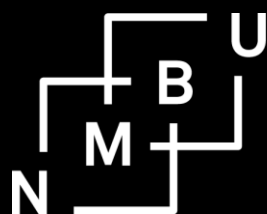


# Understanding Norwegian Commons

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### Abstract

The paper reviews the development of the legal status of Norwegian commons from the first known legislation on commons. The development can be divided into 5 periods.

The first period lasted until about 1300. In this period, the commons changed from being a local matter for the chiefs and the local thing to become a national resource where also the King had rights to resources for defence of the realm.

The second period is the big population decline 1350-1550 where Norway lost 60% of its population and the King and his bureaucracy moved to Copenhagen. The commons reverted to a local issue.

The third period lasted from about 1550 to 1814. The powers of ownership were now seen to reside in the Crown. It had moved from the local community to the state. The rights of common were respected and should remain as they had been from old on. Limitations on the commoner's exploitation were introduced. Rights of common were held by active farms and stunted to the needs of the farm. At the same time, the Crown started large-scale exploitation of the forest resources and selling off forestland to sawmill owners and timber merchants.

In the period 1814 to 1857/ 1863 the state's ideas about the commons were recast into 3 types of commons and one type not mentioned in the legal texts that here is called hamlet commons.

In the period after 1863 the limitations and regulations of the exploitation of the commons continued. By the end of the 20<sup>th</sup> century, the rights of common were reduced to rights of forests and pasture tailored to the needs of the farm. However, the development in farming and recreation activities of the population changed the usage of the commons. The rights of fishing and hunting in state commons came close to an all men's right. The national community expanded its use of the commons by defining much of their areas to be protected lands providing landscapes for recreational activities and production of ecosystem services.

**Key words:** Norway, commons, history, rights of common, ownership, landscape protection

**JEL codes:** Q15, P48, Q2, H7

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<sup>1</sup> For more information see <https://www.usicivici.unitn.it/convegni/24rs/comunicazioni.html>

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### Introduction

The Norwegian concept of a "state commons" was introduced by legislation in 1857 (Stortinget 1857 [1861]), elaborated in the act on forest management in 1863 (Stortinget 1863 [1872]), and further, for non-forest resources, in the act on non-forest resources in state commons ("Fjelloven") from 1920 (Stortinget 1920 [1925]). Between 1814 and 1857, these areas were seen as commons belonging to the state<sup>2</sup>, and before 1814 they were labelled "the King's commons". The expression "King's commons" seems to have been introduced during the reign of Christian IV (1588-1648)<sup>3</sup>. Before that, they were just the "commons"<sup>4</sup>.

The 1857 legislation introduced three types of commons. They were classified according to the ownership of the ground (the abstract land surface) into state commons, bygd commons, and private commons<sup>5</sup>. The state commons of today

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<sup>2</sup> In legislation from 1821 it is prohibited to sell any of the commons belonging to the state ("De Staten tilhørende Almindinger .."). This rule was rescinded in 1848, but reintroduced in 1863. Since then the sale of areas from a state commons is prohibited, but, of course, with a few exceptions.

<sup>3</sup> Imsen (1990, 196, note 8); Imsen emphasises that the local thing had responsibility for upholding the old rules about the commons.

<sup>4</sup> Both Christian IV's law book and Christian V's law book uses the expression "kongens alminding" (King's commons) e.g. Christian IV in Chapter 58 and Christian V in Chapter 12, section 2. In the corresponding section in Magnus Lagabøte's book (Chapter 61, section 3) it is referred to the duties of the King's representative (ombudsmand) in relation to settlements in the commons.

<sup>5</sup> The labels "Bygd" and "Private" were introduced by the 1863 legislation on forest management (Stortinget 1863 [1872]). "Bygd" is a Norwegian word, which in the context of commons does not translate well to English. Sevatdal (1985) translates "bygd" commons as "parish common lands". But it has in connection with commons nothing to do with parish as usually understood. The concept "bygd" has been used in legal texts at least since Magnus Lagabøte's (1238-80) "Landslov" ("law of the realm") from 1274 (Taranger 1274 [1915]). The meaning of "bygd" is literally "settlement" meaning a small local community. In most contexts, village or local community will be the correct translation. Current usage of the word would suggest some kind of local community independent of more formally defined units such as school districts, parishes, or municipalities. Earlier in our history, bygd would be used for the smallest administrative unit, the local law district, and later the parish. In conjunction with commons, this translation of bygd to community will not give the right associations. Because the areas burdened with rights of common throughout our history usually were tied to users from some specific local community (the bygd), the bygd became tied to a certain area recognized as "their" commons. During the past 800 years the original usage of the word "bygd" in the legal language has turned around, and today the bygd, in relation to commons, is defined as comprising of those farm enterprises which have rights of common in the area recognized in law as a "commons". This way of delimiting the units with rights of common has been in the law since 1687. Since translation of "bygd" to English in this case is seen as inadequate, the word "bygd" will be used here.

cover 2.6 million hectare. This amounts to about 23% of the surface of the country south of Nordland County. The bygd commons comprise 0.55 million hectare or about 5% of the surface. North of Trøndelag there is just one small state commons in Troms<sup>6</sup>. The 1920 act on state commons was not seen as relevant for these counties. Working from 1985 to 2004, the “Outfield court commission” stated that, with some exceptions, most mountainous parts of Nordland and Troms counties (app. 2,7 million hectares) probably are state commons – even if groups of commoners are not identified so far.<sup>7</sup> Still the act on state commons does not apply.

One type of outfield that also could be seen as commons can be called “hamlet commons”. In Norwegian terms, they are not called "allmenning" (commons), but “realsameige”, meaning that each farm, in a specified group of farms, is "owner" of a specified share of the outfield. The total area of hamlet commons is unknown, but they are assumed larger than state and bygd commons combined<sup>8</sup>. Thus, by 1920 the commons of southern Norway were split into 4 types defined by way of ownership and who the owner(s) are<sup>9</sup>. Their characteristics are outlined in table 1.

**Table 1** Norwegian commons as they emerged from the legislation in 1857 and 1863 until 1992

Type of commons	Owner of ground (and remainder)	Devolution of rights of common*	Rule for stinting exploitation of resource
State commons	State	State/ fellow commoners	Needs of the farm
Private commons	Private owner(s)	Owner/ fellow commoners	Needs of the farm
Bygd commons	Farms	Fellow commoners	Needs of the farm
Hamlet commons	Farms	Descendants of commoner	Ownership fraction
*Rights of common belong to the farm as a cadastral unit and refer to the right to exploit specific resources found in the land defined as a commons.			

<sup>6</sup> A state commons in Harstad municipality, called Mo, comprise 450 ha with no productive forests. It is managed as bygd commons (NOU 1985, 156).

<sup>7</sup> The Supreme Court has (Høyesterett 1996) decided that on some of the land owned by the state in Nordland some specified farms have right to pasture based on old rights of common. They have no other rights of common. One conclusion should then have been that this is a state commons. However, Stortinget (the Norwegian parliament) has not enacted the legislation on state commons anywhere in Nordland and Troms. In Finnmark most of the land has been transferred into a trust-like legal construction designed to fulfil Norwegian duties under ILO (1989) convention 169 (Stortinget 2005). The history of the commons in Norway's 3 northernmost counties (Nordland, Troms, and Finnmark) is deviant in so many ways that we shall leave it out here. For example, in Manndalen, Troms, the Supreme Court has decided that the local population of the bygd is the owner of an area called Svartskogen (Høyesterett 2001a). The usage of this area conforms to the definition of a commons as understood in the international literature. Unlike other Norwegian commons all inhabitant in the community Manndalen have rights of common in Svartskogen and they lose these if they move away. Sevatdal (1998, 156-158) provides a short survey of the situation in Northern Norway.

<sup>8</sup> We are still talking about southern Norway, see Sevatdal (1998, 152).

<sup>9</sup> Other types of mixed ownership or collective use of land resources are not seen as “commons” here. Even if the ground itself is held in severalty, specified rights such as grazing, hunting, etc. may belong to larger groups of farms. Individual owners sometimes have to join in utilisation “by the nature of the resource” (rivers, waterfalls, extremely fragmented property structures, etc.).

The State (through its company Statskog SF) owns the ground<sup>10</sup> of the state commons. In a bygd commons, a majority (usually 100%) of the commoners themselves owns the ground. A minority of the commoners or some commercial enterprise owns the ground of private commons. Only 3 private commons are known for a fact to exist today<sup>11</sup>, but there are probably more. It is worth noting that the only remaining rights of common in these are pasture and for one of them hunting small game without dog.

The idea of a bygd commons as different from the King's commons had been growing throughout the 18<sup>th</sup> century. This was probably a reaction of the commoners to the growing emphasis from the King on his rights of ownership to the forest resources of the commons (Stenseth 2005, 105-106).

The focus of the legislation in 1857 and 1863 was to regulate the exploitation of the forest resources. The main task in this paper is to get to understand how the commons<sup>12</sup> as we see them in our first historical records where they clearly belonged to the local community, by the 18<sup>th</sup> century came to be seen as the Crown's property, eventually leading to the legislation of 1857/63.

After 1863, the economic and technological developments have reduced the number of commoners significantly, and the regulations promulgated by the state developed in a way that by 1992 had reduced the commoner's actual exploitation of the commons to pasture and timbers.

In this study, we have two profound problems: one about missing facts and another about uncertain meanings of words. From prehistoric<sup>13</sup> times there are no physical facts surviving that might tell us anything about the commons. In historic time, we have surviving documents, including legislation where commons are regulated and also boundary stones marking the boundary between neighbouring commons<sup>14</sup>. However, we cannot be sure that the words used about the commons e.g. in our first regional legislation mean the same to us as it meant to the people living at that time. The meaning of for example "King's commons" very probably changed between 1274 and 1687. In fact Magnus Lagabøte's Law does not use this expression at all, while Christian IV's

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<sup>10</sup> In Norwegian law, the remainder, as a default condition, belongs to the owner of the ground.

<sup>11</sup> These are located in Meraker (Høyesterett 1930); Follafooss (Høyesterett 1937); Verdal (Høyesterett 2000).

<sup>12</sup> The Norwegian word for commons, "allmenning", literally means "All men's". It is reasonable to conclude that at the time that Gulatingslova was written down, it still meant the same. Robberstad comments "It appears from the wording that they did not see the King as the owner of the commons." (my translation from Robberstad and Lien (1981, 364)). Robberstad continues by suggesting that the right of the King to become owner of these new farms is a new rule added later in order to further new settlements.

<sup>13</sup> Prehistoric will here be taken to mean the time before the unification of the realm in about 930.

<sup>14</sup> The knowledge of borders was often of critical importance from early on. The Egge Border Stone's runic inscriptions describe parts of the borderline between the commons of Hadeland and Ringerike. Court cases clarifying such borders are known from the 12<sup>th</sup> century, see Alm (1975, 24-38), Taranger (1274 [1915], 142, note 1).

translator of this text does (see note 4 above). It will be kept in mind that words change meaning over time.

Based on the way the documents use the word "commons" it is safe to conclude that they existed also in prehistoric time. However, the nature of a commons in tribal societies early in the first millennium must be guesswork based on current theories about social organization and observations of tribal communities of recent times<sup>15</sup>.

First, we note that the idea of a commons (as belonging to all) implicitly points to the existence of individual property, property that was not for all. At that time, sedentary self-governed communities would be surrounded by land that was empty of settlements until the next self-governed community appeared. Due to the geography of Norway, these empty areas could sometimes be huge. Outside the settled agricultural area, the empty land was literally available for all men – if they could defend it! The easy way to do this was to come to an agreement with the neighbouring established community. These self-governed communities can, based on later regional legislation, be assumed to have had their local thing ("bygdetinget") for collective decision-making and a chief as a ruler. By the time the regional law codes were formulated (1050-1250), the local chiefs were known as Kings. One might expect that the King's main task was to organize the defence of the community against intruders, and by extension to organize other collective activities, even war on neighbouring tribes. Hence, it must be expected that the King had to approve new settlements in the commons. If the settler came from within the community this would minimize internal conflicts for example in relation to established summer farms. If the settlers came from outside their peaceful intent had to be established and their loyalty to his community ensured.

### **A short history of Norwegian commons until 1660**

The history of the Norwegian commons is long. It may go back to the time that Germanic tribes settled in Norway early in our first millennium. Our oldest regional legislation ("landskapslover"), written down in the period 1050-1250<sup>16</sup>, mostly towards the end of this period, have rules about the commons<sup>17</sup>. One rule has been in the law, unchanged from our first written law book until 1992. The rule says, "The commons shall remain as they have been of old, both the upper

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<sup>15</sup> Some inspiration for such guesswork have been found in Smith (1991), Douglas (1986), Godelier ([1984] 1986, 71-121), Forde (1934 [1963]).

<sup>16</sup> The oldest of these regional law codes, Gulatingslova, is known to have existed in oral form before 930 since it was used as starting point for the Icelandic law code (Robberstad 1937, 11). The oldest known text is supposed to date to 1164 (Robberstad 1937, 12).

<sup>17</sup> One rule, not just about commons, but worth taking note of, found in "Frostatingslov" (Hagland and Sandnes 1994, 15), says (my translation) "By law the land shall be built, not with unlaw wasted". Norway, even in the Viking age, was a rule-of-law state. Also later on, during the union with Denmark, the importance of the rule-of-law is evident, see Imsen (1994, 41).



and the outer”<sup>18</sup>. One old rule for managing the commons said that the King had the right to allocate land to settlers in the commons<sup>19</sup> and after some years take land rent from the settler.

We can understand why the farmers at the outset gave their chief or king such power by comparing this to the situation of tribal communities around the world where land is abundant. The chief will in most cases have the authority to allocate land to new people wanting to settle. A main concern in this is the defence of the tribal territory. The chief, in such communities, is usually elected by consensus at a local assembly, as the Kings were in Norway at the local thing both before its unification in the 9<sup>th</sup> century until 1163, and after 1450 until 1660, albeit, in the latter period usually elected from a select lineage by an assembly of nobles<sup>20</sup>.

In addition to the problem of defence, the problems of collective action in land tenure issues suggest that an elected King in a tribal community could manage the lands with less transaction costs than a tribal assembly could. In addition, at the outset it seems reasonable to assume that there was an abundance of outfields compared to tilled land. Hence, most resources within the commons were abundant. Only as competition for specific resources or ways of exploiting them appeared, did one need rules regulating the exploitation. One can interpret the evolution of the rules about the commons in the old law books in this perspective.

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<sup>18</sup> “Upper” (“øverste”) refers to the mountains and “outer” (“yderste”) refers to the coast (coastal waters and coastal islands); Hagland and Sandnes (1994, 204; XIV 7), Taranger (1274 [1915], 155; VII, Ch 61-1), Kong Christian V (1687 [1982], 3de Book, Ch 12-1). Our oldest regional law code, Gulatingslovi (Robberstad 1937), applies to the west coast. It does not contain this exact phrase. It is edited differently, but in book VII, chapter 15 (page 143) it comes close. This law is clearly more concerned with the “outer” commons than with for example timber rights.

<sup>19</sup> Hagland and Sandnes (1994, 205; XIV 8), Taranger (1274 [1915], 156; VII, Ch 62-1)

<sup>20</sup> During of the civil wars (1130-1240) the Norwegian Crown became an inherited office in 1163 (Robberstad and Lien 1969, 14). The rule is included in the section on the Christian faith and is assumed to be new in 1163. This lasted until 1450. In 1397 Norway entered a union with Sweden (ended in 1523) and Denmark (ended in 1814). Between 1450 and 1660 the King was elected by the Danish and Norwegian “riksråd” (a group of the realm’s most powerful people, created early in the 1200s to advice the King). Also before 1163 the King was elected. The election process was important since the King usually had to promise to certain conditions for his reign. This contract was called “håndfesting”. The further back in time, the more real the election can be assumed to be. Over time, it changed to become a ceremonial vote of support (“hylling”). After 1537 the election was done in Copenhagen by the Danish “riksråd”, even this ended in 1660.

With population growth, political marriages, and conquests the Norwegian tribes were unified into one realm in the latter part of the 9<sup>th</sup> century. But the realm was not a stable polity until 1240. During the reign of Håkon Håkonson (1217-1263) the regional law codes were written down and the preparations for a common law code for the kingdom was started. His son Magnus Lagabøte<sup>21</sup> (1238-1280) completed this process in 1274-76 by getting the unified law codes, including a law code for urban communities as well as a law code for the King's staff ("hird"), approved by the traditional legal assemblies. The law code from 1274 contains the regulations of the commons as known from the regional law codes, including the King's right to allocate land to settlers in the commons. Throughout the centuries after the unification in the 9<sup>th</sup> century, the King's rights of management got reasonable extensions in relation to defence works (particularly along the south and west coast), but also including support of churches, and of the King's staff (Rynning 1968, 741-745). These rights would seem to perform the same functions as taxation<sup>22</sup>.

The law code of 1274 provides the status of the commons as population decline started with the great hunger of 1315-17 and continued with the Black Death 1348-50. A best guess suggests that more than 50% of the Norwegian population died. As some kind of epidemic decimated the population almost every 10<sup>th</sup> year until about 1650 and the worsening of the climate during this

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<sup>21</sup> The name translates as "Law-mender"

<sup>22</sup> The picture of Norwegian society presented here sounds peaceful and democratic. It was not. At least from the start of the Viking age around 800 and until the end of the civil wars in 1240 there is evidence of clear social divisions between slave labour, ordinary tenant farmers and the free "odel" farmers (called "hauð"). The competition for being taken as King in the tribal elections was sometimes bloody. But the court system functioned, most of the time, and throughout the period the amalgamated local communities also built a court system adapted to scale. The local "bygde"-thing remained. But at the time of Magnus Lagabøte there also were 4 regional ("landscape") thing enforcing law and electing Kings (Frostating, Gulating, Eidsivating and Borgarting). They all had to approve of the new legislation for the realm. The local farmers had their local representatives. But since St Olav's time (1030) the church had grown to a significant force both as landowner and as advisor to the King. The King's own bureaucracy had also grown to a significant force. Both the church and the King needed incomes. This had to come from the farmers, one way or another. The idea of taxation did not exist at that time. On the contrary, the allodial right of not being obliged to any overlord was the ideal. The Norwegian rules about "odel" rights are usually translated as allodial rights. In our old legislation, the emphasis was on the rights of the lineage at times of transfer (inheritance or sale) of the land. The issue of an overlord did not produce any records until the unification around 900 when the sagas report that Harald Finehair took the "odel" of the land. This has produced a long line of discussion among historians. In his MA-thesis Jonassen (2009) surveys the literature. Some concluded that Harald became the owner of the land, others that it was a right to tax everyone. The taking of the "odel" has been used as an argument for the King's ownership of the commons. Most probably it was some kind of taxation system that might have led in the direction of a feudal society. However, this was aborted by among other things the fact that his youngest son, Håkon Adalsteinsfostre, is said to have given the people back their "odel" in exchange for a system of military service. Robberstad and Lien (1969, 9) note that Håkon Adalsteinsfostre gave new laws on the "odel" rights and the military service (leidangen). These are included in the edition of Gulatingslov that we have today but were not present for his father, Harald. Later on in the 12<sup>th</sup>-13<sup>th</sup> century population growth and the King's right to take land rent from settlers in the commons led to a rapid development of new settlements in the commons. This together with a growth in the King's bureaucracy might again suggest Norway was heading in the direction of a feudal type social structure (Sigurðsson 1999, 194-208). Probably, this development was aborted by the population crisis 1350-1550.



period<sup>23</sup> made agricultural production less reliable, the population decline continued at least to 1500 (Ersland, Sandvik, and Dimola 1999, 40-63). In 1520 it is estimated that the population was 40% of what it was in 1350. The demand for land and resources in the commons declined accordingly. Many of the new farms from the 13<sup>th</sup> century were abandoned. The problems of accessing resources in the commons could be handled according to the old legislation at least until mid-16<sup>th</sup> century. The population size of Norway did not reach the level it had in 1300 until about 1650. Norway was then part of the Danish-Norwegian Kingdom. In 1537 the Kingdom left the Catholic Church. The Crown took over as landlord of the lands of the Church (except for the lands supporting the priests) and became the single largest landowner with control of 52% of the land values ("skyld") of Norway (Sevatdal 2017, 44). This, however, says little about the extent of the areas owned. The Crown's knowledge about commons, their location and extent, as opposed to other Crown lands seems to have been shaky. However, a reasonable conclusion is that the Crown from 1537 on had property rights interests in quite large forest areas outside the commons.

From at least the mid-16<sup>th</sup> century there was a growing concern about the status of forest resources due to excessive logging and a growing need for wood in the mining industry (Fryjordet 1968, 117-119). From about 1550 we see a growing population. The population growth in a colder climate led to increasing local needs for wood for keeping houses warm and for dairy production. In addition, from about 1500 there was a considerable growth in sawmill and mining industries. The introduction of the waterfall driven sawmill in the early 16<sup>th</sup> century, improvement of waterways for timber transportation, growing export markets (Britain and Netherlands), and domestic metal industry's need for charcoal and timber, all led to increasing exploitation of forests. The logging was due to both locals (commoners) and city based sawmill and mine owners, including the Crown. Farmers were allocated duties of providing timber for sawmills and firewood or charcoal for the mining industry. Production of tar became an important industry. Farmers burdened with duty to provide timber for some sawmill would of course take it from the "King's commons". In some areas, this produced excessive logging and forest destruction. The Crown had, however, at the outset access to sufficient forests without any particular attention to the commons. The commons became more important later in the 17<sup>th</sup> and 18<sup>th</sup> centuries.

During the 300 years after the Black Death the rules regulating the commons were not elaborated before Christian V's Norwegian Law of 1687<sup>24</sup> (Schieffloe

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<sup>23</sup> On climate during this period see Fagan (2000).

<sup>24</sup> By the end of the 16th century very few people in Norway were able to read and understand the law code of Magnus Lagabøte. Hence, Christian IV's Norwegian Law of 1604 was an overdue translation of the law book from 1274, including additions and changes introduced in the meantime.

1955). Even then, in Christian V's law code of 1687, the rules about the commons were mostly the same as in 1274. Only 2 significant changes can be noted. The powers and duties of the King had become more elaborated (Kingdom of Denmark/Norway 1687 [1991], book 3, Ch 12). Some kind of ownership position seemed in 1687 to be taken for granted<sup>25</sup>. A taken for granted view on the owner position of the Crown is interesting. In the 13<sup>th</sup> century the population growth led to many new farms in the commons which had to pay land rent to the King. It became a source of income for the Crown. But there is no suggestion of an owner position to the commons as such. During the population crisis and the worsening climate 1350-1550 many of these farms were abandoned, the bureaucracy serving the Crown moved to Copenhagen and their representatives in Norway were mostly Danish. It seems reasonable to assume that the education of these bureaucrats was shaped by continental ideas about the ownership position of the state and the monarch rather than by the Norwegian people's ideas about rights to exploit the commons of the various local communities. It must have seemed obvious to these bureaucrats that the state should own what no one else owned. They would also have as part of their belief that Denmark-Norway was a rule-of-law state that should respect the farmer's rights of common as these were expressed in old legislation. In the legislation we find rules about exploiting timber, pasture, summer farms, and areas for haymaking, fishing, and hunting bears. Those resources not mentioned here belong, in this view, to the Crown. Since the Crown had interests only in timber we see in line with this view that the right to timber for the commoners in the 1687 law book was stunted by limiting the right of common to timber and firewood to what a commoner "needed" on his farm<sup>26</sup>. This meant that selling timber taken from the King's commons was prohibited. Later on, the pasture rights were similarly stunted to the animals that could be fed on the farm during the winter.

### **The King's Commons 1660-1857**

By 1660 the old idea of the King's Commons had during the centuries since 1274 taken on a more modern form of property rights thinking, at least among the educated class staffing the King's bureaucracy. Influenced by both Roman law and the natural rights doctrines the King's rights in the commons came to be seen as a kind of dominium directum (Schiefloe 1955, 108-137, Tank 1912, 12 note 2). The farmers had dominium utile. This was interpreted to mean that the King owned what the commoners did not utilize for their farming enterprises and by extension, the King had to be seen as the owner of the commons. Hence, the King could increase his income from the commons both by sale of timber that the farms did not "need", including renting out land to sawmills, and by taking land rent from certain exploitations such as allocation of particular areas

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<sup>25</sup> For example the expression "King's commons" is an indicator of this.

<sup>26</sup> Restrictions on the logging had been in the rule book at least since 1568 (Fryjordet 1968, 118).

for haymaking and utilization of particular lakes. It was, however, often unclear if this was seen as land rent or taxation. The way it was practiced during the 19<sup>th</sup> century has in the 20<sup>th</sup> century been seen as an administrative error both in political decisions and in the Supreme Court (Schiefloe 1955, 145-152). There was a long fight between the farmers and their representatives and the King with his nobles and bureaucrats. But the fight was mostly fought in courts. The local thing was still functional as a local institution at the end of the 16<sup>th</sup> century and the population seems to have had a basic trust in its judgements (Imsen 1994) even after reforms in the 17<sup>th</sup> century started to change its working.

But more than the legislation, the political context had changed between 1274 and 1660. The union with Denmark meant that the Danish Kings, residing in Copenhagen, were also Kings in Norway. In 1660, the King made himself absolute ruler. The electoral procedures were never more used for electing the King (except in 1905, also see note 20 above). During the latter part of the 16<sup>th</sup> century and until 1721<sup>27</sup> the Danish-Norwegian Crown fought many wars where they lost more than they gained<sup>28</sup>, resulting in severe financial difficulties for the Crown. The increasing emphasis on the King's rights in "his" commons seems to have come at the same time as the many wars fought and lost demanded immediate cash. To this, we should add that the commoners of the Norwegian forests increasingly had access to markets both within Norway and abroad. It is common observations that, as markets grow the pressures on the resources of the commons mount. Where the management of a commons seems stable and sustainable, the sudden opening of a market for timber will usually result in a process similar to the tragedy of the commons. The limitation of the timber rights to the "needs" of the farm is in this view reasonable.

The fiscal needs of the Crown forced a new development in the exploitation of forests in Norway, both forests on Crown lands and in the King's commons<sup>29</sup>. The number of crofters that got permission to settle in the King's commons was increasing (Tank 1912, 13), creating resistance from the farmers. There were active efforts to stop farmers from logging more than for the needs of their farms (Tank 1912, 14-15). The crown started to mortgage and selling forestland to nobility, timber merchants, sawmills owners, and also farmers. It was sometimes unclear whether what sold was the right to taxation and fees, if it was the right to take out timber, or if it was ownership of the land (and remainder) as such.

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<sup>27</sup> The Nordic war 1700-1720 was the last largescale war of Denmark-Norway until the Napoleonic wars that ended with Norway being transferred to Sweden in 1814.

<sup>28</sup> Including old Norwegian territories like Båhuslen (lost 1658), Jämtland (lost 1645) and Härjedalen (lost 1645).

<sup>29</sup> Fryjordet (1968) provides a survey of the situation around the period 1739-1746 when the King tried to establish a professional forest administration in Norway. We see a conflict between the new administration and established bureaucrats. The distance between the centrally promulgated regulations and their local implementation is evident. The problems caused by missing and slow movement of information are at the core of the developments.

One main problem in selling commons was lack of knowledge about their locations and extent. The exact boundary between forest owned by farmers and the commons had never been recorded (Schiefloe 1955, 78-95, Fryjordet 1968, 155-189). Due to the developments during the preceding century in terms of abuses by local representatives of the Crown (sometimes also by the Crown itself) the local population would not be expected to assist authorities in any other way than by diminishing the extent of the King's commons (Schiefloe 1955, 45-77).

Incomplete historical records, as well as slow and faulty flow of information to and from the King's rather few representatives in Norway, hampered the King's more active exploitation of "his" commons (Tank 1912, 11-40). Disagreements among different administrative branches worked in the same direction (Fryjordet 1968, 155-189). This made it possible for farmers to argue that any particular outfield was not part of the King's commons<sup>30</sup>. Efforts to limit their utilization of the forests and pastures (by requiring permission and sometimes also rent) were met by counterclaims from the farmers that "their" commons was not a King's commons but bygd commons based on co-ownership of the farmers in the local community (Stenseth 2005, 131-133). It seems that sawmill owners and timber merchants might have been one source of information about particular commons by applying for rights to utilize a particular instance (Schiefloe 1955, 93-95). Some of the forests mortgaged were reclaimed, but more were sold. Timber merchants who bought forestland sometimes sold the land to farmers after logging the timber. This is the main origin of today's bygd commons.

Bygd commons of today are assumed to have originated in 3 different ways<sup>31</sup>.

1. They were in some instances created as a group of farmers bought a piece of the King's commons.
2. Sometimes the land had first been sold to merchants that logged the forest and then sold the land to the farmers.
3. The third type appeared as a result of a subdivision of a King's commons that were bought by investors. The King could sell the land and the resources that was his (the ground and the remainder) but not the rights of the traditional commoners. Their rights remained as before. If the merchant did not sell the logged land, the land could be divided into a piece of land privately owned and a piece of land with rights of common where the land was sold to the commoners. In the 1863 Act, it was said

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<sup>30</sup> Tank (1912, 67) observes that since the start of the 18th century the state's emphasis on being owner of the commons had met severe opposition («Ialfald fra begyndelsen af det 18. aarhundrede har statens krav paa at eie almenningerne mødt megen modstand.»).

<sup>31</sup> See also Stenseth (2010, 81-87) where point 2 is not treated as one way towards a bygd commons. The interesting difference between 2 and 3 is that sales according to point 2 did not enter the category of private commons. It might lead to individualisation through a land consolidation process or to a hamlet commons or after 1857 to a bygd commons.

- that if those buying the ground represented more than 50% of those with rights of common the area burdened with rights of common should be called a "bygd commons".
4. If they were fewer than 50%, it was a "private commons".

Many large areas were kept out of the trade by claims that they were owned in common by the farmers of the bygd. They were not the King's or anyone's commons. For areas a bit out of the way and perhaps with depleted forests due to logging by the commoners, it would be possible to avoid attention from both timber merchants and the King's men. Today these areas are land co-owned by the farms. In Norwegian terms, they are called "realsameige". They are here called hamlet commons. Tank (1912, 67) explicitly argues against calling them commons, arguing that it will only create confusion about their legal status. He may have a valid point in this.

While the rights of common of the three commons named in 1857 are held jointly, the rights of the stakeholders of the hamlet commons are held in common (both the ground and the specific rights of exploitation). This means that they can exploit their ownership fraction of all resources. They are not limited to the "needs" of the farm. The stakeholders in the hamlet commons are farm units, not any kind of person. This is the same as for rights of common in the 3 other types of commons. The term "realsameige" may literally be translated as "co-ownership among real properties". The rights held by the farms are said to be appurtenant. Hamlet commons are in fact the most frequently encountered type of commons in the Norwegian out-fields.

In 1814, Norway was transferred from Denmark to Sweden. In this process we gained a modern constitution with a Norwegian parliament (Stortinget) making laws and managing the commons that formerly belonged to the King. In 1821 Stortinget prohibited selling commons belonging to the state. In 1848 they again made selling them possible, and some were sold. But in 1863 new legislation again prohibited sales. The rest of the King's commons, those that had not been sold before 1863, are today known as state commons.

### **The commons after 1857**

The 1857 legislation introduced state commons, bygd commons, and private commons as well defined concepts. For bygd commons it introduced mandatory local governance to manage common rights in general and, in particular, to stint the activities of right holders to ensure the future utility of the forest. For state commons not managed by a public servant, the same rules were applied. The 1863 Act on forest management continues the 1857 act by giving detailed rules about (Stortinget 1863 [1872]):

- 1) exercise of, and compulsory termination of easements in a forest<sup>32</sup> (§1-2); and also prohibition against creation of such rights as can be compulsory terminated (§14),
- 2) the kind of bylaws the bygd commons have to enact, including that the bylaws require approval of the national government (§26-27),
- 3) dividing private commons between owners and commoners (§35-46),
- 4) if the state do not want to manage a state commons itself, it can be management as bygd commons on the demand of the ministry (§52),
- 5) the farms allocated for the use of public servants (Crown and Church lands) and managed by public forest servants are subject to the same rules as all forests with rights of common (§62),
- 6) changes in previous legislation such as rescinding the 1848 rule making possible sale of King's commons (§72). Since then lands with rights of common (in state and bygd commons) cannot be sold (with some exceptions for building lots).

The requirements of the bygd commons bylaws may illustrate the concerns of the government at this time. The bylaws should ensure (Stortinget 1863 [1872])

- a. protection against logging for a suitable part of the forest (primarily young forest),
- b. rules furthering sustainability in the exercise of such rights as can be compulsory terminated in private forests (see point 1 above),
- c. use of dry wood and windfalls,
- d. logging furthering sustainability,
- e. timing and monitoring of logging,
- f. equality in rights and duties between owners and commoners,
- g. exercise of owner rights (to the remainder) shall observe the rights of both the commoners and the sustainability of the forest.

The concern about sustainability must here be read as a concern about the long-term economic output from the forest. The rules governing non-forest resources in state commons were revised and updated by a new act on non-forest resources in state commons ("Fjellevet"/ "The Mountain Act") from 1920 (Stortinget 1920 [1925]). A similar thorough revision of the rules governing bygd commons did not occur until 1992 (Stortinget 1992b).

During the period 1863-1920 an interesting development in the thinking about rights to fishing and hunting can be seen in the discussion of who should have the right to fish and hunt in the state commons.

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<sup>32</sup> The easements listed are use rights of various kinds, e.g. burning residue or vegetation, taking bark, all ways of producing fodder for animals out of trees. By 1992 no traces of such exploitation are known.

Law has regulated hunting since the 12th - 13th centuries<sup>33</sup>. Hunting of small game seems to have been an all men's rights. Only landowners could hunt big game (moose, red deer, reindeer). According to the law from 1274 (Taranger 1274 [1915], 155) hunting of moose (and by implication all big game) was open for all outside of private lands. The commons were not considered as private lands. This act (with a few amendments) was in force until 1687.

By the mid-18th century hunting of big game in the commons required permission by the King's representative. Hunting of small game in the commons seems still to have been open to everybody. In out-fields that were not recognized as commons the right to hunt small game required hunting without dogs<sup>34</sup>. The ancient rules were in force until 1899.

The 1899 legislation (Stortinget 1899 [1907]) set down the basic principle that the right to hunt belonged to the landowner and by this time it was clear that this meant the owner of the ground. The principle would exclude commoners from hunting. But the commons as defined in 1857 got their own paragraphs in the 1899 act (Stortinget 1899 [1907], §§4-6). The act makes it clear that in private commons as well as bygd commons the right to hunt belongs to the owner of the ground. But in addition, the population of the community where rights of common exist also have right to hunt small game without dog.

In the discussion around the 1920 act on mountain commons the rights of the local community were a topic, both regarding people from outside the community, and regarding the owner of the ground (Landbruksdepartementet 1916, 44-83). In 1920 the decision was to differentiate between people within the local community who were allowed to hunt small game without dog for free while people from outside had to pay a fee. In state commons, fishing was free for all. In the 1975 revision of the act on mountain commons (Stortinget 1975) the rights of the population of the local community were upheld even if the definition of the boundaries of the local community had become problematic due to the amalgamation of municipalities<sup>35</sup>.

The development for fishing and hunting can be seen as a return to the original idea of the commons, as a joint resource for the local community. The concerns about the sustainability of the exploitation are taken care of by legislation covering all of the lands of Norway.

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<sup>33</sup> For more details on the history here see Berge and Haugset (2013, 5-8); [http://www.umb.no/statisk/clts/clts\\_wp13\\_2013.pdf](http://www.umb.no/statisk/clts/clts_wp13_2013.pdf)

<sup>34</sup> The differentiation of hunting rights according to the use of dogs or not goes back to Magnus Lagabøte (Taranger 1274 [1915], 154-155).

<sup>35</sup> Municipalities are, since 1837, the basic local management authorities in Norway. Since 1920 they are charged with the duty to appoint the board of management for state commons ("the mountain board") within their boundaries.



The legislation of 1863 (Stortinget 1863 [1872]) stipulated that the private commons should go through a process of land consolidation splitting them into one parcel with private ownership and one parcel owned by the commoners. The private parcel should be free of rights of common to the forest. However, the rights of common to pasture proved difficult to remove in a land consolidation like this. Three instances of private commons with rights of pasture and summer farms are known today (see note 11 above).

Hamlet commons are not regulated by particular legislation like state commons and bygd commons. They are, of course, subject to all nationally relevant acts. One default act comes into force in case of disagreements among co-owners. This is the act on co-ownership and applies to everything that has more than one owner. But by the nature of their resources and their long time existence one may also stipulate that hamlet commons, more than most things owned in common, are governed by customs and contracts among the co-owners. These customs and contracts have evolved within the framework of the ancient rules on co-ownership enacted in 1274 and 1687. But no studies of such customs and contracts are known.

Two of the ancient rules deserve to be emphasised:

- 1) Where two or more persons own something together, no one is allowed to use more of the resource than the ownership fraction suggests<sup>36</sup>; and
- 2) there is freedom of contract limited only by formal precepts and some basic principles of public morality. All duly created contracts have to be honoured. This view on contracts still permeates Norwegian culture<sup>37</sup>.

While the 1863 legislation listed ways of exploitation that could be removed from commons, the 1920 legislation listed ways of exploiting the commons that was allowed. In §2 it is said that the bygd shall continue to enjoy their rights to pasture, summer farms, production of hay, taking of moss and peat, as well as fishing, hunting, and catching, as of old.

In the revision of this act in 1975 the list in §2 has been dropped and the detailed regulations of production of hay, taking of moss and peat are left out. Also, the 1920 rules about corrals for cattle drifts during the summer were removed. These changes in the legislation correspond to changes in the way farming was practiced. By 1930 the cattle drifting trade was more or less extinct (Sevatdal 2017, 210). Other means of transport took over. Hence, in 1975 the rules were removed from the act. The production of hay and taking of moss and peat were history. The ways of exploiting the commons as defined by the act were now

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<sup>36</sup> Kingdom of Denmark/Norway (1687 [1991], Book 3, Chapter 12, Paragraph 15)

<sup>37</sup> Kingdom of Denmark/Norway (1687 [1991], Book 5, Chapter 1, Paragraphs 1,2). See also Grimstad and Sevatdal (2007) and Sevatdal (1998).

limited to pasture and summer farms, fishing, hunting and catching. The forest rights remained, of course, but the forest exploitation was regulated by another act. The rules about forestry in state commons were updated in a new act in 1992 (Stortinget 1992a).

However, the reformulated §2 says that rights of common should be enjoyed in a way corresponding to rational exploitation and as seen reasonable according to the time and conditions. One such exploitation was the production of hydroelectric power. In fact, the demand around 1905 for waterfalls for such production was one of the spurs that started the process of determining the boundaries of the state commons. The commission on the high mountains worked from 1908 to 1954 on the problem of delimiting the state commons from private lands. They determined the boundaries of the state commons in southern Norway including South Trøndelag. They never reached North Trøndelag. The state commons here were determined in other ways<sup>38</sup>.

### **New developments affecting the commons**

During the 20<sup>th</sup> century building of hydroelectric power plants, and particularly after ca 1950, recreational activities including building of cabins, and fishing and hunting grew into major industries exploiting the outfields, including the state commons (NOU 2018).

Forestry was professionalized. It moved from marking of the needed trees for the commoner's individual logging, to the commons as a professional forest owner hiring logging companies and other services, while the commoner's rights to have the needs of the farm for building materials were fulfilled by receiving a discount from the commons on timber- and other building materials that reduced the need for wood.

The long-term population centralization to urban areas and the transformation of agricultural activities have resulted in diminishing use of the rights of common. Since about 1950 the number of active farms has declined from ca 200 000 to 40 000<sup>39</sup>. If there is no agricultural activity on a farm, the farm loses its rights of common including its rights to forest resources (Falkanger 2009, 109-120). In principle, the rights devolve on the fellow commoners. However, due to the stinting of exploitation of forest and pasture in state commons, the smaller number of commoners means that in state commons the state as owner of the ground (and remainder) inherits the unused resources and can for example rent out pasture to farmers that need more of it. In bygd commons, the fellow holders of rights of common inherit the unused resources. In addition, it may be that in bygd commons the commoners lose their ownership to the ground if they stop

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<sup>38</sup> For one step in this process see Landbruksdepartementet (1958).

<sup>39</sup> See Sevatdal (2017, 65) and for 2016 <https://www.ssb.no/jord-skog-jakt-og-fiskeri/statistikker/binfo/aar>

exploiting the rights of common<sup>40</sup>. The interesting question is what happens when the last farm exploiting a bygd commons ceases its agricultural activities (Falkanger 2009, 120-121, Stenseth 2010, 88-92).

Until 1963 the commoners of some state commons fought to gain access to the incomes from the hydroelectric power production within the state commons. The Supreme Court decided one such case in 1963 (Høyesterett 1963). Their conclusion was that the hydropower was not part of the old ways of exploiting the commons. It was part of the remainder and should fall to the owner of the ground.

By 1993 the State's owner position in the state commons and many other areas owned by the State was organized through a state owned company, STATSKOG SF. Their mandate was to manage the lands as profitably as possible within the relevant legislation.

During the 20<sup>th</sup> century, it did not seem obvious to the State that new ways of exploiting the state commons should benefit the local communities even if the depopulation of the mountain regions has been a recurring topic. The municipalities elected the board of the state commons managing the non-forest resources (the mountain board). Through political pressure, the income from renting out land for cabins came to be shared between the mountain board and the state as owner of the ground.

Since about 2000, it seems that the state has taken a more benevolent stance in relation to the mountain boards and the municipalities with state commons. From the start in 1920 income from hunting of big game belonged to the State and after 1993 to STATSKOG SF. In 2003, it was decided that the management of big game hunting should be a task for the mountain boards. Since 2009, the use of houses on the summer farms for new activities became relatively unproblematic.

Besides the recreational use of state commons, it is the use of the areas for nature protection and production of ecosystem services that has grown during the 20<sup>th</sup> century. Our first act on nature protection is from 1910 (Stortinget 1910). The act was updated in 1954 (Stortinget 1954), considerably expanded in 1970 (Stortinget 1970), and a thorough revision came in 2009 (Stortinget 2009). The first national parks were introduced in 1962 (Rondane) and 1963

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<sup>40</sup> This question is at present unresolved. But it has a long history. Vevstad (1994) surveys the history of bygd commons as seen from the archives of their common organisation, Norsk Almenningsforbund, during the period 1919-1994. The desire to remove the rights of common from the smallest landholdings seems to have been present from the start. The Supreme Court (Høyesterett 1914) gave in its verdict the decision that size of landholding did not count. The character of the activities on the land had to be what decided. See also Stortinget (1958, digitally 1150-1171), (Vevstad 1994, 26-27, 67-70, 88-91, 131-132), (Høyesterett 2001b, 2011).

(Børgefjell). In 1964 we got a comprehensive plan for developing protected areas (Naturvernrådet 1964) . The common characteristic of protected areas during the first wave of protection is that they were located in state commons<sup>41</sup>. In 2018 protected areas on state commons comprise 58% of their surface (NOU 2018, 149). In addition, some of the state commons are partly included in the reindeer pasturing areas of the reindeer herding Saami population (Stortinget 2007). The reindeer pasturing covers about 40% of the area of the commons (NOU 2018, 45). The needs for recreational landscapes and protection of forests have also affected the bygd commons by requirements to keep a certain area of old growth forest and, for bygd commons north of Oslo, by being included in the "Osломarka" area managed for recreational use (Vevstad 1994, 92-108).

In general it can be noted that regulations of the protected areas led to new restrictions on the active exploitation of the resources and became one more limitation on the exploitation of the rights of common. The limitation may be more psychological than real. Established activities can go on, but new activities need permission of the State. This adds a bit to the transaction costs of exploiting the rights of common.

Another development is linked to the protection of biodiversity and the reappearance of large predators like wolf, bear and wolverine. In areas set aside for predators, the exploitation of pastures in mountain areas has become increasingly difficult. Many farmers have abandoned the use of pastures far away from the farm buildings. In the commons with predators, this means that the rights of common to pasture are used less.

The protection of biodiversity was part of a broader view of the wilderness areas as a national resource in need of protection against development of both industrial character and tourist activities. The legislation on this was not targeting the commons in particular. But since the commons comprised about one third of the surface of southern Norway it had consequences also here. The economic valuable resources that farmers had access to through their rights of common became less valuable through the increased transaction costs and losses to predators.

## **Concluding**

The development of the commons from the Viking age and until 1814 can be seen as a transfer of powers of ownership from the local community to the State. This transfer of powers may best be understood as a shift in the way of thinking about what the expression the "King's commons" meant. The King's bureaucracy

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<sup>41</sup> Later on the protected areas have expanded onto privately owned land (NOU 1986).

lost their understanding of the local community's relation to their commons during the population crisis 1350-1550. A new understanding took hold in the central administration in Copenhagen. That which the farmers did not own belonged to the Crown. The rights of common as expressed in the old legislation were respected and should remain as they had from old on. But resource destruction had to be stopped. Reasonable limitations were introduced. First the exploitation was limited to the needs of the farm, and further to active farms, thus excluding from the commons the non-farming population of these communities. Then the Crown started large-scale exploitation of the forest resources and selling off forestland to sawmill owners and timber merchants.

Before the population decline and the collapse of the Norwegian State administration there is nothing to suggest other than that the Norwegian commons functioned in the same way as commons in other parts of Europe. A commons was an area with resources where all men from the local community had rights of access to sustain themselves and their families. In modern terms one might say that the residual belonged to the local community. The inevitable problems of conflict and coordination were taken care of by the local chief/ king and the local thing. As the scale of the State grew, part of the resources of the commons came to be part of the King's means to defend the realm. In a situation where allodial rights prevented normal taxation, this was a necessary addition to the incomes from the King's own lands and incomes from Viking raids.

As the Norwegian population started to grow again and new industries developed, the state administration had moved to Copenhagen and new ideas about property rights had taken hold. The old King's rights in the commons now came to be interpreted as property rights to all that the commoners did not need for their farming. Meanwhile the Norwegian commoners reacted like commoners all around the world, when a new market for a resource in the commons appeared they exploited it to the full, creating a "tragedy of the commons" by logging all timbers that could be sold. However, unlike other cases of such tragedies they were not forced to invent their own regulations. The King insisted on being the owner of the land and the remainder that the commoners did not need for their farming activities and started to introduce regulations and to enforce his claim on the residual. The commoners of Norway reacted like commoners around the world. They avoided the centrally promulgated rules as best they could<sup>42</sup>. They logged what they could sell. The King had not nearly sufficient resources to monitor logging activities and not nearly sufficient information about the location and extent of the "King's commons". The commoners did not volunteer information and if questioned

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<sup>42</sup> Ostrom (2005) surveys the research on how different ways of producing regulations affects compliance.

they insisted that the areas were not the King's, it was co-owned by the local farmers<sup>43</sup>.

Over time, the forests regrew. A democratic State took over for the King. But the bureaucrats were as ever concerned about deforestation and wanted to regulate the activities of the commoners. In the 1857/1863 legislation, they created tools to do just that. The State's ideas about the commons were recast into 3 types of commons. A fourth type was not mentioned in the legal texts. We have called this hamlet commons.

The limitations and regulations of the exploitation of the legally defined commons continued. Over the next century, the insistence on the "needs" of the farm and the developments of agricultural technology limited the exploitation of the commons to pasture and timbers. Even firewood went out of fashion as electricity took over. By 2016, the number of active farms had declined to about 25% of what it was around 1920. The rights of fishing and hunting in the state commons came close to an all men's right. The national community expanded its use of the commons by defining much of their areas to be protected lands providing landscapes for recreational activities and production of ecosystem services, including protection of biodiversity.

Thus, by the end of the 20<sup>th</sup> century nature protection seemed to take over in limiting the exploitation of the traditional resources. Now one may sense a return to the view that the commons are containing resources for all men, all Norwegian. The ecosystem services, biodiversity, and landscape qualities are there for all to enjoy.

In broad strokes, the history of the management of the commons is one of limitations on rights of the local community, transfers of powers to the central State, and developing regulations benefitting the national community.

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<sup>43</sup> Two times the King tried to establish a professional forest service, 1739-1746 and 1760-1771. They failed, partly due to insufficient manpower, partly from resistance from the established public servants, and partly from resistance from the farmers. On the history of the first forest service office ("generalforstamt") see Fryjordet (1968).

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