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Local ideas about rights of common in the context of a historical transformation from commons to private property

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Local ideas about right of common in the context of a historical transformation from commons to private property

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CLTSUMB

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Local ideas about rights of common in the context of a historical transformation from commons to private property

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Abstract
More than 200 years after the King sold one of the "King's commons" (Follafoss, located in the current Verran municipality) to urban timber merchants, local people in some ways still behave as if the area is a kind of commons. The paper will outline the history of the transformation of the area from an 18th century King's commons to a 21th century battleground for ideas about ancient access and use rights of community members facing rights of a commercial forest owner and the local consequences of national legislation. This battleground will be illuminated by the answers that current users provide to questions about what they believe their rights of access and use are. We shall in particular look for differences between what people believe and what the law seems to say about rights and duties in the Follafoss area.

Key words
King's commons; private forest; rights of common; customary rights; national legislation; loss of customary rights;

JEL-codes
Q15; P48;

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Erling Berge[1] and Anne Sigrid Haugset[2]:

Local ideas about rights of common in the context of a historical transformation from commons to private property.

Introduction

On the 26th March 1799 the Danish-Norwegian Crown held an auction offering forest properties, parts of the King's commons, to the highest bidder. Proprietor Christen Johan Müller was the highest bidder for the King's commons of "Follefoss" (or "Bedestad"; herafter Follafoss) commons, and the title deed was registered on 14th January 1801[3]. According to the legal standard of the time the King could sell only what belonged to the King. He was not allowed to infringe on the rights of the commoners. Hence the title deed contains the standard clause: "The commons is sold including all rights His Majesty until now has held over the same and without any requirements of redemption, however, the Commoners are entitled to, in the future as until now, the rights of summer farming ("Sæter"), mountain meadows, fisheries, fuel wood, fencing material and necessary timbers for house building with further rights that the Law provides for in general and without therefore in any way being trespassed by the buyer."[4]

The sale started a long drawn out conflict between the commoners and the owner(s) of the ground[5] (which in the period since 1799 have included both private investors like Müller, and public bodies like the local county). Slowly the commoners have lost important rights they once held at law. One chapter in this story was closed in 1937 when timber rights were judged by the Supreme Court to have been lost. Another ended in 2012 when the local hunting and fishing association accepted that the right to hunt small game without dog and to fish no longer could be seen as rights of common.

Ancient custom based rights to exploit resources may disappear for two reasons. The usual in Norway is that people stop exploiting the resource due to changes in technology and incomes. The other way is for the legislator to enact a rule to make some specified exploitation illegal. The present paper will highlight some of the historical development which at important junctures takes place in court cases and in acts of parliament with the consequence that such rights are made illegal. The people experiencing such forced removal of rights may not agree in the justice of the process but have been too few and disorganised to resist in any politically effective way. But the knowledge that rights once existed will linger on. The paper will end with an exploration of the beliefs and attitudes among the local population about these rights. The link between ancient customary law and formal legislation is not easy to navigate. In

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[3] The presentation here is based on the preamble to the judgement of the Norwegian Supreme court 19th March 1937 (Høyesterett 1937).

[4] "Almindingen bortsælges med al den ret Hans Majestet hidtil har havt over samme og uden al forbeholdenhed af Reluition, dog forbeholdes Almuen herefter som hidtil, den Ret til Sæter, Fjeldeslætter, Fiskerie, Brændeved, Gjærdesfang og fornøden Huustømmer med videre Rettighed, som Loven hjemler dem i Almindelighed, uden at de af Kjøberen deri paa nogen Maade maa fornærmes." (Høyesterett 1937, 169).

[5] In Norway it has been a custom of old that within the same parcel there could be different owners to different specified resources. A group of farms could hold the pasture, one person the ever-green trees and a second the deciduous trees. But the one who owned the soil or the ground came to be seen as the landowner and the one holding the remainder (the resources not specified as belonging to someone else). This view emerged slowly, maybe out of the medieval theory of the King's "regale" (economically valuable resources seen as belonging to the King), and was finally confirmed in a judgement by the Supreme Court in 1963 (Høyesterett 1963).

many cases the rights of the commoners have been reaffirmed in state commons and "bygd commons"[6]. But outside these it would seem that in the long run the large scale economic interests prevail over the local economic adaptations.

Part 1: History of rights to timber in private commons

In 1814 political events overtook the Danish-Norwegian Crown's rule of the commons. The legal situation changed. Norway became part of the Swedish-Norwegian kingdom, got a democratic constitution and a parliament to legislate. In 1848, after a moratorium of 27 years, the parliament again allowed sales of King's commons. In 1837 it enacted a system of municipal government. Follafoss commons was then located in Beitstad municipality. Since 1801 the fortunes of timber merchants had varied and Follafoss had been sold several times. Also the conditions of farmers exploiting the old King's commons had changed, and in many places within the country the dissatisfaction was growing. In 1850 a group of commoners from Follafoss complained to the municipal government that the owner of the commons had cut so much timber that their summer farming activities were threatened. If logging continued in the same unsustainable way they would be unable to use their summer farms. This would be in violation of the conditions for the sale to private owners, the commoners complained. The complaint was sent to the state's representative in the county who replied that this was a case for the courts. Nothing more came of this, and in 1858 a report from the municipal government to the state's representative in the county refers to the fact that many farmers had had to stop summer farming in Follafoss commons due to the conditions of the forest.

In 1857 the Norwegian Parliament started to clarify the situation for the commoners by legislating rules for "Private Commons"[7] as Follafoss had become after it was sold by the Crown. The act from 1857 stipulates that the commoners shall establish a common board for governing their joint exploitation of the resources. In 1858 an effort to create an organisation for the commoners of Follafoss failed. In the neighbouring Kvernaa commons they succeeded. The parliament continued its work of clarification in 1863 when legislation on forestry also relevant for commons like Follafoss was promulgated. The legislation stipulated that private commons like Follafoss should be subdivided in a land consolidation process with one part becoming a private forest without rights of common and another part an ordinary

[6] "Bygd" is a Norwegian word, which in the context of commons doesn't translate well to English. Statistics Norway translate it as "Common forest" (Statistics Norway 1969, 37). Sevatdal (1985, 34) translates "bygd" commons as "parish common lands". In a recent dissertation it was translated as "community commons" (Hoffman 2011). It has in connection with commons nothing to do with parish as usually understood, and with community only in a very specific sence. The concept "bygd" has been used in legal texts at least since King Magnus Lagabøter's (1238-80) "Landslov" ("law of the realm") from 1274. 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 Sweden the word would mean the same, but is today in Swedish spelled "by". Today and seen 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" (both state and bygd 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" is used here. Translations of current legislation on state and bygd commons is found in Berge, Mitsumata, and Shimada (2011).

[7] In the same act rules about "State" commons and "Bygd" (or community) commons were enacted. For a more detailed explication of these terms see Berge, Mitsumata, and Shimada (2011, iii-vi).

Bygd commons. In 1886 the Ministry for the interior came to the conclusion that the situation in Follafoss did not warrant any such subdivision[8]. In the case between the commoners and the owner of a part of the old Follafoss judged by the Supreme Court in 1937 (Høyesterett 1937) the judge takes this as one of several indications that the commoners had not exercised rights to log timber for house building. This was the main question before the court and the judge weighed all evidence in favour of the view that rights to timber for house building had not been exercised for such a long time that it now, in 1937, must be void. The owners of the commons should be able to act on that as a fact. But the judgement also confirmed that there was no doubt about the other rights of common stipulated by the title deed of 1801 (in particular the judgement discussed rights to summer farming (including timbers necessary for that) and fishing)[9]. The exercise of these rights was based on ancient custom, not on any contract or rights acquired by adverse possession. But the judgement also added that the right to summer farms at this time could not be considered to belong to the inhabitants of the municipality[10] in general but in current circumstances the right to summer farm must be considered to belong to a specified group of farms. The rights to hunting and fishing, however, belonged to the public of the community as the title deed of 1801 stated. We shall however, take note that the title deed does not mention hunting explicitly. We shall return to this.

This conclusion about the rights of common can be contrasted with the conclusion of a government commission of inquiry into conditions of State commons in North Trøndelag County in 1861-1865[11]. The conclusion was that rights of common as defined by law did not exist in this area. All rights that farmers exercised on state lands were based on contract as evidenced by the payment of fees, or on adverse possession. The shift in opinion from the 1860s to the 1930s says something about a shift in attitudes and perceptions among the bureaucratic elite.

The 1937 Supreme Court case was based on a judgement of the lower court[12] from 8 October,1934 (Høyesterett 1937, 167-172) where the owners of Follafoss were held to be right in believing that there were no rights of common at all. The presiding judge dissented. In his explanation for dissenting to the judgement he argues that the clear conclusions of the government commission of 1861-65 became the foundation for the management of the state commons and was a probable reason why also private owners of commons tried to stop logging and other use of rights of common in this county. The owner of Follafoss in 1866 promulgated a warning against logging in his forest and apparently he succeeded. However, according to the judge, such success could not invalidate the rights of common since these were of a nature that they could not disappear just by not being exercised. The judge also

[8] The act of 1863 stipulated that the subdivision should be done by voluntary agreement, but if no voluntary subdivision had been agreed on within 20 years of the act going into force, the subdivision would be enforced by the state; See section 43 in Act 1863-06-22 on forest management [Om Skovvæsenet]. The subdivision process had intended to dismantle all private commons. But rights of common to pasture, fishing, and hunting proved very difficult to subdivide in the fashion stipulated by the act and many private commons proved difficult to remove in this way (NOU 1985, 14-15).

[9] The farmers *"… kjennes ikke almenningsberettiget til hugst til gårdsbehov i Follafoss almenning med Færgelia, men for øvrig berettiget til å utøve de almenningsrettigheter som ved kongeskjøte på denne almenning av 14. januar 1801 blev almuen forbeholdt."(Høyesterett 1937, 167)*

[10] The community called "bygd" was often interpreted to refer to the municipality. In 1937 municipalities were much smaller than today.

[11] The commission has later been criticized for having a mandate both to establish the facts of the commons, primarily their boundaries, and to judge if they found breaches of the law (Landbruksdepartementet 1958, 23) . It has later been assumed that the farmers would be hesitant to tell about use of rights of common where the usual fee had not been paid. The fee is later explained as an illegal administrative invention that could not change the law.

[12] The court consisted of one professional judge and two lay persons.

comments that even though the owner was able to stop logging and limit summer farming the local public still in 1934 had clear ideas that they had such rights based on old customs and legislation.

One feature of the thinking is worth noting since it crops up also in the current debate about the commons. It is taken for granted without discussion that the rights of common comprise only those ways of exploiting the commons that the law lists and that is repeated in the clause in the title deed to Follafoss. The alternative view that the commoners of today try to champion is that the rights of common must be functionally adapted to the way agriculture is conducted. If today's agriculture requires electricity the commoners must be allowed to exploit the commons to produce electricity. For electricity this question was settled in 1963 when waterfalls were seen to belong to the land owner and not being part of the resources that the commoners could exploit (Høyesterett 1963). For other resources with less cash value the state may lately seem to more lenient. But this is in the state commons. Dismantling private commons has been on the agenda since 1863.

In the history up to the 1937 judgement no trace has been seen of ideas that rights of common might be a more generic category of rights than those explicitly stated in the law. On the contrary: Since the 17th century the trend had been to limit the exploitation of the commons by limiting the quantity of timer to what were needed on the farm, by limiting the number of cattle one could put out on pasture to the number one could feed during the winter, by limiting the number of commoners by requiring that they are farmers within the bygd (community), and, as seen here, to remove rights altogether when they had not been used for a long time.

Part 2: History of rights to hunting of small game without dog and to fishing

In 1937 it was final. The commoners of Follafoss private commons had lost their rights to timber for house building. But they still had "the rights of summer farming ("Sæter"), mountain fields, fisheries, fuel wood, fencing material" as the title deed stipulated. We take note that the title deed issued by the King did not mention anything about hunting rights while fishing is included. In this part we shall outline the changes in these rights.

Hunting has been regulated by law since the 12th - 13th centuries. But the text of these laws is not easily interpreted. The current consensus (Austenå 1965; Kjos-Hanssen 1983) is that predators were open access for everyone. The exception is hunting of bears in winter lairs which could be publicly declared as a right belonging to the person who marked the lair[13]. This lasted until 1932. Big game (moose, red deer, reindeer) could be hunted only by land owners. But according to the Act from 1276 (Taranger [1276] 1915, 155) hunting of moose (and by implication all big game) was open for all outside of private lands. This act was basically in force until 1687. By then the commons of 1276 had become the King's commons, and for the wilderness areas that were not known as King's commons the identity of the landowner(s) was not always clear. Large areas of land were in joint co-ownership (sometimes with individualized resource specific rights) by farms in the relevant areas. 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[14]. An attempt to make hunting of small game without dog into a land owner right in 1730 created such uproar that the legislation had to be cancelled. Other minor changes occurred, but basically the ancient rules were in force until 1899. The 1899

[13] See Chapter 58 in the Book on Land Tenure (Landsleiebolken) page 153-154 in Taranger ([1276] 1915).

[14] The differentiation of rights according to the use of dogs or not on the hunt goes back to Magnus Lagabøter (Taranger [1276] 1915, 154-155)

legislation set down the basic principle that the right to hunt belonged to the land owner and by this time it was clear that this meant the owner of the ground. But the tradition that differentiated among owners of land, forest, pasture, etc. created difficulties since the earlier differentiation did not consciously see ground as different from other valuable rights. The problem was clearly present in the large areas that in 1899 were co-owned in one way or another[15]. But it was not a problem in the commons as defined in the act from 1857. These got their own paragraphs in the 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 has right to hunt small game without dog.

The main argument in 1899 for limiting the hunting rights to the land owners was to limit the unsustainable quantity felled. In the latter part of the 19th century the guns improved and both predators and game populations declined. The open access hunting made it difficult to monitor and enforce quantity restrictions. This was clearly a concern for hunting in the large co-owned areas. The act introduced the right for anyone with hunting right to call upon other holders of rights to create a local board with powers to regulate hunting in cooperation with the municipal board of wild-life management according to by-laws that had to be confirmed by the states local representative, the county governor.

We take note that this formula for management was repeated in the 1920 legislation on state commons and seems rather similar to the more recent management system for the statutory hunting commons (jaktvald) that regulates hunters and hunting activity in cooperation with the municipal boards of wildlife management. The somewhat tentative introduction of co-management in the act of 1899 seems today to have transformed into a successful adaptation to the potential unsustainable activities of hunters.

The act on hunting and wildlife had major revisions in 1932[16], 1951, and 1981. The rules about hunting rights were slightly restricted on all occasions. The major topic in the public debate was the opposition between those who wanted restrictions based on monopoly rights for the owner of the ground and those who wanted to ensure that also non-owners of the ground were granted rights to hunt in some way. The mining workers living near Follafoss belonged to the last group. The Norwegian Association of Hunters and Anglers was in favour of the strengthening of the ground owner rule. But the strengthening of this in the 1932 act probably also led to the creation of a separate Labourers Association for Hunters and Anglers (Kjos-Hanssen 1983). In the 1951 act a major concern was the access to hunting for the general population. The goal was to encourage the formation of hunting commons with ability to sell hunting rights. The attempt in the 1951 act was however not usefully formulated. The changes introduced in the 1981 act did not lead to any development either. Only after changes enacted in 1992 did this co-management in the area of wild-life management take off. We may note that it took almost one hundred years of trials and adaptations.

[15] The act was considered to be inconsistent when section 1 was compared to section 3 (on hunting in co-owned areas). The legal interpretation was resolved in two judgments by the Supreme Court in 1916 and 1959. The interpretation was that the right to hunt for both owners of the ground and owners of specified resources was present only in co-ownerships originating in old style functional subdivisions of resources, not in other kinds of co-ownerships (Austenå 1965).

[16] The changes of 1932 was enacted as changes to the 1899 act (Lov 20 mai 1899 Nr 2 angaaende Jagt og Fangst; see Paulsen (1938)).

The hunting rights in private commons like Follafoss, remained unchanged in 1932. In 1951 hunting of fallow deer, roe deer, and beaver were added to land owners rights and not seen as small game as before (Lov 14 desember 1951 Nr 7 om viltstell, jakt og fangst; see Grundt and Bahr (1960)). In the government commission preparing a new act on wildlife (NOU 1974, 96,122) it is proposed to retain the rule on hunting in private commons that the 1951 act had. But in the government's proposal to the parliament (Miljøverndepartementet 1980) this rule has disappeared without comment[17]. The big issue is improved access to hunting for the general public, introduction of a testing procedure for new hunters, and a general rule that all wildlife is protected unless the act allows hunting. The discussion in the parliament did not mention the deleted rule about hunting in private commons either. The debate concerned the rule about making access for the general public easier. We should note that it was the parliament that insisted on a voluntary approach to co-management. Thus, as of 1 January 1982, the members of the community that had enjoyed rights of hunting small game without dog in Follafoss had lost their right to hunt.

There are no clues why this happened and without any kind of access to persons or minutes from the discussion within the Ministry we can only guess[18]. One possibility might be that in the public mind "private commons" had disappeared to the point that the bureaucrats in the Ministry did not understand the significance of the section. Hence they thought of removing it as a simplification. Another drive might have been the goal of equalizing access to hunting and fishing for all citizens. Then particular rights for certain communities would be a complicating fact.

The right to fishing has gone through a similar process. In the act on fishing anadromous fish and fishing in freshwater from 8 March 1964, the right to fish was confirmed to be a right only for ground owners outside state commons and bygd commons if custom, long time use or other legal rules do not say otherwise. The rules were continued in the revised act of 1992. Before 1964 the basic rules for fishing in freshwater and river systems was Chapter 5-11 in Christian V's Norwegian Law code from 1687. The chapter confirms that for rivers or lakes on private lands the right to fish belongs to the landowner. The only rule for fishing in the commons (at that time "commons" basically meant lands outside of private lands) was Section 1. The rule states only that in lakes in the commons everybody has the right to fish according to their share of the commons, and that the lake shall not be leased to anyone in particular.[19] One interpretation would be that in river systems within the commons (as defined in 1687) fishing with ordinary means would be allowed for all. This is basically the rules governing the state commons and bygd commons today as long as the fishing is done by hook. The rule from 1687 must have included also what later became private commons. But the way the legislation in 1964 was formulated, rights of common to fishing in the private commons disappeared[20]. Hence fishing rights, like hunting rights, in private commons have been removed by specific legislation.[21]

[17] The Ministry of the Environment is closest to acknowledging the change when it says that they have made some simplification to the rules for right to hunting. But they then go on to discuss rules for improving public access to hunting.

[18] The Minister of Environment at that time (1980-10-31) when Ot. Prp. Nr. 9 (1980-81) was presented was Rolf Arthur Hansen (Ap/ Labour Party)

[19] «1 Art. Alle Fiskevand i Alminding maa brugis af hver der haver Lod udi, og ikke til nogen i Særdelished bortbygslis.» http://www.hf.uio.no/iakh/forskning/prosjekter/tingbok/kilder/chr5web/chr5_05_11.html

[20] We may here note that the government commission (Innlandsfiskekomiéen 1948) that prepared the new act on fresh water fishing did not want to say anything about rights to fishing in the act. They acknowledged that the general opinion was that fishing was a right belonging to the owner of the ground. But they also noted that around the country there was a great variety of fishing rights based an ancient customs and found it impossible to

The loss of ancient rights in Follafoss is not unique. In a case judged by the Lagmannsretten in 1999 (Høyesterett 2000) two private commons in Verdal municipality (south of Verran where Follafoss is located) with a similar history of rights of common were found to have ceased to be private commons some time during its 200 year period of existence. The rights to summer farming and pasture had changed from being rights of common to become servitudes. No rights to hunting or fishing remained. However, the Supreme Court found Lagmannsretten in error in this conclusion. There clearly still were rights to summer farming and pasture based on ancient rights of common as late as about 1950. And the following 50 years was too short a period to change any of this. Ancient rights of common do not need formal legislation for existing. But non-use may after a sufficient time make them disappear. One may conclude that Follafoss still is a private commons but that the rights of common now are reduced to summer farming and pasture.

The farmers that finally had confirmed their loss of timber rights in 1937 have had time to adjust to this fact. The community members that in 2000 got confirmation of their loss of fishing and hunting rights have not had the time to adjust to this yet. As far as we can see they have not easily accept the loss, and they have protested along the way without being heard by relevant legislative authorities. In a survey conducted in the spring of 2011 among a targeted sample of the most active users of Follafoss area 53.8% answered that the land owner was not alone in holding rights to hunting and fishing[22]. In the period 1997 to 2011 it was a particularly strong public opinion and debate about these rights. A survey of writings in the local newspaper for the period 1919-2012 confirms this abundantly (Haugset and Berge 2013b; Haugset and Berge 2013a). In the newspaper "Trønder-avisa" from 16 September 2004, for example, Malm hunting- and fishing association (MJFF) encourages their members to hunt for small game without dog in Follafoss private commons without paying the license fee. The year before the land owner had reported similar activities to the police. But the police dismissed the case on grounds that the legal situation was not clear enough for public prosecution[23]. Clearly the local communities of Malm and Follafoss were not happy with the situation created by the national legislation in 1964 and 1982. To understand a bit more of the context for their attitudes and their somewhat delayed reactions we need to look at the history of landowning of Follafoss private commons.

Part 3: History of land ownership to Follafoss private commons

do justice to this in a general act. The government agreed but felt it necessary to give some basic rules, including rules about bygd commons and state lands that were not state commons (in state commons fishing rights were defined by the act on state commons) as well as lands owned by municipalities. (Landbruksdepartementet 1955). One may note that lands owned by municipalities as far as possible should be managed and made available to the public in the same way as state lands outside state commons. Lands owned by counties were, rather surprisingly, included here only in 2012 (Endringslov til lakse- og innlandsfiskeloven mv. LOV-2012-12-14-94).

[21] Stenseth (2005, 221) points to the interesting opposition between the Supreme court judgement from 2000 (Høyesterett 2000) that takes as given that the Parliament can remove ancient rights of commons without debate and the Supreme court judgement of 1937 (Høyesterett 1937) taking for granted that the rights of common (minus timber rights) as stipulated in the title deed of 1801 shall continue unchanged.

[22] The question was about who should decide on pricing and distribution of licenses to fish and hunt and listed 3 alternatives: 1) land owner holds these rights, 2) the land owner is not alone in holding these rights, and 3) no opinion on this question, see Table V8.56 in Haugset (2013, 117). The question was posed to 708 persons and 292 returned an answer. See also section 4 below. For a discussion of data collection and data quality see Haugset (2013).

[23] More about this below.

At the time of the original sale in 1799 Follafoss belonged among the King's commons and had the same status for local communities as the lands the King did not sell. These lands were all over the country. To the south of North Trøndelag they became state commons. But in North Trøndelag they were towards the end of the 19th century considered to have another status. Thus the county was for a period kept outside the legislation on state commons (from 1920) like the 3 northernmost counties still are. The state authorities believed the lands owned by the state in North Trøndelag were not commons and classified them as "un-matriculated state lands" together with similar lands in the three northernmost counties. However, 1926 the act on state commons was enacted also for North Trøndelag[24] and the process of restoring the rights of common started on a case by case procedure both for state commons and for private commons[25]. In 1937 the Supreme Court confirmed that in Follafoss the ancient rights of common to timbers had lapsed due to non-use[26]. In 2000 the same court concluded that ancient rights to fishing had been removed by an act of Parliament in 1964 and rights to hunting in 1982. Unless particular contracts or servitudes said otherwise the hunting and fishing rights belonged unstinted to the land owner.

The history of Follafoss Private commons was bound to the fortunes of the timber trade. During the 19th century it changed owner several times. In 1908 Folla Bruk AS who then was the owner, started a pulp mill. In 1919 North Trøndelag County bought the company to get hands on the water rights to start production of hydro-electric power[27]. They stayed on as the owner of Follafoss until 1983 when the company was sold to Lyng Industrier. The sale was intended to include a (equitable) servitude on the forest areas reserving the ancient rights of common to fishing and hunting small game without dog for the local public. The servitude was never created[28]. But neither did Lyng Industrier interfer with the public's usage of the area[29]. North Trøndelag County retained a right of prior purchase. In 1991 Verran Bruk (a new name for Folla Bruk) was sold to Norske Skog. North Trøndelag County did not use its right of prior purchase. With this sale a more turbulent period for the local public's use of the forest areas ensued. Norske Skog wanted to earn money from selling hunting rights and discontinued the voluntary cooperation with the local hunting and fishing board (Malm jakt- og fiskeområde) and in 1997 they started selling hunting permits. A local action group (later

[24] In 1990 a special law commission ruled that state lands in Nordland and Troms also were state commons. But the act on state commons has not yet been enacted for these areas. In 2005 the state lands in Finnmark were transferred to a semi-public company, Finnmarkseiendommen, in order to comply with ILO Convention 169 on indigenous and tribal peoples; see e.g. NOU 2007:14 (Del 18).

[25] See Landbruksdepartementet (1958)

[26] The non-use that was observed by the Supreme Court must be understood in the context of the history of the public administration of the forests in the King's commons in the county. Since the late 17th century an administrative practice had developed in some counties all over the country, usually managed by the local sheriff, for requiring payment of fee and permission for logging, letter of approval for the use of summer farms and fishing in lakes, and payment of a tax on the use of mountain meadows. In North Trøndelag this had developed much further than in the counties to the south, including payment of some kind of land rent (bygsel) both for summer farms and for fishing rights in a particular lake. This administrative practice had continued and been strengthened despite advice to the contrary from lawyers in the ministry. Lein (1993) refers on pages 59-60 to a letter from the government lawyer Dunker dated 20 April 1868 advising against taking to court farmers that had not obtained the permissions the sheriffs deemed to be mandatory. They were not mandatory or required by law according to the government lawyer. Initially these letters of permission from the sheriff were written on demand from the local users who wanted protection from local competitors. But they were later on used by the authorities as an income generating mechanism.

[27] See http://timeline.nte.no/1919-1923/

[28] The legislation on servitudes did not allow the creation of any kind of real right for a local public.

[29] If the clause about the rights of the public was included in the contract between Lyng Industrier and North Trøndelag County Lyng Industrier would be legally obliged to do so. We have not been able to verify this.

known as Verran Rettighetslag) publicly encouraged people to hunt without permit. They asked farmers to start collecting their sheep on the first day of the hunting period. And they more or less dared Norske Skog to take them to court. After the Ruling of the Supreme Court in 2000 Norske Skog felt secure about their rights. In 2003 they reported the illegal activities by hunters and Verran Rettighetslag to the police. But the police found it impossible to pursue the case without deciding on the issue of the rights of common. This they had no competence to do. In 2004 the forest area was sold again, now to Ulvik & Kiær AS who continued the practice started by Norske Skog of selling hunting permits. The opposition among local hunters was as strongly expressed as before, at least in the newspapers. But what did the ordinary user of the forest area think about this?

To understand the persistent local opposition to the efforts of the local landowners to commercialize fishing and hunting we should consider that Follafoss was in public ownership from 1919 to 1982. Legislation on fishing and hunting has tended to treat land owned by public bodies such as municipalities (and more recently counties) in the same way as land owned by the state. The county of North Trøndelag followed the practice for municipalities even if counties were not explicitly charged to do so until 2012[30]. During the sales process before the county sold the lands in 1983 both newspaper writings and speakers in public bodies like the municipal and county councils expressed a high degree of uncertainty about the legal status of the ancient rights to fishing and to hunting (Haugset and Berge 2013a). And as mentioned above, the county intended to create a servitude granting fishing and hunting rights to the local public. Thus, the practice of "free"[31] fishing and hunting of small game without dog was supported by established custom going back to the time long before the legislation in 1964 and 1982. Despite the expressed uncertainty in statements from political parties at municipal and county levels, the public opinion expressed in newspapers was pretty sure of their rights of common to fishing and hunting, and, as seen here, this opinion was not without foundation in historical experiences.

The answers to the questions we posed to the users of the Follafoss area must be interpreted within this context.

Part 4: Current beliefs about rights to fish and hunt in Follafoss private commons

In May 2012, we carried out a survey among users of the area formerly known as Follafoss private commons, Follafoss commons for short (Haugset 2013). The questionnaire was sent to persons who were assumed to be using the Follafoss commons area frequently: members of cabin owners associations in the vicinity, holders of rights to summer farms and pasture in the commons, members of the hunting and fishing association (Malm JFF), and holders of federal hunting licenses with residence in Malm and Follafoss. Of the 708 questionnaires sent out 292 were returned. A central part of the survey asked about perceptions of, and opinions about, rights of common in Follafoss commons.

[30] In the 1964 act on fishing in the rivers and lakes with no anadromous fish there are detailed rules about fishing rights on land held by municipalities (Landbruksdepartementet 1955). For the present study we note that the county was added in an amendment to the 1992 act from 2012. In section 23 it now says: «Fishing on municipal and county owned land. The municipality and the county shall exploit their right to fish for anadromous salmonids and freshwater fish on their lands in conformance with the purpose of this act, and give a best possible opportunity for fishing for the public for example by selling permission to fish.» (Our translation from ACT 1992-05-15 no 47 «Lov om laksefisk og innlandsfisk mv. (lakse- og innlandsfiskloven) »).

[31] "Free" fishing is defined as fishing that according to ancient custom or other particular legal rules does not belong to the land owner. See section 5d in ACT 1992-05-15 no 47: «Lov om laksefisk og innlandsfisk mv. (lakse- og innlandsfiskloven) ».

The question to focus on here is opinions about, or beliefs in, rights of common to fishing and hunting small game without dog. Table 1 presents the answers to two questions used to measure the respondent's beliefs about the existence of rights of common. Question I and II in the table were framed in this way (translated from Norwegian[32]):
The rights to hunting and fishing in Follafoss commons are disputed. In the local community, many inhabitants will claim that these are old rights of common for local people. Others will assume that the hunting- and fishing rights belong to the land owner. This would imply that the land owner can decide about the price for licenses, and whether there will an open or a restricted sale of licenses (exclusive sale).

Table 1: Cross-tabulation of the answers to two questions about the beliefs about the rights of common to fishing and hunting in Follafoss commons in Verran. N=292. Missing = 21.

	II: Do you think most people in Verran would agree that the land owner has the sole hunting and fishing rights in Follafoss commons?			
I: What is your opinion on this regarding Follafoss commons?	Yes	No	I do not know	Total
The land owner holds the hunting and fishing rights	6 31,6%	23 11,6%	7 13,0%	36 13,3%
The land owner is not the sole holder of hunting and fishing rights	8 42,1%	145 73,2%	4 7,4%	157 57,9%
I do not have an opinion on this issue	5 26,3%	30 15,2%	43 79,6%	78 28,8%
Total	19 100%	198 100%	54 100%	271 100%

New variable "Rights of common exist" defined as:
People believe strongly that "Rights of common exist" if they answer "No" on question II: "Do you think that most people in Verran would agree that the land owner alone has hunting and fishing rights in Follafoss commons?", and choose the statement "The land owner is not the sole holder of hunting and fishing rights" to describe their opinion on question I.

The co-variation between the answers to these two questions in table 1 is rather strong (Cramer's V = .428). 145 persons are convinced for their own part that others than the land owner hold rights to fishing and hunting in Follafoss commons, and they also believe that most people in Verran share this view. We argue that the perception of rights of common are most clearly and forcefully expressed by these 145 respondents, and define a new variable "Rights of common exist" by assigning these 145 the value 1 and the rest the value 0.

Holding a clearly expressed belief in the rights of common for local residents like it is seen her, despite the long history of dispute around them, cannot easily be explained by external or national values or general personal characteristics like sex or age. Only local cultural values and personal interest in the hunting and fishing activity can reasonably be argued to be causal factors. To this we should add knowledge about the political and legal aspects of the long

[32] See Haugset (2013) page 25 for questions I and II in table 1, and page 117 tables V8.56 and V8.57 for marginal frequencies of responses, including missing observations.

dispute. To test out this we have done a logistic regression with "Rights of common exist" as dependent variable. We have tried out various explanatory variables among those available.

Cross tabulations show no significant difference in the perception of rights of common between respondents who report that they own land bigger than a cabin's plot themselves, and those who don't own outfield land in Verran. However, where respondents live, their age, gender and level of education, whether they are hunters[33] or not, whether they are members of the cabin owners association at Holden (inside Follafoss commons) or not and whether they are members of the local hunting and fishing association all correlate with their perception of the rights of common. We do not have good variables indicating knowledge of political and legal aspects of the issue. But several of these variables are confounded.

The logistic regression was used to find out which variables affected the perception of rights of common and in which direction, when controlling for the others.

Table 2: Dependent variable "Rights of common exist" regressed (logistic model) on background variables (Haugset and Berge 2013a).

Descriptive Statistics

Variables in the model	N	Minimum	Maximum	Mean
Rights of common exist	271	0	1	,54
Lives in Malm or Follafoss	292	0	1	,41
University level education	292	0	1	,36
Importance of hunting	273	1	10	5,86
Importance of fishing	278	1	10	7,81
Valid N (listwise)	253			

Variables in the Equation

Dependent: Rights of common exist	B	S.E.	Wald	Sig.	Exp(B)	95% C.I.for EXP(B)	
						Lower	Upper
Lives in Malm or Follafoss	1,041	,305	11,676	,001	2,832	1,559	5,144
University level education	,731	,302	5,872	,015	2,077	1,150	3,753
Importance of hunting	,084	,039	4,757	,029	1,088	1,009	1,174
Importance of fishing	,167	,055	9,160	,002	1,181	1,061	1,316
Constant	-2,310	,499	21,384	,000	,099		

n=253; missing n = 39; correct classification 65.2%;

As suggested above the only variables affecting the expressed belief in the existence of rights of common were interests in fishing and hunting (Importance of hunting and fishing), membership in the local community (Living in Malm or Follafoss), and education (University level education). Variables like age and sex did not have any significant impact. The results

[33] Almost all respondents report that they do inland fishing, so there is not enough variation in this variable to use for analyses.

support an interpretation that local culture and personal interests are strong determinants of the beliefs in their ancient rights of common.

To further explore the boundary between what local people believe are their rights and what the law says, we asked if the respondents knew anyone who used to fish or hunt in Follafoss commons without buying a license, and how common they believed this practice was. The answers are provided in table 3 below, showing that some illegal hunting and fishing takes place.

Table 3: The respondent's knowledge of illegal (un-licensed) hunting and fishing in Follafoss commons. For all these questions quite many respondents answered "I do not know" or did not provide any answer at all. The percentages in the table are calculated among those in the sample of 292 respondents who did answer.

Do you know someone	Who fishes without a license?	Who hunts for small game without a license?	Who hunts for big game (moose, deer, roe deer) without a license?
Yes, knows someone	47.6 % (n=185)	41.8 % (n= 182)	6.9 % (n=101)
How common do you believe this practice is? (on a scale from 1-10)	6.8 (n=150)	4.8 (n=131)	1.7 (n=122)
Knows of sanctions from land owner	14.0 % (n=121)	39.2 % (n=102)	3.8 % (n=76)
See tables V8.61-69, pages 119-121, in Haugset and Berge (2013a)			

From side comments to the questionnaire we understand that many resent questions about acts that clearly are illegal. This may be so both because they have a high regard for the legal

system and do not want to know of people who wantonly break the law. It may also be a factor that they do not want to tell on friends that they know have done illegal acts. The large non-response taken together with the fact that many people may know of one or two cases clearly makes it impossible assess how frequently these poaching activities occur. But we can confirm that they occur.

Conclusion:

In 2012, 30 years after the rights of common to hunt small game without dog in Follafoss commons were formally abolished by the Norwegian parliament and 30 years after the land was sold again out of public ownership (which again made fishing a private landowner right), there is still a strong perception among the users of the area that the landowner is NOT the sole holder of hunting and fishing rights in the area. This perception is at its strongest in respondents living in the local community nearby (Malm and Follafoss) who hold strong interests in fishing and or hunting, and who are highly educated. Some voice their opposition by acting as if there still is free fishing and local open access to hunting of small game without dog.

The sale of the King's commons to private owners 200 years ago created a new context for the exercise of the ancient rights of common. The rights of the commoners were of course already at the outset in conflict with the interests of private owners. During the first part of the 19th century the private interests were on the offensive among other factors also fuelled by the liberal privatization ideology that had influenced public policy since the mid-18th century. From some time in the last half of the 19th century a slow case-by-case restoration of rights of common took place ending maybe in 1992 with the restoration of the status of commons to the state lands in Nordland and Troms.

The sale of the commons from the county to private interests in 1982 can be interpreted as part of the new privatization period, sometimes identified as "Thatcherism". To this came in the 1990s in Norway a clearly expressed public policy requiring land owners to exploit the commercial potential of fishing and hunting rights. This included also a mandate for Statskog SF to commercialize as far as possible the State Commons. It created a period of difficulties for the local Mountain Boards managing the various State Commons (Runningen 2012). In 2012 the private interests in Follafoss had emerged victorious. The local hunting and fishing association accepted to sell fishing and hunting licenses on behalf of the new land owners from 2004.

One is left wondering what kind of political system one would need in order to take care of ancient rights such as those the public in Malm and Follafoss had enjoyed until 1989/ 1997. The history we have surveyed shows a continuous practice of the rights by local residents. At periods of transition of land ownership in 1982-83 and in the 1990s the public debate flared up and revealed a considerable uncertainty about the legal realities. Part of the blame for this must be put on the lawmaker. Both in 1964 for right to fish and in 1982 for the right to hunt, the old private commons were left out of the lawmaker's consideration without serious debate.

One may say that the lawmaker had intended that the private commons should have been dismantled already by 1883. But at that time it was timber rights that were foremost in their minds. And the timber rights were gone before 1937. In 1883 the act on hunting was still 16 years away. And the 1899 act on hunting did preserve the rights of common to hunting in private commons. Fishing was finally privatized in 1964.

Today the loss of these rights by the people of Verran is not critical. They can live without them. But on the other hand: for the lawmaker it would have cost nothing to take their old rights into consideration. For people living in Malm and Follafoss it would have improved on the standard of living and quality of life. What remains of the original commons are the rights to summer farm and pasture. But to exploit these you need to have a farm with livestock. And these are disappearing. There are fewer and fewer farmers with livestock[34]. The economy of livestock farming and the threat from predators are forcing more and more farmers to quit the livestock business. And if the right of pasture is not exercised for a sufficient time it will also disappear.

References

Austenå, Torgeir. 1965. Jaktrett i sameigestrekning. *Norsk Tidsskrift for Jordskifte og Landmåling* 27 (4):309-337.

Berge, Erling, Gaku Mitsumata, and Daisaku Shimada, eds. 2011. *Legislation on commons (Statsallmenning/ Bygdeallmenning) in Norway*. AAS: Centre for Land Tenure Studies, Norwegian University of Life Sciences.

Grundt, Th., and Henrik Bahr, eds. 1960. *Norges Lover 1682-1959*. Oslo: Det Juridiske Fakultetet / Grøndahl & Sønn.

Haugset, Anne Sigrid. 2013. Jakt og fiske i Follafoss allmenning 1919-2012: Lokal praksis og oppfatning av rettigheter. Basert på en innholdsanalyse av artikler i Trønder-Avisas arkiver i perioden 1919-2012 In *Working paper*. Steinkjer/ Ås: TFoU and CLTS, UMB.

Haugset, Anne Sigrid, and Erling Berge. 2013a. Lokal sedvane i bruken av utmarka i Verran kommune. In *TFou Report/ CLTS Reports*. Steinkjer/ Ås: TFoU and CLTS, UMB.

Haugset, Anne Sigrid, and Erling Berge. 2013b. Jakt- og fiskerett i Follafoss allmenning. Basert på innholdsanalyse av artikler i Trønder-Avisa 1965-2012. In *TFoU Report/ CLTS Reports*. Steinkjer/ Ås: TFoU and CLTS, UMB.

Hoffman, Matthew David. 2011. Land and Community: Property Rights and the Future of Rural Landscapes, Graduate School, Cornell University, Ithaca, NY.

Høyesterett. 1937. Dom 19 mars 1937 i L.nr. 36/1 s.å.: Peter Ystmark m.fl. (advokat O. Solnørdal) mot A/S Folla (advokat Valentin Voss og advokat T. Bendixen) og Spillum Dampsag og Høvleri (advokat G. Sjaastad). *Norsk Retstidende* 102:158-172.

Høyesterett. 1963. Dom 3. desember 1963 i l.nr. 123: Staten ved Direktoratet for statens skoger (høyesterettsadvokat Eiliv Fougner) mot 1. Fron almenningsstyre, 2. Fron fjellstyre (høyesterettsadvokat O. Trampe Kindt). *Norsk Retstidende* 128 (II):1263-1288.

Høyesterett. 2000. Dom 7. november 200 i l.nr. 48B/2000: 1 Asbjørn Hegstad m.fl. - i alt 10 parter (advokat Pål Christensen) mot AS Værdalsbruket (advokat Knut Røstum). *Norsk Retstidende* 165 (II):1767-1785.

Innlandsfiskekomiéen. 1948. Innstilling fra Innlandsfiskekomiéen. Komitéen oppnevnt ved konfgelig resolusjon av 7. mars 1947. In *Forarbeid til lovene 1964*, edited by Landbruksdepartementet. Oslo: Justisdepartementet.

Kjos-Hanssen, Odd. 1983. Utviklingen av norsk viltlovgivning. *Stavanger Museums Årbok* 93:53-67.

Landbruksdepartementet. 1955. Ot. prp. nr. 8 (1955) Om lov om innlandsfiske og tilleggslov til lov om lakse og sjøørretfiskeriene m. v. av 27. februar 1930. In *Forarbeid til lovene 1964*, edited by Landbruksdepartementet. Oslo: Justisdepartementet.

Landbruksdepartementet. 1958. St. Meld. Nr. 19 (1958) Ålmenningsspørsmål i Trøndelag. Oslo: Regjeringen.

[34] In Verran the number of farmers with cattle declined from 47 to 27 from 1989 to 2010, for sheep it declined from 41 to 27. In North Trøndelag the number of cattle farms declined 45% from 2000 to 2010, and the number of sheep farms declined 35% (SSB 2013)

Lein, Anne Berit. 1993. Allmenningsrettens utvikling i Nord-Trøndelag. Hovedoppgave, Institutt for planfag og rettslære, Norges Landbrukshøgskole, Ås.

Miljøverndepartementet. 1980. Ot. Prp. Nr. 9 (1980-81) Om lov om viltet. In *Forarbeid til lovene 1981. Bind II. Forarbeid til lover nr 28-60*, edited by Justisdepartementet. Oslo: Justisdepartementet.

NOU. 1974. NOU 1974:21 Viltstell, Jakt og fangst. Oslo: Universitetsforlaget.

NOU. 1985. NOU 1985:32 Revisjon av almenningslovgivningen. Oslo: Universitetsforlaget/ Statens forvaltningstjeneste.

NOU. 2007. NOU 2007:14 Samisk naturbruk og rettssituasjon fra Hedmark til Troms: bakgrunnsmateriale for Samerettsutvalget. Oslo: Departementenes servicesenter, Informasjonsforvaltning.

Paulsen, P. I., ed. 1938. *Norges Lover 1682-1938*. Oslo: Det Juridiske Fakultetet / Grøndahl og Søns.

Runningen, Irene. 2012. *Fjellstyrene 100 år. Glimt Fra historien.* Oslo: Norsk Fjellstyresamband.

Sevatdal, Hans. 1985. *Nasjonalatlas for Norge. Offentlig grunn og bygdeallmenninger*. Hønefoss: Statens kartverk (Norges Geografiske Oppmåling).

SSB, Statstics Norway. 2013. *StatBank Norway*. Statistcs Norway 2013 [cited 30 May 2013]. Available from https://www.ssb.no/en/statistikkbanken.

Statistics Norway. 1969. Census of Forestry 1 September 1967 Volume 1 Properties, Area, Ownership etc. Oslo: Central Bureau of Statistics of Norway.

Stenseth, Geir. 2005. *Almenningens Janusansikt. En sammenlignende rettslig analyse av almennings- og samarbeidsforhold i norsk utmark*. Oslo: Gyldendal.

Stortinget. 1899 [1907]. Lov 1899-05-20 Nr. 2 Angaaende jagt og fangst (jaktloven). In *Almindelig Norsk Lovsamling. Femte Bind 1895-1899*, edited by P. I. Paulsen, J. E. Thomle and C. S. Thomle, 1033-1046. Oslo: Aschehoug.

Taranger, Absalon (translator). [1276] 1915. Magnus Lagabøter's Landslov. Oslo: Universitetsforlaget, 1979.