transfer natural resources are assigned within societies, along with responsibilities and restraints. The notion of tenure includes temporary or mobile property and access rights, in addition to customary tenure that is fixed in time or space. On small islands with congested coasts, access to and use of marine space is highly contested by multiple stakeholders. The development of flexible institutions *vis-à-vis* tenure can be beneficial from several perspectives. However, such institutions may be constantly challenged by those in society who consider themselves disadvantaged by, or excluded from, the arrangements. In such cases governance structures that adapt can facilitate tenure resilience.

Governance of tenure comprises the means by which diverse interested parties in society negotiate and decide upon the equitable tenure of natural resources. Fisheries governance, tenure, and governance of that tenure are all poorly documented in the eastern Caribbean. In part this is because strong marine tenure institutions have not developed in most of these small islands, even though the islands are highly dependent on shared coastal and marine space and resources for social and economic development. Along the shore and in the nearshore it is common to find tourism, residential development, marine protected areas, waste disposal, marine transportation, sea defences and other competing and conflicting uses. Of these uses, coastal fisheries are especially critical for supporting rural food security and culture, as well as buffering against poverty among vulnerable groups (often seasonally), including female-headed households that have little or no access to land ownership. Strong and respected traditional institutions of marine tenure, incorporated into current coastal management as promoted by FAO's Code of Conduct for Responsible Fisheries, have the potential to reduce the conflicts and challenges caused by sea users from within and outside coastal communities in small Caribbean islands.

Strong and respected traditional institutions of marine tenure, incorporated into current coastal management as promoted by FAO's Code of Conduct for Responsible Fisheries, have the potential to reduce the conflicts and challenges caused by sea users from within and outside coastal communities in small Caribbean islands

Examples of enduring but threatened marine tenure and fishing institutions are found in Grenada, and much can be learned from these. In Grenada, interdisciplinary research and fishing industry consultations on the beach seine fishery have led to fishery tenure rules being recommended for legalization

and enforcement, through a process of adaptive co-management. In a global study on fishing with beach seines, Tietze *et al.* (2011) reveal that high levels of coastal conflict often accompany beach seine fishing. They conclude that co-management and the use of local knowledge in crafting practical management regimes are critical ingredients in the sustainable management of seine fisheries.

In Grenada, as elsewhere, conflict among fishery and non-fishery users and uses has intensified, given ongoing coastal development in recent years. Unresolved tensions are threatening community-based solutions that were adopted in the past through social learning and enforced through social sanctions. Levels of compliance with and acceptance of community decision-making are declining. So how does one go about ensuring that formalization of traditional tenure rules maintains the cultural and community context that will give them their power, legitimacy and potential sustainability? Addressing this research problem is key to successful adaptive co-management.

In this study we draw heavily upon research into the Grenada beach seine fishery pioneered by Finlay (1995) and guided by Oxenford; this research was followed up by McConney (2003). We analyse how fisheries stakeholders and the government sought to address governance of tenure through dialogue on the adaptive co-management of the Grenada beach seine fishery.

CARIBBEAN CONTEXT

In terms of governance, the Caribbean Large Marine Ecosystem (CLME) is complex, with the highest density and diversity of small-to-large independent nation states per unit area in the world (Mahon *et al.*, 2010). It is a compact mosaic of marine jurisdictions (McConney *et al.*, 2007), and Grenada is one of its small island developing states (SIDS) in the eastern Caribbean. Located between latitudes 11.5° and 12.5° N and longitudes 60° and 61° W, Grenada comprises the mainland island of that name, the inhabited islands of Carriacou and Petit Martinique, and several uninhabited smaller islands mainly off the northeast and southeast coasts. The town of Gouyave is situated on Grenada's west coast (Figure 1).

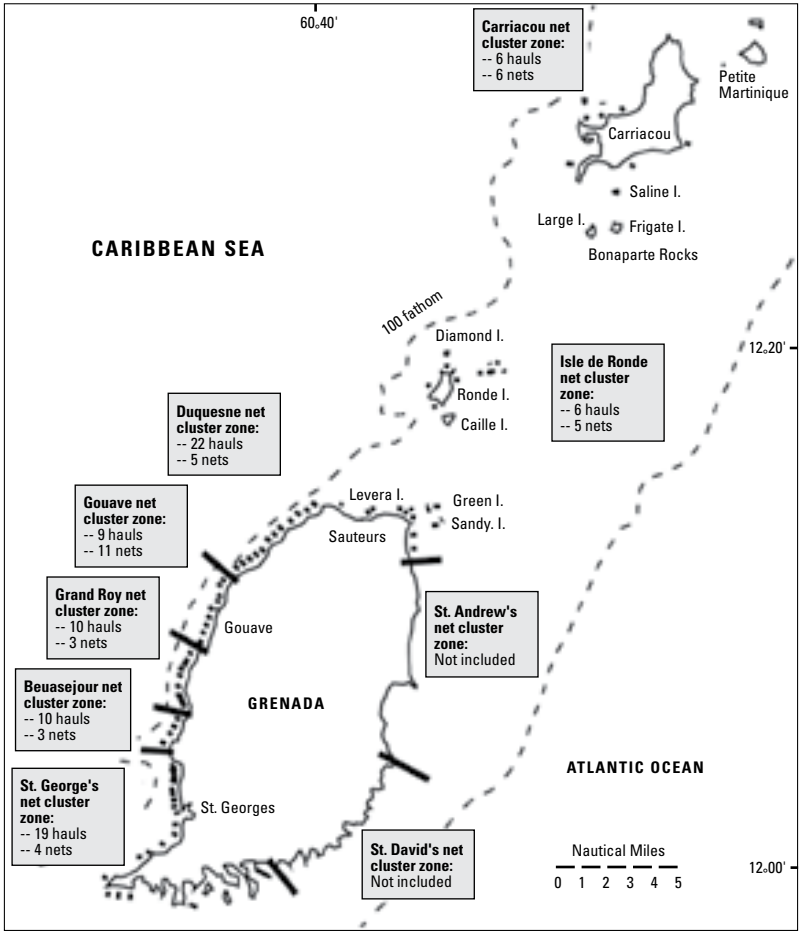

Figure 1
Location of Gouyave and distribution of seine net haul sites around Grenada

LEGEND

GRENADA
Insular shelf
(Depth contours in fathoms)

Boundary between haul clusters

Hauls

Source: Finlay, 1995

Despite its declining contribution to national income, the agricultural sector (of which fishing is a part) has an important socio-economic role in providing livelihoods, nutrition and food security. Fishing in Grenada is small-scale and constitutes about 15 percent of agricultural output: about 1.5 percent of total GDP (Gross Domestic Product). It is therefore not as highly valued an

economic sector as tourism, which earns the highest revenue (Rennie, 2002). Most fishers come from the lower socio-economic classes; about 90 percent of them have only completed primary education. Although nearly 90 percent of the 5–7 metre un-decked vessels are owned by fishers, fishers own just 30 percent of offshore vessels, that is, decked vessels around 12 metres in length (Rennie 2002).

BEACH SEINE FISHERY

Beach seining is fairly widespread throughout the eastern Caribbean. Although poorly documented in most places, a brief report that could be considered a profile on the seine fisheries of Dominica, St. Lucia and St. Vincent & Grenadines was produced by Finlay in 1997. The lack of literature on this topic is explained partly by the fact that seine fishing is a mobile small-scale operation carried out from numerous rural villages and landing sites. Such fisheries are difficult to monitor and are usually not well known, but Grenada is an exception. The island's mainland has a coastline of about 121 km, a land area of 340 km^2 and an insular shelf of 3 100 km^2. The shelf is narrow on the leeward western coast, attaining a depth of 200 metres less than one kilometre from shore. The beach seine fishery in Grenada has also been researched by Finlay (1984, 1995). Seines are most effective in leeward bays with sandy bottoms and few obstructions that could snag a net, such as rocks or coral heads. These nets are most often hauled onto beaches, but can also be pursed offshore when the shoreline is not suitable. Examples of this occur along Grenada's west coast, where sea defences have been installed along the shore to combat coastal erosion. A finite number of suitable seining sites exist within the country.

Seines are used to target small coastal pelagic species and the juveniles of larger offshore species that school in bays around the islands of Grenada, Isle de Ronde and Carriacou. Target species include jacks, round robins, rainbow runners, sprats and anchovies. A small proportion of the catch comprises juveniles of oceanic pelagic species such as tuna. Each site is called a *haul*: a small area of the bay where physical conditions are appropriate for the seine net and which is within the effective reach of the net when one end is

attached to the shore. The hauls have been grouped by Finlay (1995) into nine net clusters, based on the range of hauls within which individual nets tend to operate. Finlay found that there is a tendency for nets to be confined largely to the hauls within a net cluster. Usually, there is only one haul per bay, but in a few bays there may be two or more. The 97 seine hauls in Grenada are shown in Figure 1. The Gouyave area seine fishery is relatively discrete, with only minor overlap into adjacent areas; this is shown in Figure 2.

Figure 2
Gouyave net cluster hauls

Source: Finlay, 1995

Finlay describes the standard large seine net as rectangular, comprising four sections, each having a different mesh size:

- *fondcier*, central piece, 1" mesh
- *quatrieme* on either side of the fondcier 1–2" mesh
- *bois* on either side of the quatrieme, 2–3" mesh
- *grand maille*, the outer ends, 4" mesh.

There is a weighted foot line on the bottom and a float line on the top, with a hauling rope attached to either end.

Seine fishing is conducted from open, wooden, double-ended vessels that are rowed. A seine boat will row between bays to select a suitable haul, then anchor in the haul with a stern line to the beach. The boat waits for a suitable school of fish to enter the haul, sometimes staying in position for several days waiting for a school. When ready, one end of the net is tied or anchored on shore and the other end is paid out from the boat as it is rowed in a semicircle to enclose a school of fish. The net is then hauled slowly ashore. Divers within the enclosure may beat the water to herd fish into the net and may also help the footrope over obstacles. Seining on the southeastern coast is not carried out according to the traditional rules, partly because there are a greater variety of seine types in these areas, several of which are smaller and more mobile. Further details of net setting practices are provided by Finlay (1995).

Fishing is year round, with no strong seasonal pattern. The Fisheries Division kept detailed records of seine fishing in the Gouyave area for two twelve-month periods, May 1998 to April 1999 and May 2001 to April 2002. A total of 690 seine sets were recorded in the first period and 320 were recorded in the second. In the first period 12 seines were active, though activity varied widely among them. Only the six most active seines operated in the second period. The number of sets per month and catches per set was such that total monthly landings varied little over the periods examined (McConney, 2003).

The catch is shared among the boat crew. Onlookers may assist the crew in hauling the net. If the captain asks them to help, they become entitled to a share that is 50–75 percent that of a crew member. If they assist voluntarily and the captain does not stop them from doing so, they are given a smaller share. Seines fish to meet a limited market demand for bait and food fish rather than to catch

all that is available, which may flood the market. Market demand constrains the effort made and hence curtails overfishing, but competition amongst seine enterprises may be fierce during windows of opportunity in the market.

Stock status is unknown but presumed to be fairly healthy, despite variability in abundance depending on the haul and the time of year. Fishers shared local ecological knowledge while describing the traditional tenure rules for access to seine hauls. They had various perceptions about why fish had become scarce in certain areas. Some concluded that areas in which seines had operated over many years were less productive as a result of frequent disturbance of the seabed. This is similar to observations made in other countries, of the impact of bottom trawls.

Regarding fisheries governance, Kairi Consultants (1999) view the ministry responsible for agriculture and fisheries as a key. They describe it as strong in the analysis of problems, but less effective in delivering solutions. The Fisheries Division is governed by the Grenada Fisheries Act and Regulations (Cap. 108). Finlay and Franklin (2002) note that its roles and functions include:

- Monitoring, control and surveillance of fishing activities in order to sustain fish stocks and habitat, collaborating with States sharing fisheries resources.
- Establishing and maintaining infrastructure in support of fishing activities.
- Maintaining a fisheries management programme in collaboration with local fishing communities.

The duties of the fisheries authority include coordination and management, extension services, fisheries biology, fishing technology, aquaculture, marine protected areas, socio-economic monitoring, and fisheries project planning and implementation. Links are maintained with the Coast Guard to help ensure fleet safety, search and rescue, and enforcement of fisheries regulations. Other allied external agencies include the Port Authority and the Board of Tourism. Internally, the ministry's Forestry Division and Planning Unit are relevant. The staff of the Division is fairly small and limited in social science capacity. Mahon and McConney (2004) comment on the need for more social science skills in small fisheries authorities in small island states.

Senior officers in the Fisheries Division report that they are sometimes requested to settle disputes concerning perceived violations of the traditional

tenure rules, when the conflicting parties and their community advisers are unable to reach a settlement. When conflicts are serious, the aggrieved party usually takes the matter to the police and thereafter the law court, with or without the involvement of the seining community or fisheries officers.

TENURIAL ARRANGEMENTS

The process of formalising tenure for seine fishing in Grenada has been ongoing since 1982 when Finlay became aware of the informal tenure system with community-based rules. As Chief Fisheries Officer, Finlay interviewed seine fishers and documented the rules of tenure. He reported 41 large beach seines operating in Grenada, manned by 289 fishers. Net units were operated by groups of six to eight fishers who positioned themselves at a fishing location and took turns at fishing. In the mid-1990s beach seine fishing was still governed by a well-defined set of traditional tenure rules enforced at the haul by the seine net fishing community. No other fishery in Grenada had similar tenure traditions.

Finlay (1995) confirmed the unwritten tenure rules with groups of fishers at all major fishing areas, and transcribed them into a written set of rules that they could review and endorse for the government to implement as fisheries regulations. His unpublished survey to determine fishers' views showed that 97 percent of captains strongly supported legalising the traditional tenure rules. Soon after this Finlay retired from the fisheries authority and there was no follow-up: institutional memory and continuity is often a challenge in small fisheries authorities that operate without written fisheries management plans.

Several years later, McConney (2003) reported that increasing competition and conflict among seine nets, and also between seine nets and non-fishing coastal users of the sea, were disrupting the informal seine rules. Traditional tenure practices were rapidly breaking down, necessitating consultations to decide on management or co-management measures for the beach seine. An initiative to return to the tenure formalization that Finlay had started was briefly revived during the participatory action research undertaken by McConney (2003), with input from Finlay. First the tenure rules, and then

the adaptive co-management system of governance recommended by seine fishers, are described below.

Up to around 2000, seining was governed by a well-defined set of 15 traditional rules (Table 1) enforced at the hauls around Grenada by the seine net community. The tenure rules institutionalise how fishers stake a claim to a haul by anchoring and tying the stern line to shore; how they determine the sequence of turns if more than one boat is preparing to seine; how to share the catch or revenue from it when helpers and volunteers take part; and other practices designed to make fishing operations work smoothly and predictably.

The rules apply everywhere to all fishers, but younger fishers were said to be disobeying the rules more frequently in order to secure income on a competitive basis, and this was causing conflict (McConney, 2003). The conflicts were most often verbal but occasionally they became physical. When loss of gear or damage to gear or vessels resulted, the police were called in and the matter was eventually taken to court.

GOVERNANCE ARRANGEMENTS

Since Finlay (1995) documented the traditional beach seine rules and obtained consensus from the fishers on having the rules legalized, the co-management case study (McConney, 2003) focused on how legalization could be implemented so that the fishers retained some authority and responsibility.

The assumption that fishing communities are willing and able to adapt tenure rules and governance arrangements is too often untested in the field (Berkes *et al.*, 2001). We found here that fishers wanted to maintain inputs into the design of tenure legalization and its anticipated implementation. The fisheries authority also wanted to be adaptive in its approach to making changes. In this section we describe what the fishers proposed for adaptive governance of tenure in the co-management case study, and why the initiative may have been abandoned.

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Table 1
Beach seine fishing tenure rules in Grenada

RULE NAME	RULE OPERATIONAL DESCRIPTION
#1 Staking claim at the haul: the haul claim rule	A net must anchor in the haul and tie the stern line to the shore in order to have a right to make a cast.
#2 Nets take turn: turn sequence rule	If several nets come to the haul and take up position in sequence, i.e. A, B, C, etc., then each net is entitled to its fishing opportunity (cast) in the same order.
#3 Absence of sufficient crew: sailors absent rule	If seines A, B, and C are waiting for a turn in that order, but the crew of seine A is absent or not enough of them are present, then seine B may cast for the fish. However, if seine A retains its turn to cast, then seine B goes last in line.
#4 One cast rule	Each net has only one fishing opportunity (cast) at a time.
#5 Permission to cast rule	If seine net A, B and C are waiting for a fishing opportunity in that order, but net A does not wish to cast immediately, then net B may be given permission to cast. If net A grants permission and net B casts, then net A retains its right to the next cast while net B goes to the last position.
#6 Double haul rule	Where there are two hauls within a bay, the first net to come to the bay may anchor at the boundary of the two hauls and has the right to choose either haul. If another net then comes into the haul, that second net must ask the first net which haul it may have. Once the first net chooses a haul the second net becomes the owner of the other haul. Any other net coming into the bay must wait in line at either one of the two hauls.
#7 Stern line rule	Except in high seas, any net without a stern line tied to the shore has no claim to the haul.
#8 Beating fish rule	No haul right shall be claimed for beating fish, i.e. oceanic pelagic fish feeding in frenzy and bleaching within the haul-reach.
#9 Chase or race rule	When two or more seine nets are chasing a school of fish at or near a haul, the first net to encircle (cover) the school of fish and drop its stern line on the shore wins the school.
#10 Spent cast rule: the fondcier or cast rule	A single cast (turn) is considered spent when the net is cast as far as the centre of the *fondcier*, if any part of the net before the centre of the fondcier is not cast then the net may be pulled back onboard (barque) and the turn kept.

#11 Captain responsible for sharing rule: share rule	Half the gross catch goes to the net while the other half goes to the net crew and captains; the captain is responsible for sharing all proceeds of the catch.
#12 Removal of inactive seine rule: anchored easement rule	Anchored beach seines waiting in line or anchored at the haul are obliged to allow the current holder of a turn to remove the anchored seine, and position it later after making the cast.
#13 Recruit helps rules	When the net captain deliberately calls on a helper to haul at the net, then the captain is obliged to give that helper half or three-quarters of the share that a normal seine-man will earn.
#14 Volunteer helpers rule	If the captain of the seine net notices a helper hauling at the rope then the captain either asks the helper to let go of the hauling rope, or else he is obliged to give all helpers a small portion of the catch, known as " *j'ai hale*".
#15 No ring net	No ring net that does not take up turn at the haul shall be allowed to cast at fish within 300 metres of a designated haul.

Source: Finlay, 1995; McConney, 2003

In three workshops aimed at identifying fisher preferences for the tenure legalization process, we found that fishers wanted to form a group of local seine experts to work with a legal officer in drafting regulations for incorporating the traditional tenure rules into conventional fisheries regulations. They then advocated community consultation to promote widespread acceptance before the rules' implementation. This demonstrates the willingness of the fishers to play an active role in the governance of tenure, approached as a co-management activity.

Questions were posed to fishers to prompt a discussion on the extent to which they wanted to remain involved in the implementation of the proposed legislation, and what their roles could be under different options. The questions are shown in Table 2, with the response summaries reflecting the consensus reached by about 10–15 people following discussion.

Responses indicate that fishers would like adaptive co-management arrangements to continue through to implementation of the tenure regulations. Fishers were aware of the difficulties of forming and sustaining an organization to represent them in any interaction with government over the operation or updating of the proposed legislation.

Table 2
Perspectives on the process of legalising informal tenure rules

PROPOSITION PUT TO WORKSHOP	RESPONSE OF PARTICIPANTS
1. Wide circulation of new regulations by posters, video etc. to explain to fishers and the public how the rules are to work.	Use TV and radio documentaries and posters. (Impression was that booklets of rules would not be best medium on account of literacy limitations.)
2. Should net cluster areas be managed by communities like local management areas?	Communities are not ready yet for management roles and responsibilities. Would be too much of a burden.
3. Should there be community-based enforcement such as by fishery wardens selected from among the fishers to get people to comply with regulations?	Could not agree. Fishers may be effective based on their local knowledge if empowered, or perhaps ineffective due to existing community ties and allegiances.
4. Should a community or seine fishery group be part of a non-judicial two-tiered judgment system, where smaller conflicts are taken to the group and, if resolved, not taken into the court process?	If there were a structured way to bring matters to a community body that had authority, then matters would enter the normal court system only if there were no resolution at the community level.
5. Should there be seine experts available to the court for interpreting offences and advising on appropriate penalties?	Seine fishers should have a say in both, because experience suggests that the court system does not understand fishery matters well.
6. Should a national seine fishery association have community sections to promote laws, and coordinate implementation?	Need a national group and would also need to strive to make it work, despite evidence of fisher groups not working well, including in Gouyave.
7. Will the ability to take everything to law weaken the ability of communities or groups of fishers to solve their own problems, thereby fostering dependency?	The community is already weak, so enacting the law could do no more harm. It may even help to strengthen the community by providing a solid foundation for community action.

Source: Adapted from McConney and Baldeo, 2007

A subsequent workshop provided more detail on what fishers wanted in terms of legal structure and operations. They identified three options for governance of tenure involving co-management:

1. **An informal Gouyave community 'conflict council' for the seine fishery**. Fishers rejected establishing their own informal group or council to which seine disputes could be taken. They claimed that compliance with local informal council decisions would be extremely low, even if the council was utilised at all. There was little trust in or respect for local authority unless backed by state law.
2. **An informal Grenada national 'conflict council' for the seine fishery**. There was some support for an informal national seine dispute settlement group, but again it was stated that compliance would be low if decisions at the national level were not backed by the force of law. Several failed attempts to form national fisher bodies also fuelled this perspective.
3. **A formal tribunal or arbitration panel for the seine fishery**. The final, most formal and preferred option was for the tenure rules to be put into fisheries regulations, but a special tribunal rather than a magistrate would be the forum for dispute settlement. This appealed to several of the fishers who saw criminal convictions as being harsh for rule breaking (as distinct from the clearly criminal acts of violence that may occur in a physical dispute).

Workshop participants suggested that a five person formal tribunal should comprise:

- an experienced and respected seine fisher, who could be considered an expert
- a private sector businessperson, such as from the Chamber of Commerce
- an experienced senior fisheries officer who has knowledge of seine fisheries
- a teacher – a wise person able to take multi-faceted decisions – familiar with fishing
- a youth leader, likely to understand the attitudes of younger fishers who break the rules.

The fishers also developed a sequence of actions and responsibilities that would apply if an arbitration tribunal were the institution that applies formal tenure rules, in the event that community-based and informal settlement were unsuccessful but the courts were to be avoided (Table 3).

Table 3
Stages, responsibilities and considerations in conflict management

STAGES IN THE CONFLICT MANAGEMENT PROCESS	STAKEHOLDER RESPONSIBILITIES	CONSIDERATIONS OF WORKSHOP PARTICIPANTS
1. Conflict arises from a breach of beach seine rules that are in law	Disputing parties report the incident to a fishery officer and fishing organization	Fishers try to avoid drawing police and criminal justice into dispute settlement
2. Informal attempts at conflict management	Parties, fishery officer and/or organization try to reach speedy resolution	Advice of fisheries officers is often sought, but currently no fishing organizations can assist
3. Formal complaint made to tribunal if no informal resolution is achieved	Complaint is made by disputing parties themselves, with or without external assistance	Reliance on fisheries officer was not acceptable since it was a means of avoiding obligations
4. The tribunal examines the evidence but may not conduct its own investigation	Disputants bring their own evidence, lawyers may be barred, fisheries officers and others are used as experts	Lawyers may be barred in order to keep costs low and the process simple
5. Tribunal provides facilitated negotiation	Disputants attempt resolution with external assistance	It is important that settlement is reached at this last attempt
6. If the dispute is not resolved, the tribunal makes a legal decision and awards compensation as appropriate	Members of the tribunal exercise the powers provided to them under the law	The State would fund the tribunal but get little or no revenue from the penalties, so it would be a public expense
7. Enforcement of the tribunal's decision or appeal to authority	Disputants abide by the decision or appeal to the appropriate legal authority	This was not discussed in detail, but the existence of a higher body was assumed

Source: Adapted from McConney and Baldeo, 2007

Finally, fishers recommended that the fishing industry should retain involvement in two main ways. First, it should be involved in reviewing the performance of the new governance of tenure arrangements after three to five years. Second, it should be represented at the national level on a fishing industry body such as the fisheries advisory committee, which is supposed to exist under the fisheries legislation.

The conclusions reached by the workshop included:

- There was consensus on the recognition of traditional tenure rules and the need for legalization.
- Flexibility of tenure regulations will have to vary with the subject matter of the rule.
- Fishers want to ensure that the punishment fits the crime (causing loss of earnings).
- Rules may be subdivided into ones mostly compensatory and others more criminal.
- A civil tribunal governance system of facilitating the interpretation of tenure rules was favoured.
- Fishers prefer to have solutions imposed rather than to strengthen self-governance.
- There was scepticism about compliance with rights allocated through a licensing system.
- The structure and function of the tribunal needs to be developed further via collaboration.
- Models of legal provisions should be used to structure joint decisions on these matters.
- Because of coastal protection and development, conflicts involving seining are likely to increase.

Having so carefully set out what they wanted in terms of governance of tenure, and the way in which they should proceed to establish the co-management governance arrangements, the seine fishers in Gouyave and the fisheries officers were left with these conclusions as the co-management study came to an end.

Informal investigation a few years later revealed that for several reasons there had been no follow-up action to legalise the tenure rules. The foremost reason for this lack of action was lack of leadership. The Gouyave seine fishers were not organized to take the collective action necessary to create the interest or pressure group that could implement their recommendations from the bottom-up. Meanwhile the fisheries officers saw no need to take further action unless the problems in the fishery reached crisis proportions, in which case they would have been forced either by the industry or the political directorate to respond. The expatriate Solicitor General took part in the study with keen interest, on account of prior experience with customary marine tenure in the Pacific region. But in the end he could not be a resource for the legalization of the tenure process either: his contract came to an end and he left the country before significant advances could be made.

In summary, the problems in the beach seine fishery were not at a societal level that engaged public attention and prompted action from political decision-makers. In essence the cost of change was perceived as exceeding the benefits. As a result the tenure rules continue to erode, although the Gouyave seine fishers are at least aware of having had the option to attempt dispute resolution via discussion and cooperation.

In summary, the problems in the beach seine fishery were not at a societal level that engaged public attention and prompted action from political decision-makers. In essence the cost of change was perceived as exceeding the benefits

EVALUATING SUCCESS

The extent to which conditions in Grenada favoured a successful adaptive co-management approach to governance of tenure in the beach seine fishery can be evaluated in part by the process and results of the workshops presented above, and the concrete follow-up (or lack thereof) to those workshops. Assessment was further assisted by the results of an additional workshop in which Grenada fishery stakeholders were asked to discuss the conditions that would favour success, drawn from regional and international co-management research (e.g. Brown and Pomeroy, 1999; Pomeroy *et al.*, 2001). Each condition was evaluated as being either absent, present but weak, present to a fair extent, or a strong feature of fisheries in Grenada. The evaluation workshop was attended by researchers, the Fisheries Division, fishing cooperatives, the

Cooperatives Department and a private fisheries consultant. The perceptions of fisheries stakeholders as to the conditions necessary for the success of a co-management arrangement of tenure governance in Grenada are now outlined.

First, a few conditions were seen to be absent. Stakeholders did not think that current fisheries legislation gave fishers any meaningful level of ownership or control over resource use because, despite the traditional seine rules, all fisheries were open access. They also thought that decentralization and delegation of authority were not part of the policy of resource management in Grenada. Even if devolution were to become policy, they said fishing industry groups were too weak and poorly organized to take on management responsibility.

These few conditions are critical. Fisheries tenure under open access conditions is likely to be challenged perpetually, especially as coastal and marine space becomes more hotly contested. Although seining can take place entirely offshore in shallow waters, beach seining by definition requires an area of foreshore from which to operate. These areas are shrinking on account of beach erosion attributed to climate change and natural disasters (Peters, 2000). Further loss of access and use of the beachfront can be expected given the expansion of tourism and residential development, as has occurred in Barbados, for example.

Some of the necessary conditions were noted to be present, but weak. There was a weak fit between the scale of resource distribution and feasible fishery management arrangements. Fishers thought that government did not have enough information or capacity for fisheries management, and that fishery resources are inherently unmanageable given that nature is not predictable or controllable. It was also said that little was known about the distribution of fisheries resources. Boundaries and definitions of numerous types – resources, management area, fishing 'community' – were not clearly agreed. It was therefore difficult to establish exclusive rights and responsibilities associated both with co-management and with tenure.

Other weak features of fisheries governance in Grenada included fisher group cohesion and collective action, mechanisms for managing conflicts, organizational capacity, and financial capability. It was thought that the benefits of participation in co-management did not always exceed the costs, hence individual and group incentives to participate in co-management

were weak. Lack of incentives clearly constrained the follow-up to the case study research. Furthermore, co-management was not perceived to have a good social and cultural fit to the circumstances in Grenada. For example, there was a strong dependence on government for problem-solving and assistance – rather than a strong spirit of partnership with the State, or at least a strong desire for self-governance.

Conditions that were present to a fair extent could be built upon as capacity was developed. Shared recognition among stakeholders of resource use problems that needed to be addressed was judged to be present to a fair extent, as were management approaches and measures that were flexible to suit changing circumstances. Cooperation, communication, coordination, leadership skills, trust and respect among stakeholders were all assessed as being present to a fair extent. These were necessary, but not sufficient, to advance the governance of tenure.

It was also thought that assistance from external agents was conducive to co-management of the tenure arrangements to a fair extent, and that stakeholders affected by management arrangements were generally included in decision-making by the government. Tenure rules were considered enforceable by resource users and the management authority, even though there was often little enforcement of other existing regulations. Legislation, such as the provision for a Fisheries Advisory Committee or an arbitration panel, potentially gives resource users the authority to make or contribute to management decisions. However, the current fisheries legislation was only being partially implemented. Consistent with previous responses, it appeared that the state was not keen to devolve power to fisheries stakeholders.

Only two conditions that were strong features were identified. First it was thought that memberships, such as the identification of stakeholders in various fisheries and interest groups, were easy to define. Also, participants felt that clear objectives for management could be defined based on the stated problems and interests of the various stakeholder groups, even though there was little documentation on current management objectives.

CONCLUSION

We can draw lessons from the attempts at adaptive co-management of tenure in Grenada. This is critical if fisheries authorities and other stakeholders want to create or enhance learning institutions that have the ability to adapt to changing circumstances and increase their resilience (Folke *et al.*, 2002; Ostrom, 2005). In Grenada there is a need for adaptive co-management of the tenure arrangements that is sustainable despite changing situations. Co-management is adaptive where ecological knowledge and institutional arrangements are tested and revised in a dynamic, ongoing, self-organized process of learning-by-doing (Folke *et al.*, 2002). The seine fishers clearly demonstrated an interest in this, although they lacked the adaptive capacity to transform the governance arrangements from failing informal tenure to successful legalized tenure. Most importantly, the case shows the innovative thinking of the seine fishers and their potential for a greater, self-organized contribution, based on co-management – if they were assisted appropriately. In prior periods, self-organization and self-help were cornerstones of Caribbean rural society (Finisterre and Renard, 1987).

The case shows that fishery managers need to pay more attention to the social and cultural dimensions of their responsibility, as advocated by Berkes *et al.* (2001). Mahon and McConney (2004) argue that fisheries authorities in small developing states are often not appropriately staffed or structured. Too much emphasis is placed on technical skills and biological or bio-economic management models. In trying to mimic the arrangements of large and developed countries for conventional management, they neglect the human dimension of fisheries management, yet this dimension is essential for the emergence of resilient, nested, co-management institutions (Ostrom, 2005). If the Grenada fisheries authority had retained the social science capacity it exhibited in documenting the traditional management of the seine fishery, it would have been more likely that co-management of tenure would have progressed.

The case shows the innovative thinking of the seine fishers and their potential for a greater, self-organized contribution, based on co-management - if they were assisted appropriately. In prior periods, self-organization and self-help were cornerstones of Caribbean rural society

Many of the conditions identified in this paper as favouring the success of co-management of tenure are only weak or moderate features of fisheries in Grenada. Particularly weak are the legal provisions and institutional

arrangements for empowering the fishing industry to play a greater role in managing fisheries and tenure arrangements. As noted above, this could be a reflection of the limited capacity – including the limited world view – of the fisheries authority and the public sector as a whole. State and industry stakeholders will require a considerable amount of capacity building if governance of tenure through co-management is to have a reasonable chance of success. Such capacity building must encompass much more than training. It must include changes in the vision for fisheries management, and the structures or institutional arrangements that are intended to make and keep it functional (McConney *et al.*, 2003). These changes will take time, but will probably have to start with the fisheries authority taking the lead in co-management (Pomeroy and Berkes, 1997).

Adaptive co-management requires that the state apparatus be much more flexible and innovative in fashioning institutions and learning from experience, than was demonstrated in this case. Leadership is also needed among the resource users: another element that will enable the transformation of the tenure governance system. Fishers are uncertain about how best to proceed with taking up governance of tenure responsibility, and are receiving little guidance on this matter. The most appropriate role for external researchers and agents may be to point out the potential products and processes involved in transforming the governance of tenure, and the pathways that can be taken to achieve success. It is largely up to participants in institutions to learn by working together collaboratively, experimenting with different tenure arrangements until they establish those that are best suited to Grenada.


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MARINE PROTECTED AREAS
Securing tenure rights of fishing communities?

AIRES MARINES PROTÉGÉES
Faut-il sécuriser les droits fonciers des communautés de pêcheurs?

ÁREAS MARINAS PROTEGIDAS
¿Cómo asegurar los derechos de tenencia de las comunidades pesqueras?

ABSTRACT

TENURE RIGHTS

MARINE PROTECTED AREAS

FISHING COMMUNITIES

FISHERIES MANAGEMENT

Marine protected areas (MPAs) are increasingly being used as instruments for conservation and management of coastal and marine biodiversity, with most MPAs being located within the territorial waters of specific nation states. Most inshore and coastal areas are defined by complex systems of local or customary tenure, and cannot really be classified as 'open access' areas. This paper explores the extent to which tenure rights are recognized in marine protected areas. Based on a review of recent literature the paper examines whether the tenure rights of local communities have been respected in MPA practice. It draws attention to cases where tenure rights have been weakened or

RÉSUMÉ

DROITS FONCIERS

AIRES MARINES PROTÉGÉES

COMMUNAUTÉS DE PÊCHEURS

GESTION DE LA PÊCHE

Les aires marines protégées (AMP) apparaissent de plus en plus comme des outils de préservation et de gestion de la biodiversité côtière et maritime, la plupart d'entre elles se situant dans les eaux territoriales d'Etats-nations spécifiques. Les zones intérieures et côtières sont généralement régies par des systèmes complexes de régimes fonciers locaux ou coutumiers et ne peuvent pas être véritablement classifiées comme zones « à accès libre ».
A partir d'une analyse de la littérature récente en la matière, le présent document examine le niveau de reconnaissance des droits fonciers dans les aires marines protégées s'agissant notamment du respect des droits fonciers des

SUMARIO

DERECHOS DE TENENCIA

ÁREAS MARINAS PROTEGIDAS

COMUNIDADES PESQUERAS

ORDENACIÓN PESQUERA

Las áreas marinas protegidas (AMP) se están utilizando cada vez más como instrumentos para la conservación y la ordenación de la biodiversidad costera y marina; y la mayor parte de las AMP están localizadas en aguas territoriales de determinados Estados-nación. Por lo general, las áreas costeras están definidas por complejos sistemas de tenencia local o consuetudinaria, y no pueden en realidad ser clasificadas como «áreas de libre acceso».
El artículo indaga sobre la medida en que se reconocen los derechos de tenencia en las AMP.
A partir de una revisión de publicaciones recientes, se examina aquí si con la implantación de AMP los derechos de tenencia

extinguished, and the displacement, social conflict and sense of alienation associated with them. At the same time several more positive examples are offered – primarily driven by local communities – where tenure rights have been strengthened during MPA practice. The paper emphasizes the importance of recognizing and respecting the tenure rights of local communities, both as a means for more effective and sustainable conservation and management (given the link that has been observed between biological and social success in relation to MPAs), and as an end in itself – reflecting the commitment of MPA practitioners to respecting human rights. The paper suggests some key steps and principles with respect to tenure rights that need to be part of MPA practice.

communautés locales. Il relève plusieurs cas d'érosion ou de disparition de ces droits et en examine les conséquences en termes de déplacements, de conflits sociaux et de sentiment d'aliénation. Il propose également des exemples concrets de renforcement des droits fonciers des communautés locales par les pratiques des AMP. Le document souligne l'importance de la reconnaissance et du respect des droits fonciers des communautés locales, à la fois pour une meilleure gestion et une protection plus durables de ces aires – compte tenu des liens observés entre les aspects biologiques et sociaux au sein des AMP – et en tant que fin en soi, qui témoigne de l'engagement des praticiens des AMP à respecter les droits humains. Le document propose des étapes et principes clés pour l'intégration des droits fonciers dans les pratiques des AMP.

de las comunidades locales han sido respetados en la práctica. Se llama la atención sobre casos en que estos derechos han sido debilitados o anulados, y sobre los desplazamientos de población, conflictos sociales y sentido de alienación del individuo que ha conllevado este menoscabo jurídico. Al mismo tiempo, se ofrecen varios ejemplos positivos, provenientes ante todo de las comunidades locales, en que los derechos de tenencia han sido reforzados gracias a las AMP. El artículo hace hincapié en la importancia del reconocimiento y respeto de los derechos de tenencia de las comunidades locales, tanto como medio para una conservación y una ordenación más efectiva (dado que existe un vínculo entre la buena conducción de los aspectos biológicos y sociales y las AMP) como fin en sí mismo que refleja el compromiso de respeto de los encargados de las AMP. El artículo sugiere algunas etapas clave relacionadas con estos derechos y que deben formar parte de la puesta en práctica de las AMP.

INTRODUCTION

Indigenous and local small-scale and artisanal fishing communities often have a long, even centuries-old, tradition of fishing. Many such communities have, over time, evolved their own institutions and systems of governance, systems that have mediated their relationships with each other and with the natural resources—land and water—on which they depend for their livelihoods (Ruddle, 1994). Indigenous and local fishing communities often have a clear perception of their rights to resources, based on a long tradition of use and interaction with such resources (Ruddle, 1994; Ruddle *et al.*, 1992; Hviding, 1998). This perception is often shared by the larger community, even if such 'rights' are not formally recognized or recorded within the prevalent legal system. Acknowledging this, the recently-adopted Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (Tenure Guidelines) have stressed the need to take measures '*to identify, record and respect legitimate tenure right holders and their rights, whether formally recorded or not*' (CFS and FAO 2012).

The customary institutions and systems that have evolved usually reflect the specific gender, caste, class and ethnic relations that exist within these communities. They vary in the extent to which they secure equitable access to resources and to decision-making for all members of the community. For example, they may be biased towards men and may exclude women from decision-making processes (Harkes, 1999).

Such customary institutions and systems of governance among indigenous and local fishing communities may not be formally recognized, including by the State. While some countries do recognize customary law, the way in which customary law is integrated with statutory law in relation to governance of marine resources can be problematic. Hviding (1998), with reference to the Solomon Islands, notes that while government policy recognizes rights entailed in customary law, there are few explicit provisions in the formal legal system, such as in the fisheries legislation, regarding customary marine tenure. This lack of recognition and the associated imposition of top-down governance models, such as state-imposed management systems, have at times weakened these institutions. Other factors contributing to these weakening

systems include modernization and technological change, commercialization of resources and the growth in fish trade, and the increase in competing uses of inland and coastal spaces.

Notwithstanding, such institutions and systems of governance and their associated 'rights' to natural resources have continued to operate at local levels in many countries, challenging the mainstream perception of fisheries as an 'open access' resource. It has been noted, for example, that artisanal fishing tends to be strongly associated with specific community-based, inshore territories, which are held under a wide range of traditional tenure arrangements and of fishing and resource use-rights customs and principles (World Bank, 2006). Such systems of local or customary tenure vis-à-vis aquatic resources (marine and inland) have been documented by many researchers worldwide, in countries of the Asia-Pacific, Africa and Latin America (Ruddle, 1988; Ruddle, 1998; Lenselink, 2002; Johannes, 2002; Cinner and Aswani, 2007). The extent to which these systems are well formed and entrenched varies. However, it is often the case that inland waters and coastal inshore areas are not really 'open access', despite the common and sometimes erroneous perception that they are.

Such institutions and systems of governance, and the associated 'rights' to natural resources, have continued to operate at local levels in many countries, challenging the mainstream representation of fisheries as an 'open access' resource

Migration of fishers – e.g. to pursue migratory fish stocks – has also been a common and accepted feature in several regions, and migrant fishing communities have often evolved very distinctive tenure relations. In the context of Ghanaian fishers migrating to fish in the waters of neighbouring West African countries, Overå (2000) notes that duties, rights, and access to resources are regulated by institutionalized mechanisms both in the home and migrant communities. The system is 'monitored' by local leaders in both locations, making co-existence between migrants and locals possible and, in most cases, economically advantageous.

Given the complex mosaic of tenure rights that have been documented, particularly within inshore and coastal areas, it is important to examine whether the management tools used for the conservation and management of coastal and marine biodiversity, including fisheries resources, have actually taken account of all the challenges involved.

This paper will specifically explore the extent to which existing tenure rights are recognized in MPA practice, in a context where MPAs are increasingly

being used by governments and others as instruments for conservation and management of coastal and marine biodiversity. For example, reaffirming earlier targets, the 10-year Strategic Plan for the period 2011–2020 adopted by the Tenth Conference of Parties (COP10) of the Convention on Biological Diversity (CBD) aims for at least 10 percent of coastal and marine areas to be conserved through effectively and equitably managed, ecologically representative, well-connected systems of protected areas, and other effective area-based conservation measures (Secretariat of the Convention on Biological Diversity (SCBD), 2010a).

The coming period is, therefore, likely to see a major increase in the areas under MPAs. Kelleher *et al.* (1995) point out that within a period of 25 years (1970–1995), the number of MPAs grew ten-fold—from 118 to 1306. In the subsequent decade the number increased to 6 289 (Thorpe *et al.*, 2011) (www.MPAglobal.org).

Currently only four percent of the world's marine and coastal areas are under such protective regimes, as against the target of 10 percent. It is important to note, however, that the proportion of MPAs is much higher in the case of territorial waters—MPAs cover 7.2 per cent of these (SCBD, 2012). As mentioned earlier, systems of tenure are often well developed in inshore coastal areas, and it is in such waters that artisanal and small-scale fisheries are primarily found.

The focus of the paper will mainly be on MPAs that are being reported as MPAs by national governments, as in reports to the CBD, and that are being declared primarily for the purpose of biodiversity conservation. The focus is **not** on spatial management measures, such as closed areas and artisanal fishing zones that have been (and are being) widely used by indigenous and local fishing communities, and by fisheries departments, including for purposes of fisheries management. Such areas are typically not recognized as MPAs by governments, even though they may offer a higher level of protection to coastal and marine biodiversity compared to surrounding areas. To clarify: the term 'MPA practice' is used in this paper to refer to the ways in which MPAs are being conceptualized, initiated, planned, implemented and enforced.

The first section of the paper highlights provisions for protecting the rights of indigenous and local communities within CBD processes, given the

fact that much of the impetus for increasing areas under MPAs comes from commitments under the CBD. The second section, drawing on a review of literature, examines cases in which the tenure rights of indigenous and local communities have or have not been respected in MPA practice. The third section suggests some key steps and principles with respect to tenure rights that need to be part of MPA practice, noting that recognition of tenure rights is a key element that can enhance the probability of achieving 'social success', as well as the observed links between biological and social success.

CBD AND THE RIGHTS OF INDIGENOUS AND LOCAL COMMUNITIES

It is essential to understand the commitment to the human rights of indigenous peoples and local communities within CBD processes, given that this is the most important international convention that has a strong focus on MPAs and that provides an impetus for increasing MPAs.

Article 8(j) of the CBD recognizes the need to respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities (ILCs), embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity, and to promote their wider application. Article 10(c) calls on states to protect and encourage the customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements (SCBD, www.cbd.int).

Decisions taken by the CBD's Conference of Parties (COP), as under the Programme of Work on Marine and Coastal Biological Diversity and the Programme of Work on Protected Areas, also reflect a similar commitment to protecting the rights of Indigenous and Local Communities (ILCs). Several other COP decisions have similarly reinforced the need to respect the rights of ILCs in the context of protected areas. Such commitments are also reflected in the policy documents of donor agencies and environmental groups supporting MPA implementation. However, national-level policy and legislation as related to fisheries and conservation in marine and coastal areas often does not reflect the above commitments (International Collective in Support of Fishworkers (ICSF), 2010).

A REVIEW OF THE LITERATURE ON MPAS AND TENURE RIGHTS

Against this backdrop and given the rapid expansion of the areas under MPAs, particularly in territorial waters, the extent to which MPA practice is, or is not, respecting tenure rights of indigenous and local communities that have customarily been fishing in waters declared as MPAs, is examined.

The review draws on both peer-reviewed literature as well as grey literature, including doctoral and masters theses, government reports, conference proceedings, papers presented at workshops/conferences, case studies undertaken by NGOs and others, and unpublished texts. A bibliographic database was developed through a web search and by searching through peer-reviewed journals, as well as by searching through the Aquatic Sciences and Fisheries Abstracts (AFSA) and EBSCO databases, using keywords and terms such as 'MPAs', 'marine reserves', 'communities', 'rights', 'marine parks', and 'tenure'.

Literature available in English was reviewed where this specifically discussed socio-economic issues and issues of tenure in relation to fishing communities in Asia, Africa and Latin America. It was noted that the focus of much of the literature on MPAs is on environmental and biological issues. Case studies were chosen based on areas where socio-economic and biological information in relation to MPAs was available.

Cases where MPA practice has weakened or extinguished tenure rights are discussed first, followed by those where tenure rights have been strengthened.

Weakening of tenure rights associated with MPA practice

There is significant literature on how communities have been divested of their tenure rights during MPA practice. Almudi (2010) describes the situation of traditional fishing communities in the Peixe Lagoon MPA, located in the central portion of the Rio Grande do Sul State coast, Brazil. The Peixe Lagoon was declared a national park in 1986, based on its importance for migratory birds. Although the creation of the park helped to conserve fish stocks and restrict access to outsiders – with positive impacts for local fishers – communities live under the constant threat of eviction. They are allowed to fish and live inside

the park only until financial resources can be allocated to relocate them. The temporary licenses granted to traditional fishers are not transferable to their children and expire when they quit fishing. Houses inside the protected area are not allowed running water or electricity, and fishers are forbidden to receive visitors overnight, even relatives. Notably, Peixe Lagoon fishers use relatively simple fishing equipment and non-motorized open boats. They also play an important part in maintaining the local ecological system through practices such as annually opening the mouth of the lagoon, allowing algae, nutrients and larvae of molluscs, crustaceans and fish to enter the lagoon.

The Ballena Marine National Park, on the southern Pacific coast of Costa Rica, was implemented without consultation with local communities. Local resource users were denied access to lands and resources after the MPA was declared, generating significant conflict between the local artisanal fishers and government agencies (Fonseca, 2009, quoted in Gallardo, 2009). The process was similar in Las Baulas Marine National Park at the northern Pacific end, created in 1991. Restrictions on fishing activities finally forced communities that were fully dependent on coastal and marine resources to change their livelihood strategies (Utting 1994, quoted in Gallardo, 2009).

In Guam in the Western Pacific, fishers lost access to fishing grounds resulting from the establishment in 1997 of five MPAs in traditional Chomorro fishing areas on the west coast. Fishing for most species and by most techniques was prohibited in the MPAs. This also had safety repercussions, as fishers were forced to fish on the windier east coast. A study indicates that the number of deaths from drowning among the traditional Chomorro fishers almost doubled after the establishment of the MPAs (Western Pacific Regional Fisheries Management Council, 2010).

The Gahirmatha (Marine) Wildlife Sanctuary, Orissa, India, which was set up in 1997, has directly affected over 50 000 fishers through restrictions and regulations on fishing that were put in place to protect turtle habitats and migration routes. The number of fishing days has been drastically reduced from 240 a year to fewer than 100, and fishers' access to nearshore fishing grounds has been greatly restricted, without proper compensation or provision of supplementary livelihoods. This has led to considerable hardship for fishing communities that were already economically-disadvantaged. There is little

indication that the sanctuary is meeting either biological or social goals. In the Gulf of Mannar National Park in Tamil Nadu, declared in 1986, fishing is restricted. This has affected about 150 000 people, of which around 35 000 are small-scale fishers. They include 5 000 fisherwomen collecting seaweed and 25 000 divers. Fishers face loss of livelihoods from reduced access to fishing grounds, arrests, and confiscation of vessels and catch. Efforts to provide alternative livelihoods have not been considered effective by fishing communities (ICSF, 2009).

The Had Chao Mai Marine National Park in Thailand was established without consultation with local communities. There is a lack of clarity on MPA boundaries and rules, and conflicts between communities and management authorities are common. Communities located inside the park face additional problems, as many of them do not possess land title deeds or documents, either for land used for habitation or for agriculture. They are threatened with displacement as a result (Prasertcharoensuk, 2010).

In the Ha Long Bay World Natural Heritage Area, Vietnam, established in 1995 to manage, protect and conserve world cultural and natural heritage sites, fishing communities that used to live in floating villages in the bay areas were asked to move to land. While no new floating houses are allowed, a certain number of houses have been retained for tourism purposes and to preserve cultural identity. Hien (2011) points out that, ironically, an area declared to preserve cultural heritage is the main reason for fishing communities being evicted.

The Sanya Coral Reef National Marine Nature Reserve, China, was declared primarily to promote tourism. Fishing communities lost access to natural resources, both in the sea and on land. Coral reef areas, where fish are abundant, are occupied by tourism developers and are becoming increasingly inaccessible to local fishers. There are also conflicts, as collectively-owned lands used for coastal farming in a couple of villages have been leased to tourism developers in return for meager compensation (Qui, 2011).

In the Soufrière MPA, St. Lucia, a popular tourist destination, there are restrictions on fishing. The situation is marked by conflict and political struggle over conservation and resource access among fishers, yachters, scuba divers, and conservationists (Trist, 1999, quoted in Christie and White, 2007).

Marine reserves were established in the municipality of Mabini, Luzon, the Philippines, to protect corals and to attract tourism. Based on a social survey, Oracion *et al.* (2005) found that fishers felt their ownership of the resources had been appropriated, and that resort operators tended to treat MPAs as their territory. Christie (2004) also draws attention to other cases of de facto privatization in the Philippines, where private entities and government tourism operations took over the management and enforcement of MPAs (such as Twin Rocks and Balicasag Island), after they were established by community and local government entities.

In Bunaken National Park in north Sulawesi Province, Indonesian fishers' access to productive fishing areas has been reduced, even as the same areas are open to tourism-related activities (ICSF, 2010). Fishers feel that the zonation scheme is unfair because it reserves the best fishing areas exclusively for diving, not allowing for necessary seasonal relocation of fishing around the islands (Merrill, 1998; Christie *et al.*, 2003). The situation is similar in the Wakatobi National Park, southeast Sulawesi Province, where almost 40 000 people are dependent on marine resources and fishers face restrictions on access to fishing grounds (ICSF, 2010). Fishing is allowed in the traditional use zone and general use zone, and prohibited in the core zone, marine zone and tourism zone. The traditional *Bajau* (sea gypsy) community feels alienated, given that their access to the resources has been considerably restricted (Clifton, 2011).

The Langebaan MPA on South Africa's west coast was declared in 1976. The long history of the local traditional fisher community was not recognized in the establishment and management of the MPA. On the contrary, the community that lived in and adjacent to the park has been systematically dispossessed of its culture, tradition and livelihoods. Despite repeated attempts by the community to negotiate their rights to fish in their traditional waters and to participate in the management of the lagoon, they remain marginalized (Sunde and Isaacs, 2008). The Maputaland MPA, also in South Africa, provides a stark example of an instance where ecotourism initiatives are further excluding the community and restricting their access to resources (Sunde and Isaacs, 2008).

In Kenya, fishers who previously had unlimited access to and use of the marine resources in coral reef areas had to seek other livelihoods and/or locations, when marine national parks and reserves for the purposes of conservation were declared in several areas. Some of the younger fishers attempted to convert their boats to ferry tourists interested in snorkeling and sailing in the protected areas, but not always successfully. The immediate reaction to this denial of rights to fish was strong opposition to marine conservation among the locals (Weru, 2005; Ngugi, 2001). Weru further points out that, in contrast, the consultative processes launched more recently by the Kenya Wildlife Service (KWS) to develop management plans for some MPAs has to some extent helped reduce resistance among fishers to conservation.

In Mozambique, Johnstone (2009) notes that MPA-managed regimes do not recognize fishers' rights and traditional fishing rules, leading to conflicts and low compliance. This contrasts with the situation in the areas outside the MPAs, where traditional fishing rules are recognized by state governing institutions and are integrated into several co-management initiatives. The rules are sanctioned by the fishing community through collective ceremonies, and by the state through legislation. This approach has resulted in good compliance with traditional and state fishing rules.

In the Mafia Island Marine Park, Tanzania, the General Management Plan (GMP) prepared has specific objectives to ensure community participation in management, and community access to resources. The GMP stipulates the documentation of traditional fishing grounds and traditional and contemporary tenure rights and integration of local residents' indigenous knowledge and scientific knowledge into fisheries management plans. However, Mwaipopo (2008) highlights that these stipulations are often not implemented, leading to ongoing conflicts between different user groups and management authorities.

There is another class of MPAs in Tanzania that are privately owned, and by some parameters can be considered successful. An example is the Chumbe Island Coral Park, designated as a privately managed MPA in 1994, in which ecotourism was introduced in 1998 as a revenue-generating tool. While the park has been of benefit in several ways, rural fishers along the adjacent coast on Unguja main island have been negatively affected by loss of access to traditional fishing grounds. Small-scale fishers, unable to diversify to other fishing grounds, have been the worst affected (Thorkildsen, 2006).

Strengthening of tenure rights associated with MPA practice

As mentioned, some of the literature also refers to recognition of tenure rights in MPA practice. In general this is associated with participatory and/or community-led processes for conservation and management of resources. Perhaps the most well known examples, that build on customary tenure and governance as well as on traditional knowledge systems, are locally managed marine areas (LMMAs). These are being established mainly in Pacific nations and in a few countries in Asia. An LMMA is an area of nearshore waters being actively managed by local communities or resource-owning groups, or being collaboratively managed by resident communities with local government and/or partner organizations. LMMAs are typically characterized by local ownership and/or control (http://www.lmmanetwork.org). The main driver, in most cases, is a community desire to maintain or improve livelihoods, often related to perceived threats to food security or local economic revenue (Govan, 2009a).

In Fiji, the Navakavu locally managed marine area was formed in 2002 by the clan (*yavusa*) of Navakavu. A community-based *tabu* or 'no-take' zone, and a wider marine managed area under customary traditional authority, has been established. Governance and enforcement is undertaken by a committee answerable to the 'meeting of chiefs', and decisions are enforced by the community through customary mechanisms and honorary fish wardens. The community enjoys a number of benefits as a result, including increased fish stocks in the no-take zone and increased value of the fishery overall (Govan, 2009a).

The Nguna-Pele MPA, Vanuatu, initiated in 2002, is managed by a local, indigenous, non-governmental organization made up of sixteen communities on two islands. The effort is to ensure that local people retain access and use of the diversity of marine species of Vanuatu through proactive conservation, resilient management, and locally-appropriate awareness. The chiefs and people of the member communities have each set aside an area of village-owned reef or forest to be considered *tabu* or permanently off-limits to serve as a "resource factory". There are monthly meetings of the management committee to make decisions guiding the current and future management of the MPA network. Nguna and Pele's managed reefs, sea grass beds, mangrove forests and intertidal lagoons now exceed 3,000 hectares. The national government recognizes and supports the work of local community networks and emerging management institutions (http://www.marineprotectedarea.com.vu).

According to Govan (2009b), more than 12 000 square kilometres in the South Pacific (of which more than 1 000 square kilometres are 'no-take' areas) have come under active management over the last decade, involving more than 500 communities in 15 independent countries and territories. He notes that the acceptance of LMMAs is a result of communities' perception of likely benefits, including among other things recovery of natural resources, improved food security, improved governance, improved security of tenure, cultural recovery, and community organization. Perceived benefits also include the exclusion of other stakeholders from fishing areas.

Several other case studies support this observation—communities tend to support or lead conservation efforts where they perceive that this will help them either to establish or to strengthen tenure rights. This includes the right to exclude others, such as fishers from other areas or other sectoral interest groups: for example, tourism, aquaculture and the oil industry.

Communities tend to support or lead conservation efforts where they perceive that this will help them either establish or strengthen tenure rights, as well as the right to exclude others, such as fishers from other areas or other sectoral interest groups, for example, tourism, aquaculture and the oil industry

In Nicaragua, local communities are trying to establish a protected area in Pearl Cays, off the Caribbean coast. Jentoft *et al.* (2011) notes that local communities are trying to use the MPA route to gain control of what they perceive to be their rightful property according to Nicaraguan law, which states that local communities have inalienable rights over their territories. In recent years, the cays have been bought by private developers and local fishers have been excluded from using them. Local communities feel that by declaring the area an MPA, they could make the new private owners return the cays and obtain control over their usage. The process of dialogue for establishing the MPA is underway as there are still concerns among some communities that MPA establishment could also deny local fishers their fishing rights.

Columbia's native islanders hope that their rights to use the sea will be fully recognized through the establishment of the Seaflower MPA. Mow *et al.* (2007) observe that '*The issue for islanders is not only what is at stake in regard to their traditional livelihoods if coastal and marine resources are not conserved but, more importantly in their eyes, whether they have the right to manage and use the natural resources that have supported them for centuries and how they can defend and assure their rights.*' (Taylor *et al.*, 2011).

The Isla Natividad MPA in Mexico was created by the local fishers' cooperative within the waters of the cooperative's fishing concession. The 20-year concession expires in 2012. The MPA was used by the cooperative as a way to fortify its claims to resource access rights in the long term by demonstrating that it could manage and conserve resources beyond the minimum requirements of stewardship. The cooperative also used the MPA to leverage its claims, and to exclude outsiders from the zone (Weisman and McCay, 2011).

Meanwhile in Yucatan, Mexico, the fishing community of San Felipe established the Actan Chuleb marine protected area (ACMPA) in 1994, in collaboration with some scientists. Rules for managing the MPA were collectively formulated; locals were permitted to fish using only hook and line. One of the main objectives of establishing the MPA was to exclude fishers from outside the area. The creation of ACMPA has also brought back management responsibility from the state to the community, though challenges in implementation remain (Fraga and Jesus, 2008; Bjorkan, 2009).

In Brazil a new category of protected area for sustainable use of resources has been in place since the early 1990s, called the marine extractive reserves (RESEX or MER). A MER can only be designated based on community demands. Communities in several parts of Brazil are seeking the establishment of such reserves to formalize their rights to coastal lands and fishing grounds and to exclude other interest groups. As observed by Diegues (2008), such reserves can be considered the 'new commons' being built by coastal communities, particularly fishing communities, to protect their territories from encroachment by other economic activities, such as tourism, commercial shrimp farming and industrial fisheries.

The community of Mangangoulak in Casamance, Senegal, has advocated successfully for authorization to manage and protect their resources within a declared Site of Community Patrimony. The fishers' organization has reintroduced rules for their traditional fishing grounds and established the boundaries, internal zoning and fishing regulations in each zone, as well as the means for ensuring that these rules are respected (ICCA, 2010; ICSF, 2010).

Discussion

Mascia and Claus (2009) have pointed out that legally-designated MPAs may formalize or invalidate pre-existing de facto rights, thus reinforcing or undermining pre-existing privileges. Mascia *et al.* (2010) found that most fishing subgroups experienced a shift in their ability to govern MPA resources. Their analysis was based on a review of literature that investigated the effects on fishers of establishing MPAs with respect to five commonly reported indicators of social well-being: food security, resource control (i.e. the right to govern natural resources within the MPA), employment, community organization, and income. Forty four percent of all subgroups gained greater control over marine resources following the establishment of an MPA; the same percentage experienced a loss of resource control.

The review of literature undertaken in this paper also finds that there are cases where tenure rights have been strengthened: for example, when communities have used MPAs as a tool to secure their access to resources and their rights to manage them. There are also cases where MPA implementation led to the tenure rights of fishing communities – particularly their rights to access, use and manage resources – being weakened or extinguished.

Based on the cases reviewed it appears that, on balance, situations where tenure rights have been weakened or extinguished number more than those where they have been strengthened. This suggests that MPA practice has not adequately recognized the importance of factoring in the tenure rights of local communities. But more detailed research would be needed to obtain a comprehensive picture, including on the numbers of people whose rights have been extinguished or weakened during MPA practice. On the terrestrial side, which has been studied in more detail, estimates indicate that the number of 'conservation refugees' in Africa alone would be 14.5 million (Geisler, 2002). However, Brockington *et al.* (2006) note that there is a dearth of reliable information on displacement from protected areas.

The review of the literature indicates that the denial or restriction of tenure rights is associated with considerable conflict between fishing communities and management authorities, given the relationship between secure access to resources and livelihood security. The antagonism generated by denial of access rights often pitches communities against conservation efforts, in effect making

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The antagonism generated by denial of access rights often pitches communities against conservation efforts, making them in effect 'enemies of conservation'

them 'enemies of conservation'. Instances of violations and illegal fishing by local communities are commonly reported, undermining the effectiveness of conservation efforts as well. Enforcement measures such as fines and arrests, apart from 'criminalizing' local populations, often make the situation volatile. An additional dimension that needs further exploration and documentation is the higher risk taken by fishers denied access to their traditional fishing grounds, even leading to death at sea, as discussed in the case from Guam.

MPAs marked by denial of tenure rights and other forms of human rights violations are unlikely to meet their biological objectives, to the extent that they have to deal with hostile local populations. Christie (2004) has pointed to the strong link that exists between social and biological success, with social considerations determining the long-term biological success of MPAs. He draws attention to the need for MPAs to be designed to meet multiple social and biological goals, and to ensuring that standards for measuring both biological and social success are applied equally. Similarly, a report by the United Nations Environment Programme (UNEP) (2011), based on an analysis of case studies from across the world, has noted that reinforcement of community/user property rights is identified by a number of case studies as a priority to improve MPA governance.

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GETTING IT RIGHT: RECOGNIZING TENURE RIGHTS IN MPA PRACTICE

The following are some of the key principles and imperatives that need to inform MPA practice if the tenure rights of local communities, particularly of disadvantaged groups, are to be better respected.

Recognize that mapping tenure rights is important

A systematic understanding of legitimate tenure rights and the institutions and systems of governance associated with them is essential, as is the need to ensure that MPA practice builds on them. That existing systems allocating tenure rights may be disadvantaging certain groups, such as women, needs to be kept in mind. Such a mapping exercise could help in minimizing conflicts and enhancing compliance, as has been demonstrated by experience. In the case of the Solomon Islands, for example, a detailed mapping of the customary sea tenure systems in Roviana and Vonavona lagoons helped in establishing a network of MPAs, in partnership with local communities. Mapping forms of sea tenure (i.e. secure versus insecure tenure) was crucial to determining which sites were more appropriate for accommodating MPAs (Aswani, 2005). In Kimbe Bay, Papua New Guinea, information on customary marine tenure boundaries was taken into account when refining an MPA network initially designed using reserve selection software (Weeks *et al.*, 2010). In the case of Siquijor, Philippines, where traditional fishing rights and barangay-based management systems are still prevalent, barangay boundaries were combined with modern Marxan software to identify 'no-take' areas in MPAs. Inclusion of local marine tenure boundaries also led to widespread acceptance of zoning areas by the local communities (Weeks *et al.*, 2010).

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Recognize that successful processes take time

There is a need to recognize that processes such as those described above take time. Christie and White (2007) offer the example of the management plan for the Tubbataha Reef National Marine Park in the Philippines, which was developed over a 10-year period. This fostered the successful resolution of seemingly unsolvable conflicts over resource uses. Management could

then proceed with a strong mandate both from the government and the stakeholder community (Arquiza and White, 1999). From this perspective target-driven approaches to expanding areas under MPAs, with a primary focus on meeting quantitative goals, are inherently problematic.

Recognize power differentials and the fact that MPAs reallocate rights

MPAs play a role in reallocating pre-existing rights governing resource access and use (Mascia and Claus, 2009). The relative power of various actors involved undoubtedly influences the process of who gains what kinds of rights, whose rights are recognized, who participates in decision-making and who corners the benefits. In most parts of the world, small-scale and artisanal fishing communities tend to be among the least powerful, especially as compared to other actors with economic and other interests on the coast and in the marine space: the tourism industry, governments, conservation groups, industrial fisheries, the oil industry etc. It is therefore not surprising that cases of displacement and marginalization of fishing communities from MPAs set up in the name of conservation are actually rather common. Well-intentioned policies and legislation may exist, seeking to protect the rights of fishing communities in MPA practice; but where communities remain poorly organized and lower down the power hierarchy, the gap between policy and implementation is likely to remain.

Several of the case studies discussed above, for example, draw attention to the link between MPAs and tourism. In a number of cases the establishment of MPAs has been associated with greater benefits to the tourist industry and a weakening of community rights. Local people have not necessarily benefited from the growth of tourism in protected areas. This link between MPAs and the tourist industry, as it relates to the tenure rights of local communities to access and manage resources, needs to be better studied.

In this context the fact that there are power differentials even among fishing communities needs to be kept in mind. Specific parties may be negatively affected by management decisions: for example, small-scale fishers on non-motorized vessels who are unable to relocate to other fishing grounds when they are denied access to their traditional nearshore grounds, or women, who are often not part of decision-making processes.

Recognize the need for creating conditions for communities and community groups to organize and negotiate

The case studies indicate that in some cases communities have been able to organize, including by building on the strength of their traditional organizations, to retain and strengthen their access to resources and their rights to manage resources. They have been able to negotiate with other actors on the basis of relative equality. This also underlines the importance of creating conditions that support fishing communities, including disadvantaged sub-groups within such communities, to organize. This has the potential of leading to better and more equitable arrangements in managing and conserving resources.

Recognize the need to support and create the conditions for community-led processes

Across the world there are many examples of communities that have played a critical role in conserving and managing a variety of natural environments and species for various purposes. The website of the Indigenous and Community Conserved Area (ICCA) network (http://www.iccaforum.org/) documents several such examples. There is a strong case for identifying and supporting such community institutions and systems of governance and the tenure rights associated with them, in ways that respect their autonomy. There are also several recent examples of community-led conservation and management of coastal and marine resources. In the case of Brazil, discussed earlier, it is communities that are seeking the establishment of marine extractive reserves (MERs) as a way of establishing their rights to their territories. The legal framework for the establishment of MERs enables communities to take the lead in promoting sustainable use and conservation. Such frameworks, currently lacking in most countries, are essential.

CONCLUSION

The evidence presented in this paper suggests that communities tend to support or lead conservation efforts, so long as these efforts enable them to establish or strengthen their tenure rights.

Conversely, where such rights are weakened or extinguished, the social conflict and sense of alienation generated can undermine conservation efforts. Given the links observed between the social and biological successes of MPAs, emphasis must be placed on the process of establishing MPAs, on mapping existing tenure rights, and on creating conditions for communities to take the initiative in MPA practice. Fundamentally, respecting the tenure rights of local communities should be seen as an end in itself, reflecting the commitment of MPA practitioners to protecting human rights. Equally, respecting tenure rights must be seen as essential to achieving more effective and sustainable conservation and management of coastal and marine resources.

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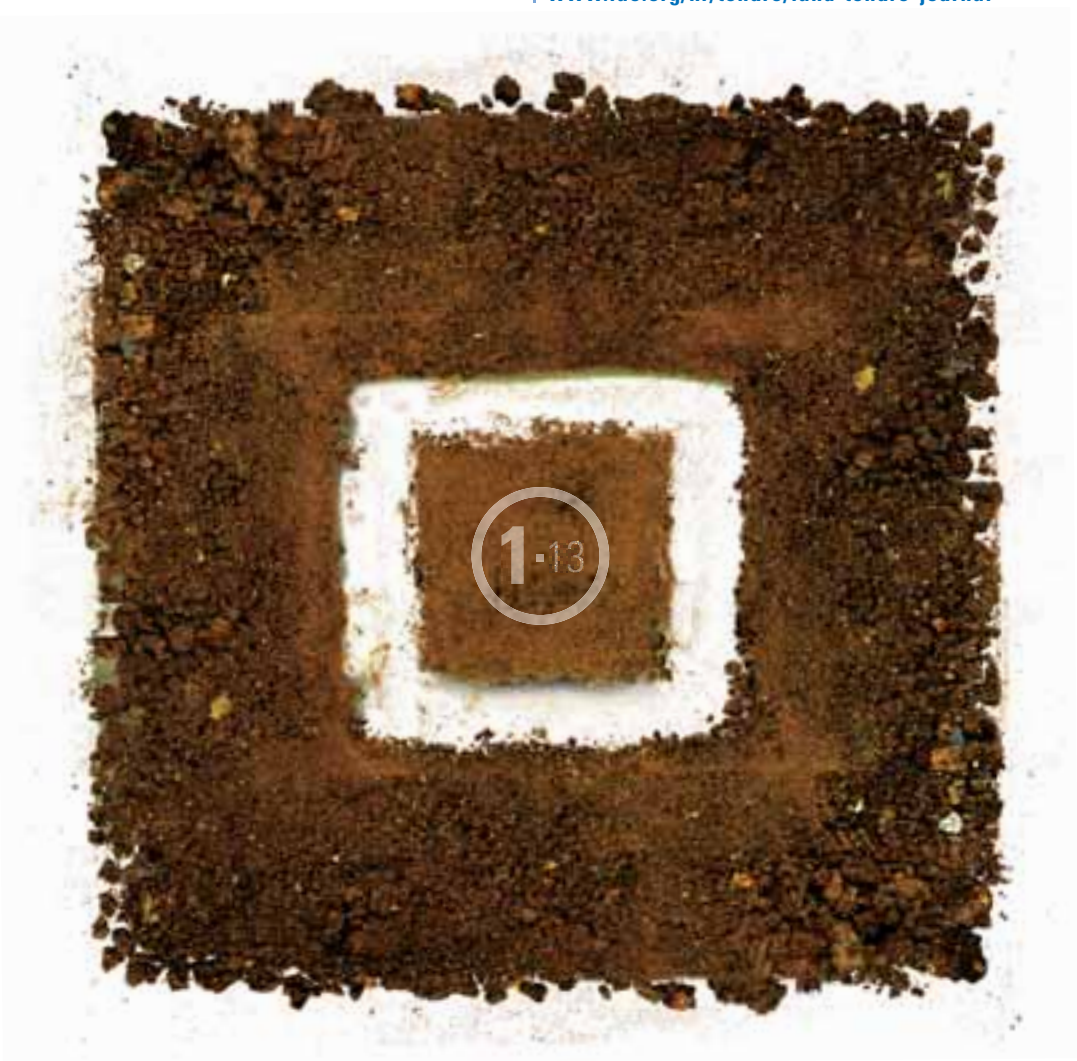

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