

Challenging ITQs: Legal and Political Action in Iceland, Canada and Latin America

A Preliminary Overview

By Parzival Copes and Gísli Pálsson

THE ICELANDIC SUPREME COURT RULING

The research for this paper was triggered by a stunning judgement of the Icelandic Supreme Court in December 1998, which declared as unconstitutional existing fisheries laws on individual transferable quotas (ITQs), because they privileged those who derived their fishing rights from ownership of vessels during a specific period over which their "fishing history" was established (Pálsson 1999, Copes 1999a, Gudmundsdóttir 1999). In Iceland, as elsewhere, it has been the practice to start up ITQ systems by giving away quotas for free to individuals or companies owning licensed fishing vessels at the time an ITQ regime is introduced. The amount of quota allocated to recipients is usually calculated in relation to their recent catch history. The Court decided that this privileged allocation violates both the constitutional provision against discrimination and the provision concerning the "right to work". This set the stage for intensified legal and political discussions in Iceland about ITQs. There are potential implications for the constitutionality or legality of similar systems elsewhere. The ruling is interesting, in its own right, to legal scholars, anthropologists, political scientists, and investigators concerned with common property regimes and public-trust doctrines. In our paper we explore emerging constitutional and political challenges to ITQ systems in Iceland, Canada and South America.

That there should be legal challenges of ITQ regimes in Iceland and elsewhere is not surprising. Such regimes invite challenge particularly because they are based on meeting a set of narrow economic objectives at the expense, often, of considerable values—both non-economic and economic—that they violate. It is common to recognize three major policy areas in fisheries management that require balanced consideration: biological conservation, economic optimization and social equity (Copes 1999b). ITQ systems are entirely focused on market-measured economic optimization, which usually consists of maximizing the present value of narrowly conceived and arbitrarily measured economic rents (Arnason 1995). Consequently, it should not be

surprising that ITQ systems, incidentally, cause significant adverse impacts both on biological conservation (Copes 2000a, 2000b) and social equity (Copes 1997a, 1994; Pálsson and Helgason 1996; Pálsson and Pétursdóttir 1997). Additionally, ITQ systems have serious endogenous economic defects resulting in market failure on account of negative externalities that they generate (Copes 2000b).

It is easy to understand initial acceptance of ITQs. The universal practice of offering quotas for free to current license holders, often accompanied by annual license fees that are well below the cost of fisheries management, constitutes an enormous bribe—one that is sometimes worth hundreds of thousands of dollars to a recipient. Who wouldn't take it?! Yet, with evidence of conservation failure and social inequities, resistance to ITQ systems appears to be growing. The perceived faults of ITQ quota systems are manifold and knowledge of these faults is spreading. Following is a brief summary of what the public increasingly has come to recognize (Copes 1986, 1995, 1998b, 1998c):

Gratis quota allocations give windfall gains to the privileged few. Capitalization of quota rights at high values encourages their accumulation in the hands of corporations and wealthy investors. This facilitates financial and geographical concentration of fishing operations, with substitution of capital for labor, causing irrationally excessive job losses. High quota costs deprive crew members of the traditional opportunity to become independent owner-operators as they can no longer afford to purchase a vessel with quota privileges. Communities, historically dependent on adjacent fish stocks, find their economic viability—and sometimes their very existence—threatened when their resources are alienated to outsiders. Members of the public are scandalized by the gifting of access rights to public resources, privileging an emerging class of "armchair fishermen," who become rentiers, living off the

avails of quota leasing. The public views with dismay the waste of resources and impaired conservation from quota generated high-grading, quota busting, and by-catch dumping.

The Supreme Court decision was a serious blow to the government of Iceland which has been strongly committed to the ITQ system. They reacted swiftly by amending the legislation concerned, so that Icelanders generally would be issued fishing licenses on demand. This was designed to overcome the charge of discrimination in access. Relying on a statement in the original Supreme Court ruling that acknowledged the need for "temporary" restrictions (by quota or other limitation) when stocks were under stress, they left the existing quota system intact. However, before new license-holders could fish for any stocks under quota (which covered the bulk of the available catch), they would still have to purchase quota, the price of which was about four times the value of the annual catch it represented, or lease quota at about half of the gross value of the catch it represented. This left the privileged access of quota holders virtually intact.

One vessel operator tested the new regulations by fishing for certain quota species without possession of any quota for such species. He was charged, but a regional court found the skipper and boat owner of the vessel concerned "not guilty." The government appealed this ruling to the Supreme Court, which reversed the lower court's verdict, thus finding the vessel operator guilty. This appears consistent with the Court's initial pronouncement that quota limitations on the catch may be justified on conservation grounds.

With respect to this later decision, the Court added commentary regarding equity considerations on which their earlier decision was based. They suggested that equity may be satisfied if the government would charge quota holders for the quota privileges they enjoyed and returned the benefits to the general public. The precise means of implementing this would be the task of Parliament, rather than the courts. There are two disturbing features of this solution that the Court may not have considered. Access to quotas presumably would still be achieved through the market, with the level of their values contingent upon the level of charges government imposed on quota holders. It seems unlikely that governments would raise charges on quotas to a level at which the market value of these quotas would be reduced to zero. Thus, it would still mean that access costs to the fishery would likely be capitalized at significantly higher values than in pre-ITQ times, reducing inter-generational accessibility for deck hands trying to work themselves up to owner-operator status. There also would be nagging inequities to be reconciled in respect of quota trades

consummated at higher prices in the past. Could one recover the substantial windfall profits from ex-quota-holders who had sold out their quota privileges? Would one have to compensate operators who, in good faith, had bought quota at the higher prices of the past, only to find their investment—against which they may have borrowed heavily—greatly reduced in value and thereby threatening their financial solvency?

The final shape of Iceland's fisheries management system is up in the air. ITQs remain under a cloud.

THE CANADIAN SITUATION

Successive federal governments in Canada over the last two decades, generally, have regarded individual quota (IQ) systems with favor. The prevailing philosophy among key fisheries management staff of the Department of Fisheries and Oceans, aided by staff turnover, appears to have been converted to one of support for IQ systems, preferably including transferability privileges (ITQs) (Copes 1998a, 1994). An individual quota system was used in Canada's Lake Winnipeg fishery as early as 1972, and an IQ regime for herring was introduced on Canada's Atlantic Coast in 1976 (Parsons 1993). Individual quota systems became the dominant management system on the country's Atlantic Coast during the 1980s, either as regular ITQ or other IQ systems. But the management results have given little reason for confidence in these systems. The major stocks are those for groundfish, which for the first time in history reached utter collapse in 1992. The fishery on cod and other groundfish species was then closed. With minor exceptions they remain closed today as stock rebuilding has been a very slow process. The stock collapse came after a decade of widespread use of ITQ and IQ systems, with incontrovertible evidence of serious levels of quota busting, high-grading, by-catch waste and data fouling, much of it acknowledged by the Department of Fisheries and Oceans (Copes 1992). It may also be noted, incidentally, that Iceland's highly important cod stocks in the 1990s reached their lowest levels ever—again after about a decade of ITQ fishing (Hannesson 1996).

Fortunately, the decline of the groundfish stocks brought with it a large increase in the crab stocks, allowing the Atlantic crab fishery to flourish. However, crab was also managed by an individual quota regime, which was subject to the usual problems of high-grading, quota busting, etc. The Department of Fisheries and Oceans recently announced that crab stocks are showing signs of serious stock declines. The ITQ history may be repeating itself once more!

In several areas on both east and west coasts of the country there is strong resistance to quota systems, particularly in smaller coastal communities that have banded together in *Coastal Community Networks*. As a concession, the government now, in a few cases, is arranging community allocations (quotas) under co-management arrangements with local provisions for resource stewardship.

In Canada's independent-minded Senate, the Standing Committee on Fisheries (1998) has worked diligently for years to explore social conditions in Canada's fisheries and recently brought out a report, *Privatization and Quota Licensing in Canada's Fisheries*, containing a critical assessment of IQ impacts. Following are two of the noteworthy recommendations in the report:

5. The Committee urges the Department of Fisheries and Oceans to more thoroughly consider the long-term social and economic effects of individual quota licences, especially those that are transferable, on Canada's coastal communities, Aboriginal and other, and not extend the individual quota regime until the needs of coastal communities, Aboriginal and other, have been fully assessed.

10. The Committee recommends that the Department of Fisheries and Oceans stop using the examples of individual quota management systems in New Zealand and Iceland until the Department has taken full account of the criticisms of individual quotas emanating from those countries.

The Federal Court of Canada (1996) has dealt with contestation of ITQ regulations on equity grounds, but this was concerned with allocation internal to an ITQ system, rather than with challenges to the system itself (*R. v. Carpenter*). While the court found in favor of the plaintiffs, the judgement was overturned on appeal on technical grounds. Interestingly, the case itself evolved around striking evidence of manipulation by key personnel of the Department of Fisheries and Oceans to secure majority support from the industry for the establishment of an ITQ system.

The Supreme Court of Canada also has made historically important rulings on fisheries matters. In a 1990 landmark decision (*R. v. Sparrow*) the Court ruled that the constitutionally protected rights of Aboriginal people in Canada required the federal government to allow them

improved access to fishery resources. The Court based its judgement in large part on historical usage of, and continued dependence upon, such resources by Aboriginal communities. This brings to mind the current agitation in Canadian coastal communities, through formally organized Coastal Community Networks, for recognition of their rights to local resources upon which they have long depended. Transferability of quotas and licences has allowed corporations and wealthy individuals to use their superior financial resources to capture an increasing share of fishery access rights, which may be used to divert fish catches to their centrally located operations. Can a legal case be made to protect communities against such alienation of their historical resource base (Copes 1998b)? Interestingly, this question appears to have occurred to a Chief Justice of Canada's Supreme Court. In a 1996 case of the Court bearing on Aboriginal fishing rights (*R. v. Gladstone*), Chief Justice Lamer, before his recent retirement, mused on possible extension of the principles supporting Aboriginal fishing rights, referring to concomitant objectives "... such as economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups"

More directly comparable to the recent Icelandic development could be an appeal by individual citizens in Canada who claim to be disadvantaged by ITQ provisions. The Icelandic Supreme Court ruled in favor of the plaintiff on the grounds that he had suffered discrimination and that his "right to work" in the fishery had been infringed. The constitutionally entrenched Charter of Rights and Freedoms in Canada has a strong non-discrimination clause that offers individuals "... the equal protection and equal benefit of the law without discrimination...." Certainly, the case can be made that in Canada, as in Iceland, ITQ provisions have discriminated in favor of particular groups in the fishery, allowing them substantial wealth benefits from the public fishery resource, at the expense of others. In fact two relevant court cases, seeking relief from discrimination in access allocations have been launched in the province of Nova Scotia, on Canada's east coast, though one of these has been abandoned for lack of funding.

SOME DEVELOPMENTS IN LATIN AMERICA

There is growing resistance to attempts to introduce and expand ITQ systems in Latin America, notably so in Chile and Argentina, where the concerns are both with conservation and social impacts. In Chile environmental groups, small-scale fishermen and small to medium size processors are allied in their resistance to ITQs (Copes 1999d). However, ITQs are being strongly promoted by

other groups, prominently including larger fish processors, organized workers in their sector, and right-wing political parties. Action here takes the form of political pressure. A few small-scale fisheries have been under ITQ management for some time and in 1999 broad ITQ-enabling legislation was introduced in Parliament. At the important Fisheries Committee stage of the Senate numerous submissions were made, including Copes 1999c. Eventually, the Senate Committee recommended against ITQs and the legislative proposal was withdrawn. However, a new proposal for ITQ legislation was introduced in 2000 and is now under hotly contested consideration by Parliament.

In Argentina, similar resistance to ITQs has come from a grouping of small-scale fishermen and environmentalists through an organization called CEDEPESCA, concerned with both social and conservation impacts of ITQs. Separately, there is resistance from domestic small and medium size corporations involved in fishing and fish processing, organized by a chamber of commerce (Unión del Comercio, la Industria y la Producción) in Mar del Plata, the principal fishing port of the country (Copes 2000a). A major concern of this latter group has been the threat of multinational corporations buying up access rights to Argentine fish stocks. The action here is primarily political, to put pressure on the government not to proceed with plans to apply ITQs on a larger scale.

CONCLUSION

To meet common policy objectives, it is necessary to arrange fisheries affairs not only with direct social equity in mind, but also with attention to the collateral need for conserving fish stocks and for keeping fishing operations economically viable, i.e., unsubsidized and reasonably remunerative. This requires a balancing of biological, economic and social considerations at acceptable trade-off levels through political and legal processes. It behooves courts and governments to acquire an understanding of these trade-offs so as to avoid decisions that are counter-productive to good intentions and the public interest.

The difficulty of reversing the inequitable outcomes of ITQ regimes is one vexing problem that should induce responsible authorities to think twice when they are contemplating installation of any additional ITQ regime. The demonstrated occurrence in ITQ systems of seriously adverse impacts on conservation and long term economic benefits gives further reason to insist on a precautionary approach. This should require any proposed new ITQ regime to undergo an experimental phase that will allow for uncompensated cancellation of the regime and the access privileges attached thereto, if it cannot be shown

that the regime has succeeded in meeting standards of equity, conservation and economic viability that can and will be made permanent. Moreover, before experimentation with such a regime is allowed to proceed, an articulated plan should be produced, demonstrating a significant probability of success in meeting the required standards.

There was a hint of *naïveté* in the Icelandic Supreme Court decision to counter discrimination and assure the right to work, simply by ruling all citizens are equally entitled to fishery access rights. The Court did show a measure of realism by recognizing a temporary need to limit access to major stocks, in the interest of conservation. It needs to be acknowledged, further, that both conservation and economic viability require permanent limits on access to most commercial stocks. On the other hand, it needs also to be understood that there will be no social equity unless the current ITQ management rules are replaced by provisions that avoid the assignment of great windfall profits to the few, while many others may face uncompensated loss of livelihood and unremediable community decline.

It is to be hoped that when further fisheries cases reach the Supreme Court level, these realistic considerations will inform the decisions rendered. Court protection of citizens' rights to equitable treatment is essential, but the interests of society equally require conservation of a country's resource endowment and healthy economic performance. At the same time, it needs to be recognized that the rigid economic requirements of ITQ management too often have been shown to be in unyielding conflict with conservation and social equity. If balanced biological, economic and social policy objectives are to be met, it is time to review critically which ITQ administered fisheries can meet the objectives or can be adapted to do so. Where they cannot succeed in meeting objectives, there is reason to seek out more flexible limited entry regimes (Copes 1997b) that will accommodate distributional equity and meet needed conservation standards.

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