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Anita Maurstad
Norwegian College of Fishery Science
University of Tromsø
Breivika
N-9037 Tromsø
Norway

CUSTOMS IN COMMONS - COMMONS IN COURT:

Fishermens' customary practice and statutory law concerning the cod-fishery in North-Norwegian waters

.... introduction

The world-wide historical repetition of introducing formal regulations on who is allowed to fish on top of informal systems of management, has created regimes that contain both formal and informal systems of marine resource rights[1]. In many resource systems, customary law is not recognised before the introduction of statutory law. Lack of recognition may be due to the fact that informal rights are not documented. It may also be a result of the statutory law purposively overruling customary law.

In Norway there recently was a court case where fishermen claimed their rights to fish (Anon 1994). The fishermen argued partly the existence of customs, partly the existence of

[1]By *resource rights* I refer to the rights to withdraw the flow of benefits from the resource; i.e. "a right to both individual livelihood and collective identity and existence" (Usher 1993;41, see also Durrenberger and Palsson 1987 for a discussion on ownership at sea). I use the notion system of rights as a label for this customary practise, to underline the fact that it is a system which contains perceptions of rights and where rights are distributed. However, it lacks the special characteristica of juridical systems; monopolised power to put physical sanctions in practise (Ross 1971). The proper legal terms for describing formal and informal rights would be *rights* symbolising juridically recognised practises, and *factual interests* symbolising non-recognised, or extralegal practises. However, since it is not common - for writers in the field of commons - to talk of *factual interests*, and since this term draws attention from the fact that people regard these *interests* as *rights*, I will use the word rights to describe both formal and informal systems of rights.

a legal commons, and claimed that the state could not take away their rights. However they lost the case. The court claimed that legally there is no commons in the Lofoten fishery, the area in question, nor in "other parts of the sea" (op.cit;24). However, the court also added that there were few sources which could throw light on the question of customs[2].

My main purpose with this paper is to throw light on what I here will call fishermen's practice as an informal system of marine resource rights distribution. In the Commons-literature, focus is put on conceptualising social and cultural practices in resource systems, that is customs in commons. As I read the court's decision, it took on the technical-juridical task of settling whether a legal commons existed in fishing. The court case then, could be seen as a meeting between the informal and the formal system of rights distribution, as well as a meeting between the commons literature's conceptional use of the word commons and current law's practical use. I will close the paper by discussing the court as an arena for settling disputes between these two rights systems, that is commons in court.

.... customs in commons

Hardin (1968) sat off an important discussion on human ecology. After his article the critical distinction between the open access situation - which he describes - and the socially and culturally regulated situation - which he ignored, but which almost necessarily surrounds the commons he desribes - has been pointed out (Ciriacy-Wantrup and Bishop 1975). The literature[3] has widened the understanding of resource regimes from the conception of no rights on the one hand (open access) and state and private systems of rights on the other, to the understanding that resource rights may be held within a fourth regime, the communal one; that is people in an identifiable group hold the rights to fish (Berkes and Farvar 1989). This fourth possibility of marine rights holding systems allows

[2]The case was appealed, and if money can be raised it will be brought further in 1995, probably appealed again and brought to Supreme court. However, the case's further destiny is uncertain, due to money scarcity.

[3]For elaborations, see Berkes 1989, Bromley 1992, Johannes 1981, McCay and Acheson 1987, Netting 1981, Ostrom 1990, Pinkerton 1989, Ruddle and Johannes 1989.

for seeing people's use of resources as a way of management. Social and cultural institutions might regulate fishing practice in a way in which harvest is curtailed. It might also not be curtailed. However, whatever resource impact the rules have, it is important to recognise the social and cultural practice as a system for distributing access, a system of rights. These are the rules that people have negotiated through their interaction in the resource pool.

The literature then has first and foremost done important work in conceptualising the customs in commons. The word commons, is refered to as Hardin's conceptional misunderstanding of the setting were people have a practice concerning communal resources (McCay and Acheson 1987), common property resources (Berkes 1989), common pool resources (Ostrom 1990) or common property regimes (Bromley 1992) - as are different conceptions of the focus in question - customs in place concerning the natural resources and the human use of it.

.... commons in court

Most resources are held within a mixture of regimes; a formal juridical system is no guarantee for people only playing by these rules. In many resource systems the state's presence as a legislaturer is relatively new. People have interacted over succeding generations for ages.

Of the four regimes mentioned, the communal is usually not protected by law. Lack of coherence between formal and informal procedures for interaction in resource systems, weakens the success of the resource regime (Ostrom 1990). The introduction of formal regimes may also be the origin to the tragedies that Hardin speak of; by destroying existing practices - practices in which the harvest was curtailed - the resource use is undergoing changes which might lead to overexploitation (Bjørklund 1991, Eythorsson 1991, Gibbs and Bromley 1989, McCay 1979, Johannes 1978, Maurstad 1992, Usher 1993).

However, customary use of the commons can be legalized and turned into current law. In

Norway, the recently mentioned court case, could be seen as an attempt to do so: Two fishermen sued the state and claimed that they had common-property-rights to fish; the state had no mandate to overrule their right to fish. Formerly, there has been court cases where fishermen have claimed compensation for the state's interference in fishing, but at no time earlier have fishermen sued the state, claiming the existence of commons, and claiming a customary right to fish.

The background for this was changes in the formal regulations concerning the cod fishery. Until 1990, Norwegian statutory laws had minor influence on the everyday practice of small scale fishermen; i.e. a formal and an informal system of management co-existed. Resource scarcity brought the grounds for the state exerting its ownership to cod by introducing new formal regulations in 1990. This implied a strengthening of the formal system, and this strengthening brought the question of fishing right to the forefront. The new system divided fishermen in two groups; those with rights and those without. Right-holders were the only ones to have an individual boat quota. Others had to fish within the uncertain framework of competing on the small amount of resource set off for this purpose; in effect no guarantied rights[4].

In court, the fishermen argued the existence of a legal commons, by refering to sources of law dating far back in time: The territories at sea in the north was given to the northerners by the king at the beginning of this millennium, and no laws had overruled this. They underlined the existence of the commons by refering to certain characteristics; intensive use by an identifiable group of people on equal terms for a long period of time. They did not elaborate upon the issue of practice, but they specifically argued their rights to fish by refering to the fact that the areas had been used for a long time and the right to fish had been so obvious that no one had considered its legal title, and perceived of it by the notion commons. Their right to fish was thereby a part of unwritten law (Norw. "ulovfestet rett").

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[4]The amount of resource available for this latter group has gradually increased, lessening the difference in catch quantities between the two groups. The critical distinction of being granted the right to a quota or not, is still in effect.

The state maintained that open access was the rule and took previous Supreme court decisions as evidence for their stand, as well as the fact that open access had been the foundation on which previous laws were built. They therefore dismissed the need to look into old laws; no new sources of law support the idea of a legal commons.

The judge confirmed the state's arguments. He maintained that open access was the rule; he found it proved in Supreme court decisions, in juridical literature and by the legislature. He particularily refers to the Salt Water Fish Act, made by the state in 1983, which is founded on the presumption of open access. The judge further discusses old as well as new laws and finds no evidence for the existence of rights in fishing that would account for commons at sea. In his discussion, he does not separate between customs and commons, as did both the state and the fishermen. However, he also stated that he would not rule out the possibility of special rights to fishing grounds or fishing sites, but these circumstances lack documentation; they were not elaborated upon in court, neither in research or other sources.

.... fishing practice

The fishermen lost the case. The judge stressed the fact that there is no commons at sea. He based his arguments on former Supreme court decisions, as well as a lack of documentation. So what is this, how can we understand customs in commons and commons in court?

I find it interesting to regard the court case as a meeting between fishermen's practice and current law practice, i.e. between non formalised customs and formalised commons. By this it is also an interesting meeting between the literature on commons and current law. I'll explain how:

Fishermen do have a customary practice on how to perform at sea; a practice which fits into the literature's conceptionalisation of the commons. I'll briefly discuss how the rights

are distributed among small scale fishermen in the north[5]: By observing where people fish, I find that the sea is divided among people in the sense that there exist perceptions on rights to places at the sea. Fishermen from one village tend to use a certain area, while fishermen from a neighbouring village tend to use another. The villages are located in a certain geographical arrangement and so are the fishing grounds. "We fish here and they there" is a common statement made in interviews, and remarkably; in interviews where the focus is put on other aspects than fishing rights.

Further; studies of the activity on the site, reveals that a system of access distribution between those who use one special fishing ground, is in place. There are four kinds of right-holders: Known locals, known strangers, unknown locals and unknown strangers. The categories *local* and *stranger* are based on the peoples' attachment to a certain geographical sea space, strangers are non-residents, locals live in the area. The categories *known* and *unknown* are comprised of having (or not having) *knowledge* about the fishing ground, and *knowing* (or not knowing) people who use the ground. Knowledge is contained in the system of rights, that is without a right to fish, the knowledge about the ground seems of little practical value. The concept of knowing, or being known, with its relational connotations, is thereby the word which can describe important categories of right-holders[6].

The rights these statuses hold range as the known local having the highest rights, the unknown stranger the least rights. The position between the two other categories is more complex: An unknown local has some rights in the status of being a local. However, by unknown I refer to him not using the local waters, the known stranger on the other hand

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[5]My data stems from studies of the small scale fleet, that is boats ranging below 13 meters. This fleet contains, on a national basis, around 80 % by number, and 20 % by catch quantities of cod (numbers for 1994). I have done studies - interviews and observations - in the northernmost part of Norway, the counties of Troms and Finnmark, where about 40 % of the small scale fleet is located. The two fishermen who raised the court case, lived in Nordland, the third area in the north which holds a huge small scale fleet. One fishermen worked in the small scale fleet, the other had a boat ranging a few meters more By fishermen I therefore only have data to talk of small scale practises in Troms and Finnmark. From what I know - many of the fishermen who live in the north partake in seasonal activities in Nordland - the difference between fishing practise in Finnmark, Troms and Nordland is not of great extent, concerning the matters I speak of.

[6]The notions strangers and locals are used by fishermen, the labels known and unknown are invented by me.

is, and an unknown local cannot chase him off the ground. Thereby the stranger in some ways has more rights than the local. However, the unknown local can to a greater exent come to the local field and claim rights, than can the unknown stranger.

A way to illustrate this is as following.

Few rights		Several rights
Unknown stranger	Known stranger	
	Unknown local	Known local

These are categories illustrating what is observable at sea. The next question concerns the process that creates these categories: How do you get access? First of all there is a interpersonal transfer of access to sites. The knowledge of the place, which contains the rights, is passed on through relational ties; - to relatives, to co-villagers and to friends.

There are criteria to fulfill to receive this gift. Personal characteristics seem to form the fishermen's position as rights-getters and rights-holders. Cleverness, eagerness and experience are important criteria which rank fishermen in the system of access distribution. These criteria can be said to interfere with the four categories listed as more or less: More giving more rights, less giving less on each of the four positions.

The criteria known/unknown, local/stranger are important for access to the fishing grounds. The personal characteristica are important for the distribution of sets within one fishing ground; i.e. they rank the possibilities between known strangers and known locals, that is those who use a certain territory.

The degree of territoriality seems to vary along with biological and technological characteristica of the fishery. Gillnetting is mostly performed from January til April on spawning cod, and located near shore throughout the north, although concentrated in Nordland. Jigging is the most common gear used for the migrating cod in the period April til August. This fishery is located off the coast, and the main activity is concentrated in

Finnmark. Gillnetting is more territorial than jigging, a feature I connect to the fact that gillnetting is located near the place someone lives. However, jigging also has its territorial aspects; small scale boats operate on a daily basis from ports; that is from the local's villages. Knowing someone in the village, be it a known local or a known stranger, provides means of access to an area.

This social practise is not verbalised as a system of rights, nor as a system with excluding capasities. Rather the opposite is verbalised. The same fisherman who states "this is my site", may in the next sentence state that "fishing is open for all". This is somewhat paradoxical. However, the stating of openness can be seen as a functional characteristica of the fishery. Fish is mobile, so are the fishermen. The ability to move is secured by stating the openness. So is at the same time the ability to keep a place as one's own, whenever settled in an area. And I have to add; not settling just anywhere you like, but rather on the accessible sites. Since the knowledge of informal rules is widespread, it is possible to spread the word of open access as well as the word of closed. You know that people will play by the rules, in the open system.

I will not elaborate further on this issue here. It is sufficient to say that small scale fishermen have a system with criteria for including and excluding people from the fishery and ranking the possibilities of access. What I want to stress is that fishermen's practice fits neatly into the conceptual understanding of the commons in the commons literature. The fishermen's problem in court is that this is so much wider than the court's definition of commons.

Norway has formal laws concerning respectively village commons and state commons. The borders of these commons end a few meters below the low water mark (Norw. "marbakken"). The question of existing commons at sea is not as clear. Generally the Norwegian small scale fishermen's practice, which I've briefly discussed, is not recognised by current law as a system of customs, nor - as shown by the recent court case - as

commons[7].

The criteria by which the commons on land are defined are connected to land estates. Being settled in an area gives rights. Exclusivity is determined on these grounds. Such criteria have also been made relevant in previous court cases concerning the use of the sea. These are court cases where fishermen have claimed compensation for the state's interference in their fishing (f.ex. Rt 1969 p.1220, Rt 1985, p.247, see also Ørebech 1991 for a discussion on fishermen's right to compensation when it comes to the state's appropriation of sea space for oil activities). It seems to have been of crucial importance for the outcome of these court cases, whether or not fishermen were able to document exclusive use of a sea space[8].

Fishermen's practice then, does not correspond to the juridical criteria for defining commons. These are land based criteria; they make sense in farming, which is performed within set boundaries. Fishermen's practice contain a much more dynamic process of rights distribution, a system which is better suited to fishing and the mobile fish. It includes people who have another place of origin than the one they use in fishing, as long as they fulfill certain criteria. Managing the open and the closed fishery at the same time makes the fishermen's system weak. How can they argue closed access, and exclusive use, when they need the open sea? As I have shown, they manage it in practice. However, in court this feature of the fishermen's system becomes disqualifying for achieving rights, since the court has clear definitions on exclusivity.

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[7]In the court case, both parties - among other sources - refered to a former public reports, as bases for their positions. Ironically they use the same reference - same book, same page - as evidence for respectively the existence and the non-existence of commons at sea. The page in question stems from a public government report revising the laws on commons, published in 1985 (NOU 1985:32 p.15). Here the issue of a commons at sea is discussed briefly: At the same time as the sea technically is labeled commons (Norw. "havalmenning"), it is assumed that the sea is open to all; however village commons at sea may exist. The discussion is not taken further; the report's main purpose is to revise laws on land-based commons. The fact that it is possible for two parties in court to bring forward sources like this, shows the controversies concerning the issue of commons.

[8]While court cases concerning the use of commons on land, are multifold, the situation is different when it comes to the use of the sea. To my knowledge, the court case I refer to here, is the first to claim commons at sea. However, there are a few cases were fishermen have claimed rights to certain areas, and certain activities; on grounds that they are entitled by customary law Hauge and Ørebech (unpubl.) are in the process of gathering the the relevant material on these cases.

This shows that the juridical and small scale fishermen's systems of rights distribution are two very different systems of rights, and to some extent contradictory systems. However, this is not important concerning the court case on the commons; fishermen's practise was not discussed in detail in court. The reason for this, is not all the fault of the court. Fishermen themselves focused on the fixed definition of a (land-based) commons. They did not elaborate upon their system of rights distribution in court. They did say that they had fished for ages, that fishing rights had formerly been indisputable, and they also to some extent refered to the exclusive use by the northerners. However, they did not talk in the specific categories of inclusivity/exclusivity as I do here. I guess the reason for this is partly the non-verbalised character of their system, and partly that they tried to play by the court's rules.

.... conclusions

Playing by the courts' rules was the happenings in this court case. And since all parties did this, the court's task in this case was easy: It did not relate to the conceptual understanding contained in the commons literature. Nor did it relate to fishermen's practice. The thing it relies on is its own technical-juridical definitions on how to interpret conflicts. Former sentences in Supreme court are important sources of law, as were they in this case. Law scientists discuss Supreme court as an arena for verification of laws and interpreting the rules of society, and raise as a problem that Supreme court concentrates on a certain case between parties, thereby it does not have the intention to answer general questions (Doublet og Bernt 1992). It can also be argued that a decision is only "right" in the very special setting it was made: Not only does the empirical situation change over time, so does also the Supreme Court's ground to make decisions on, since they after having made one decision change the ground for practices. Taking this argument to its extreme, almost each case should be tested in Supreme court since the ground changes over time, and Supreme court changes the ground.

Since law is interpreted as the reflection of former court decisions, then this court case follows in what seems to be a line of cases overruling fishermen's rights. This judgement forms the ground for other cases. When in the one decision, practice is overruled, then this

is brought further in the next case. The important thing is that the first case might be right considering the circumstances; no-one was arguing practice as important to pay notice to, as an empirical ground to build new laws upon. However, the empirical situation may change, and the decision of the former time is no longer relevant. This is one way to interpret the Norwegian court case. At no previous time was it necessary to claim a right to fish. When it becomes necessary, fishermen find their title overruled by previous court decisions, some dating far back in time. In the 60's for instance, no fisherman could foresee the events of 1990.

When law is made, it is to reflect reality and correct for certain behaviours. My point is that in this court case, practice was not considered. This is somewhat paradoxical. How can the court make laws concerning the reality of fishermen, without discussing it? The court took previous laws into consideration. Fishermen's practice was not as much the theme of the court case, as was the question of a legal commons; and legal-ness defined by farming practices. On these grounds I want to question if the notion of commons then could be said to trap; fishermen had a case according to the commons literature, and according to customary rights, however not according to statutory law.

We are facing a dilemma if court is to be an arena for discussing the legality of fishermen's systems. If so, the court has to adress the conceptual framework of the informal commons as described by the literature on commons, and not only consider current law on commons in place at sea. Additionally, former laws have to be questioned for their validity today. If the issue in question is turning customary practice into current law, then current law is an inadequate source to interpret customs. If customs already has been overruled, and practice ignored, in previous court cases, by which current law is being created, then the court must take this process of overruling seriously. These facts should be considered as "new evidence" in the case of legalising customs.

The case tells of an interesting development of relevance for the study of common property. First we have Hardin talking of the commons, and expressing situations that might occur - as described by his followers - in an open access situation. Then the common-property-field developes, into the situation where people's customary practise in

the commons is seen as a potential solution to management problems concerning the resource use. We are now in the face of seeking solutions to the question on how to implement this wisdom. The court case then revealed an interesting fact concerning the discussion on implementation. The wisdom contained in the literature has not reached the juridical system of rights, nor the practitioners'.

Rather, the notion of commons could be said to trap. Since it has so much of a juridical definition, and a conceptual understanding which is different from this definition, I think the court as for now, is a poor arena to discuss fishermen's customs as grounds for common-property-rights.

References:

Anon (1994): Rettsbok for Salten Herredsrett. Sak nr 93-00233 A. 04.02.94.

Berkes, F. (ed.) (1989): Common Property Resources: Ecology and Community-based Sustainable Development. London, Belhaven Press.

Berkes, F. og M.T. Farvar (1989): Introduction and overview. pp 1-17 in Berkes, F. (ed.): Common Property Resources: Ecology and Community-based Sustainable Development. Belhaven Press, London.

Bjørklund, I. (1991): Property in Common, Common Property or Private Property: Norwegian Fishery Management in a Sami Coastal Area. *North Atlantic Studies*, Vol.3, no.1:41-45. Århus.

Bromley, D W. (red.) (1992): Making the Commons Work. Theory, Practice and Policy. Institute for Contemporary Studies. San Francisco.

Ciriacy-Wantrup, S.V. and R.C Bishop (1975): "Common Property" as a Concept in Natural Resources Policy. Natural Resources Journal 15(4):713-727.

Doublet, D.R. og J.F. Bernt (1992): Retten og vitenskapen. En introduksjon til rettsvitenskapens vitenskapsfilosofi. Alma Mater, Bergen.

Durrenberger P. og G. Pálsson (1987): Ownership at Sea: Fishing Territories and Access to Sea Resources. in American Ethnologist 14(3):508-522.

Eythorsson, E. (1991): Ressurser, livsform og lokal kunnskap. Studie av en fjordbygd i Finnmark. Hovedfagsoppgave i samfunnsvitenskap, Institutt for Samfunnsvitenskap, Universitetet i Tromsø.

Gibbs, C.J.N. and D.W. Bromley (1989): Institutional Arrangements for Management of Rural Resources: Common-Property Regimes. p.22-33 in Berkes, F. (ed.): Common Property Resources: Ecology and Community-based Sustainable Development. London, Belhaven Press.

Hardin, G. (1968): The Tragedy of The Commons. *Science,* 162:1243-1248.

Johannes, R.E. (1978): Traditional Marine Conservation Methods in Oceania and their Demise. Annual Review of Ecology and Systematics, vol. 9:349-364.

Johannes, R.E. (1981): Words of the Lagoon: Fishing and Marine Lore in the Palau District of Micronesia. Berkeley og Los Angeles.

McCay Bonnie J. 1979: "Fish is Scarce": Fisheries Modernization on Fogo Island, Newfoundland. s.155-188 i Andersen R. (red.); North Atlantic Maritime Cultures. Mouton, The Hague.

McCay B. J. og J. M. Acheson (red.) (1987); The Question of the Commons. The Culture and Ecology of Communal Resources. University of Arizona Press, Tucson.

Maurstad, A. (1992): Closing the Commons - Opening the "Tragedy": Regulating North-Norwegian Small-Scale Fishing. Paper prepared for the 3rd Common Property Conference of the International Association for the Study of Common Property, Washington D.C. September 17-20, 1992.

Netting, R.M. (1981): Balancing on an Alp: Ecological Change and Continuity in a Swiss Mountain Community. Cambridge University Press, Cambridge, UK.

NOU (1985:32): Revisjon av almenningslovgivningen. Universitetsforlaget.

Ostrom, E. (1990): Governing the Commons. The Evolution of Institutions for Collective Action. Cambridge University Press. Cambridge.

Pinkerton, E. (ed.) (1989): Co-operative Management of Local-Fisheries. New Diretions for Improved Management and Community Development. Vancouver: University of British Columbia Press.

Ross, A. (1971): Om Ret og Retfærdighed. En indførelse i den analytiske retsfilosofi. Nyt Nordisk Forlag, Arnold Busck. Første opplag 1953.

Ruddle, K. and R.E. Johannes (eds.) (1989): Traditional Marine Resource Management in the Pacific Basin: An Anthology. UNESCO/ROSTSEA. Jln. M.H. Thamrin No 14 Jakarta.

Usher, P.J. (1993): *Aboriginal Property Regimes in Land and Resources*. p.38-44 in Cant, G., J. Overton and E. Panson: Indigenous Land Rights in Commonwealth Countries: Dispossesion, Negotiation and Community Action. Commonwealth Geographical Bureau, Christchurch, New Zealand.

Ørebech, P. (1991): Om allemannsrettigheter. Særlig med henblikk på rettsvernet for fiske ved igangsetting og utøving av petroleumsvirksomhet. Osmundsson Forlag A/S. Vettre.