

## On enclosure Norwegian style

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**Abstract:** More than 200 years after the King sold one of the “King’s commons” to urban timber merchants, local people in some ways still behave as if the area is a kind of commons. The paper outlines the history of the transformation of the area from an 18th century King’s commons to a 21st century battleground for ideas about ancient access and use rights of community members facing rights claimed by a commercial forest owner within local consequences of national legislation. The discussion is focused on the right of common to hunt small game without dog in Follafooss private commons. The right was confirmed in a judgement of the Supreme Court in 1937 and in legislation on hunting in 1951. In the Government’s proposal for new legislation on hunting in 1981 the right was removed without saying a word about it, and it was never commented on in parliament during the legislative process. To explain what we observe it is suggested that a new layer of legislation on rights of common from 1857 and 1863 created a structural amnesia about private commons making it easy to remove them from legislation.

**Keywords:** Customary rights, King’s commons, loss of customary rights, national legislation, privatization, rights of common

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## I. Introduction

In Norway privatization of natural resources is an on-going process arousing interest every so often. This article is about privatization of forests and hunting rights.<sup>1</sup> At the core of this process is the privatization of land in the meaning of ground ownership. Privatization of land ownership is not a well-defined process. In the discussion here, it means transfer of rights from members of a local community to some well specified legally recognized actor(s). This kind of privatization is in England known as enclosure (or inclosure) and has been extensively studied (see e.g.: Pugh [1953] 1968; McCloskey 1972; Dahlman 1980; Neeson 1993; Mackenzie 2010). In Norway the process has been less studied, maybe because it never created conflicts like those reported from England. Therefore our interest was aroused when we became aware of a flare-up of conflict around hunting rights in an area that 200 years ago was known as the “King’s commons of Betstaden”. Today the bulk of this area locally is known as Follafooss Commons. It is not in any way a commons as these are defined in current Norwegian legislation. The landowner is a large company exploiting it commercially. The conflict arose as the local community discovered, more than 15 years after the fact, that their ancient rights to hunt small game without dog<sup>2</sup> had been removed by the Norwegian parliament in 1981. How can this institutional change be explained?

In the Follafooss area we shall trace the privatization of land and hunting rights since it had status as a Kings commons in 1799 until 1982 when the local community finally had lost all rights to exploit the area as a community. The community did not know about that loss until the company that owned the land in 1997 tried to make profit from selling hunting rights. Then the conflict broke out. The hunting organisation encouraged its members to hunt without permission of the owner. In 2003, the owner reported the illegal hunting to the police. The police found the legal situation so unclear they dismissed the case. The land was sold to a new owner. For a while, the conflict seemed to subside and in 2012 the organised hunters agreed to sell hunting licenses on behalf of the owner. However, in 2013 the conflict flared up again. In a survey among users of the area in 2012 58% of those we asked (n=271) were sure that people in the municipality would agree that the landowner was not the only one with fishing and hunting rights (Haugset and Berge 2013a, 117). And in the newspapers the opposition among local hunters was as strongly expressed as before (Haugset and Berge 2013b).

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<sup>1</sup> The paper is a shortened version of Berge and Haugset (2015).

<sup>2</sup> This kind of hunting was an all men’s right until 1899 when it became a right for communities around commons of all types. When hunting is not otherwise specified in this paper it means hunting small game without dog.

The hunting rights that the local community members believe they hold are seen as customary in the sense that they have existed for as long as we have knowledge of such things. Their local rights have also been acknowledged by public authorities, last time in a judgement of the Supreme Court in 1937 (Høyesterett 1937) and in the act on hunting and trapping from 1951. Today the old rights of common in Follafoss from before 1857 have been reduced to the right to summer farms and pasture for a few livestock farms. Livestock farming is disappearing. And if the right of pasture is not exercised for a sufficient time also this right will disappear.

However, the question we try to resolve here is how it is possible to remove customary rights to hunting without a comment from the government and lawmakers in the Norwegian parliament. To provide an understanding of the decisions of the government and parliament in 1981 we will trace the developments concerning rights of common and related institutions. Several trends are interesting. On the one hand the traditional rights of common have become more specific and limited while the practice of farming require the resources of the commons less and less; on the other hand, the general public gets more rights to enjoy and exploit the outfields in ways resembling the old rights of common. However, these processes interact with a strong policy guarding the unity of resources of the family farm while the number of active farmers is declining.

The loss of old rights for small groups, like the local hunters of Follafoss, may, perhaps, in the large-scale national developments be seen as “collateral damage” in the modernization of Norway. How this “damage” came to pass is unclear. Pending further evidence, such as the minutes from the government from 1981, we can only offer speculations. These speculations, however, have to account for the long process of withering away.

The forests and wastelands that in Norway 250 years ago were known as King’s commons have a complicated history. At the end of the 18th century when our story starts, the meaning of “King’s commons”, as revealed by administrative practice, was that the King was owner at law of the ground, and of the remainder of other resources after the commoners had harvested what they could use in their farming activities (Løchen 1957). Based on Norwegian history other meanings could have been possible (Berger 1956, 1959). The alternative would have been to consider the rights of common to belong to a local community where community membership was the key. However, the legal reality came to be that exercising rights of common required farmland and practice of agriculture except for fishing and hunting where rights belonged to members of the local community.

Legal regulation of the commons goes back to before the national legislation of 1274. At the time of sale of this particular King’s commons in 1801 it was legislation from 1687 that was in force. After 1687 the first major change in the legislation relevant for the commons came in acts from 1857 and 1863. We should note that hunting was not included among the rights of common in these acts. Hunting had from old been regulated in a different way; part of it had been a land

owner right, part of it, hunting of small game without dog,<sup>3</sup> an all men's right. In 1899 the all men's right became a right of common. For the commons known as private commons this ended in 1981. How can the changes that affected the Follafoss commons be understood? The described institutional changes have been gradual, almost invisible, and do not involve any obvious political or economic actors.

## 2. Gradual institutional change

The rights of common is an institution consisting of the rules and norms that people use to organize repetitive and structured interactions within the areas and resources recognized as some form of commons in the Norwegian society. The main focus will be on Norwegian law, but we need to understand how the legislation depends on cultural values and precepts.

The "creation" of Follafoss private commons and its slow withering away, requires a historical perspective on institutional change. Mahoney and Thelen (2010a) provide four modal types of institutional change:

1. "Displacement: the removal of existing rules and the introduction of new ones
2. Layering: the introduction of new rules on top of or alongside existing ones
3. Drift: the changed impact of existing rules due to shifts in the environment
4. Conversion: the changed enactment of existing rules due to their strategic redeployment" (Mahoney and Thelen 2010a, 15–16)

Mahoney and Thelen (2010b) as well as Ostrom (2005) provide frameworks for linking institutions and actors within a context of political and cultural realities informing actors of the implications of alternative ways of choosing actions as defined by the institutions.

However, the long duration of the change processes and the many parallel changes of the Norwegian society suggest that we need other or additional explanatory factors than organised political activity. The process of dissolving private commons between 1863 and 1883 did reduce their number. How many remained is unknown. The Director of Forestry stated in 1909 that he assumed that all private commons with forest resources had been subdivided according to the 1863 rules (Skogdirektøren 1909, 461–477). Later private commons have been "discovered" through judgements of the Supreme Court, but as late as 1985 we see no interest in finding out about their numbers (NOU 1985). It seems reasonable to assume that after about 1890 the number of owners and commoners of private

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<sup>3</sup> The differentiation of hunting rights according to the use of dogs or not goes back to Magnus Lagabøter's Law Code from 1274 (Taranger [1274] 1915, 154–155).

commons were too few to sustain any long term political activity defending rights of common in the private commons. Their remedies were court actions. Thus it is not reasonable to think that political activity can “explain” the slow withering away. The only visible actors in the story are the courts with decisions of the Supreme Court settling the disputes according to their interpretation of the lawmakers’ intentions. In some way the internal structure of the institution of rights of common must supply the conditions for its own withering away, perhaps assisted by interactions from external institutional developments.

Mahoney and Thelen’s typology of institutional change will help in making the institutional structure distinct. But in addition to a structural causation attributed to the Norwegian commons institution (structuring choice alternatives, mandating powers), we need to see if the institutions affect the memory of relevant actors both within and externally to the institution. Both the conviction that there were no more private commons and the complete lack of interest in them as category of ownership are puzzling. Mary Douglas (1986, 69–90)’s ideas about structural amnesia has provided some insight into how this might come about. The key to understand structural amnesia is to see how attention is systematically shifted away from the “forgotten” issue. In the details of the case of Follafoss commons presented below we shall be looking for such explanations of observed changes.

### 3. A short history of Follafoss commons<sup>4</sup>

On the 26th March 1799, the Danish-Norwegian Crown held an auction offering forest properties, parts of the King’s commons,<sup>5</sup> to the highest bidder. Proprietor Christen Johan Müller was the highest bidder for the King’s commons of “Follefoss” (or “Bedestad”; hereafter Follafoss) commons. The title deed was registered on 14th January 1801. 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.” (our translation from Høyesterett (1937)).

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.

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<sup>4</sup> The presentation here is based on the preamble to the judgement of the Norwegian Supreme Court 19th March 1937 (Høyesterett 1937).

<sup>5</sup> The idea of “King’s commons” in the meaning that the King could sell his commons is difficult to trace further back than the 17th century, see Falkanger (2009, 45–50).

The Danish-Norwegian Crown's sale of bits and pieces of the King's commons was stopped by an act from 1821 (Stortinget 1821, Section 38). In 1848, after a moratorium of 27 years, the parliament again allowed sales of King's commons (Stortinget 1848). However, such sales were again prohibited by legislation in 1863 (Stortinget 1863 [1905], Section 72, page 477).

The 1857 act created a new understanding of the term commons (Stortinget 1857 [1905]). Three types of commons were defined. One of them was "Private Commons". The two other types were "State" commons and "Bygd" (or community) commons. Rights of common on lands owned by the state became "state commons". Rights of common on land owned by private actors became "bygd commons" or "private commons". The dividing line between the two was the proportion of landowners among the group with rights of common. If the proportion was less than 50%, the commons was a private commons.<sup>6</sup> The definition of private commons fit the reality of Follafoss commons. The 1857 act was titled "On Forest Commons". It was continued in 1863 by an act "On Forest Administration" (Stortinget 1863 [1905]). For the present discussion the most interesting part of the 1863 act was rules stipulating that private commons, like Follafoss, should within the next 20 years, be dissolved by land consolidation into one part pure private land and one part bygd commons.

The history of Follafoss private commons has been bound to the fortunes of the timber trade. During the 19th century it changed owner several times. In 1919 North Trøndelag County bought the company to get hands on the water rights to start production of hydro-electric power. They stayed on as the owner until 1983. The 1983 sale was intended to include a 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. When the North Trøndelag County tried to register a servitude to the effect that the community members of Follafoss should have the fishing and hunting rights they had enjoyed from old, the legal rules of the land act from 18 March, 1955 would not allow it. We should note, however, that the Ministry could have made an exception to the rule if the seller and buyer had applied. For instance, Meråker municipality in 1974 secured similar hunting and fishing rights on the lands of Meraker private commons owned by Meraker Bruk AS (Lein 1993, 91).

One factor that partly might explain the persistent and long lasting local opposition to the efforts of the landowners to commercialize fishing and hunting is 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. During the sales process before the county sold the land in 1983 both newspaper writings and speakers in public bodies like the municipal and county councils expressed a high

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<sup>6</sup> For a more detailed explication of these terms see Berge et al. (2011, iii–vi).

degree of uncertainty about the legal status of the ancient rights of hunting and fishing (Haugset and Berge 2013b). The sale of the commons from the county to private interests in 1982 was motivated by a concern for the workers in the local pulp mill. The interests of the local commoners with rights to fish and hunt were marginal to this, but sufficiently noted to be included in the sales contract. But at the next sale the contract clause of 1983 was left out. It may seem that private commons had low priority both in parliament and in the county.

#### 4. On the history of rights of common in private commons and their withering away

One may reasonably stipulate two reasons for the disappearance of customary rights like those we investigate here. The usual reason in Norway has been that people stop exploiting the resource due to changes in technology and/or incomes. After some decades, the custom based right is void. The other way is for the legislator to enact a rule to make some specified exploitation illegal or devising rules for removing them. This was part of the 1863 legislation on forest management (Stortinget 1863 [1905], 461–477). But to understand the long withering away process where the parliament removed rights and the commoners of Follafoss continued exploiting them, we need to see the context of the legislation. We see three phases of this process from the sale of King's commons in 1801 to the loss of hunting rights in 1981.

##### *1. The first phase runs from 1801 to 1857: Exploiting the old forest commons*

During this period we see the fortunes of timber merchants varied and Follafoss was sold several times. More observations are provided in Berge and Haugset (2015). Here we note that the usage of the commons, still, in the 1850s was guided by ancient custom and the rules of the 1687 law book.

##### *2. The second phase can roughly be said to run from 1857 to 1937: The loss of rights of common to timber*

Since the 17th century, the trend had been to limit the exploitation of the commons.<sup>7</sup> The new rules promulgated in 1857 and 1863 defined precisely what comprised the rights of common and provided rules for extinguishing other ways of exploiting the commons, some of which, like making charcoal, were destructive for the forests. The new rules were made with forestry in mind and did not affect fishing and hunting. It is also doubtful that they affected the ancient ideas of commons. In 1886 the Ministry for the Interior came to the conclusion that the situation in Follafoss did not warrant any subdivision as stipulated by the 1863 act. In the case between the commoners and the owner of a part of the

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<sup>7</sup> The quantity of timber was limited to what was needed on the farm. The number of cattle one could put out on pasture was limited to the number one could feed during the winter. The number of commoners was limited by requiring that they are active farmers within the bygd (community).

old Follafoss commons 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.

The timber rights were the main question before the court in 1937 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 landowners should be able to act on that as a fact. The 1937 conclusions 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. The conclusion was that rights of common as defined by law did not exist at all 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 (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, he argues that the clear conclusions of the government commission of 1861–1865 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 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. By 2012 they are still convinced that they have some rights as far as fishing and hunting is concerned.

There were many forces contributing to the fact that in 1937 the commoners could not prove that their timber rights had been used for a long time. 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 fishing and summer farming, including timbers necessary for that). The exercise of these rights was based on ancient custom, not on any contract or rights acquired by adverse possession. 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 in general but in current circumstances the right to summer farm must be considered to belong to a specified group of farms.

### *3. The third phase 1899–1981 The loss of rights to hunting of small game without dog*

The third phase of the history has roots, partly in the 1899 act on hunting, and partly in the 1919 sale of Follafoss to North Trøndelag County and ends in 1982 when the



loss of hunting rights to small game is final. This is confirmed in a decision from 2000 by the Supreme Court (Høyesterett 2000) in a case involving a neighbouring commons. The court concluded that ancient rights to fishing had been removed by an act of parliament in 1964 and rights to hunt in 1981. Unless particular contracts or servitudes said otherwise the hunting and fishing rights belonged unstinted to the landowner. This removal is the core problem we are investigating.

There is an interesting contrast between the judgement of 2000 and the judgement from 1937. In 1937 the presumption was that the nature of rights of common was that their origin was not acts of parliament and they could not disappear just by not being exercised. Also Stenseth (2005, 221) points to the interesting opposition between the Supreme Court judgement from 2000 that takes as given that the parliament can remove ancient rights of common 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.

Law has regulated hunting 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 that could be publicly declared as a right belonging to the person who marked the lair. This lasted until 1932. Big game (moose, red deer, reindeer) could be hunted only by land owners. But according to the act from 1274 (Taranger [1274] 1915, 155) hunting of moose (and by implication all big game) was open for all outside of private lands. By and large the 1274 act was in force until 1687. By then the commons of 1274 had become the King's commons. But 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. An attempt to make hunting of small game without dog into a landowner right in 1730 created such uproar that the legislation was cancelled. Other minor changes occurred, but overall, the ancient rules were in force until 1899. The 1899 legislation 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. However, 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. It was not a problem in the commons as defined in the act from 1857. These got their own paragraphs in the new act on hunting (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 landowner. But in addition, the population of the community where rights of common exist has right to hunt small game without dog.

The main argument in 1899 for limiting the hunting rights to the landowners 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 note that this formula for management was repeated in the 1920 legislation on state commons.

The act on hunting and wildlife had major revisions in 1932, 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 landowner and those who wanted to ensure that also non-landowners 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 landowner 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).

The management rules of the act on state commons from 1920 seems rather similar to the more recent management system for the statutory hunting commons (jaktvald) that regulate hunters and hunting activity in cooperation with the municipal boards of wildlife management. 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 the co-management in the area of wildlife management take off. We note that it took almost one hundred years. The somewhat tentative introduction of co-management in the act of 1899 seems today to have evolved into a successful adaptation of the rules, able to handle the potentially unsustainable activities of hunters.

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 landowners rights and not seen as small game as before (Stortinget 1951 [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 of the 1951 act. But in the government's proposal to the parliament (Miljøverndepartementet 1980) this rule has disappeared without comment.<sup>8</sup> The big issue is improved access

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<sup>8</sup> The Ministry of the Environment is closest to acknowledging a change in hunting rights when it both emphasize that hunting belongs to the landowner and says that they have simplified the rules for right to hunting on state land. Then they immediately go on to discuss rules for improving public access to hunting. Private commons are never mentioned (Miljøverndepartementet 1980).

to hunting for the 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 public easier. Thus, as of 1 January 1982, the local public of Follafoss, the members of the community that had enjoyed rights of hunting small game without dog, had lost their right to hunt.

The inconsistency between the emphasis on access to hunting for the public and the removal of the rights for the local publics around private commons creates questions about why this happened. There are no clues and without any kind of access to persons or minutes from the discussion within the Ministry we can only guess. 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.

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. This court case adds a third private commons to the two confirmed to exist in the 1930 and 1937 judgements, and the withering away of their rights of common seems rather similar. One can only wonder how many similar cases one might find if one investigated systematically all transactions starting with the sale of a King’s commons. But for our purpose it may not matter much if there are 3 or 30 or more cases.

It is worth noting that the Supreme Court in several judgements has emphasised that ancient rights of common need no formal legislation to exist and that their removal is difficult. After the 1857/1863 limitation of rights there are no positive legal enactments removing rights of common. The possible exceptions are the fishing rights in 1964 and the hunting rights in 1981. However, these removals come about in a somewhat indirect way. First the lawmaker confirms the existence of such rights even though legal theory says it is not necessary. Then the lawmaker removes the rules confirming the old rights and then legal theory confirms that they are gone.

Table 1 provides a short overview of the various acts that are relevant for rights of commons and hunting in private commons.

*Table 1: List of the various acts relevant for rights of commons and hunting in private commons.*

Year	Rule	Summary of the rules affecting the rights of commons
1687	Christian V's Norske Lov [Christian V's Norwegian Law – usually referred to as N.L.]	Provides legal regulation of the exploitation of commons, in particular Sections 3-12-1–3-12-6 and for fishing, Section 5-11-1
1857	Lov 1857-10-12 Indeholdende bestemmelser om almindingskove. [On forest commons]	Defines state common, bygd commons, and private commons
1863	Lov 1863-06-22 Om skovvæsenet. [On forest administration]	Section 42 stipulates that in 20 years at the latest private commons should be divided into private land and bygd commons
1899	Lov 1899-05-20 Nr. 2 Angaaende jagt og fangst (jaktloven). [On hunting and trapping]	The act makes hunting into a right for the landowner. It includes rules about rights for community members to hunt in state, bygd, and private commons, and rules prohibiting the severance of the right to hunt from the land for more than 10 years
1920	Lov 1920-03-12 Nr. 5 Om utnyttelse av rettigheter til beite, fiske, jakt og fangst m.v. i statens almenninger (fjelloven). [On the exploitation of rights to pasture, fishing, hunting and trapping etc. in state commons (The mountain act)]	The act provides rules about hunting and fishing in State commons, making fishing and hunting small game without use of dog into an all men's rights provided the stipulated fee is paid.
1951	LOV 1951-12-14 Nr 7 Lov om viltstell, jakt og fangst. [On wildlife care, hunting and trapping]	Section 15 continues the rule for private commons introduced in the 1899 act. Hunting rights cannot be severed from the land for more than 10 years at a time.
1957	Lov 1957-06-28 Nr 16 om friluftslivet (on out door life)	The act secures the right for every person to roam across wilderness areas and in forests without regard to ownership status as long as due care is taken not to impose unreasonable burdens on the landowner. This includes the right to enjoy the land by camping and bathing, by picking berries and nuts.
1964	Lov 1964-03-06 om laksefisket og innlandsfisket. [On fishing for salmon and in freshwater]	The act states that the default rule is that the right to fish follows the land. The act rescinds N.L. Section 5-11-1 and in the 1920 act it adds rules about access to fishing for citizens of other countries than Norway. The community of commoners of bygd commons retains minimal rights of common to fish. Private commons are not mentioned. Fishing rights cannot be severed from the land for more than 10 years at a time.
1981	LOV 1981-05-29 nr 38 Lov om viltet (viltloven). [On wildlife]	The act removes the rules about hunting rights in private commons. But it retains rules about hunting rights in bygd commons, and in co-ownerships also for those without full ownership (only use rights), and the board for wildlife management is instructed to work for increased public access to hunting.

## 5. Discussion

The link between ancient customary law and formal legislation is not easy to navigate. Rights of common have never been created by an act, but they have been regulated at least since the first written legislation in the 13th century, and more recently reaffirmed in legislation on state commons and “bygd commons”. For “private commons” the trend has been to remove as much as possible of the ancient rights. One problem we want to understand is how or why the process of removing rights of common from private commons was pursued from 1863 onwards. One feature of the process is that it was not pursued consistently.

### 5.1. Enclosure is not pursued consistently

The first round of enclosure following the 1863 act did not succeed where pasture, summer farming and fishing were more important to the commoners than timber. These rights were difficult to distribute equitably in a land consolidation process and they were of small significance to the timber merchants who had bought the land. Nothing happened. Commoners kept on, as far as possible, using their rights as of old.

In the 1897 act on election of governors in bygd commons and state commons rules about governing private commons in the 1857 act were removed. On the other hand, the 1899 act on hunting and trapping got a paragraph securing the traditional hunting rights in private commons as in the other commons.

### 5.2. Declining importance of rights of common

While Norwegian society evolved and the practice of agriculture changed, the exploitation of the commons could not change. This is a fact affecting the way of the thinking that is worth noting. It is taken for granted that the rights of common comprise only those ways of exploiting the commons that the law lists. To the farmers the economic importance of the commons declined for all ways of exploitation but less for timber and pasture than other ways. Today timber for building material is not as critical as it used to be due to the many new types of materials. Lately also pasture is losing in importance as the number of active livestock farmers decline and productions become more specialized. While the old rights of common decline in use, new ways of exploiting have consistently been judged to belong to the landowner. This was the case for waterfalls with potential for hydro-electric production. The ownership of this right was settled in 1963 when waterfalls were seen to belong to the landowner and not being part of the resources that the commoners could exploit (Høyesterett 1963). The inability to invent new ways of exploiting the commons must have contributed to their insignificance.

### 5.3. Belief in their disappearance

Most people seemed to forget about private commons. In 1909 the Director of Forestry was sure there were none left (Skogdirektøren 1909, 131). After decisions

of the Supreme court in 1930 and 1937 (Høyesterett 1930, 1937), professionals had to admit that private commons still existed. But apparently, then again they were “forgotten”. In the preparation to the law revisions enacted in 1992 they were “rediscovered”. The government paper on the revision of the acts on commons (NOU 1985, 14) notes that two Supreme Court judgements from 1930 (Meråker) and 1937 (Follafoss) confirm the existence of private commons. The preparations to the 1992 acts (Stortinget 1992a; b) stipulated that in private commons there were no farms with rights to take timber (NOU 1985, 14–15), as the Supreme Court decision of 1937 indicated, and therefore they seemingly were without much interest. The outcome was one paragraph on private commons mandating the Ministry to provide necessary rules for the governance of private commons (Stortinget 1992c). Then again one may observe how a Supreme Court case from 2000 concludes that there is a third private commons.

#### **5.4. Fishing and hunting are moving towards all men’s right**

After the 1863 decision to enclose the forest resources of private commons the rights to hunting and fishing in such areas came under pressure from another development. New legislation on fishing (1964) and hunting (1899) confirmed these to be rights of the landowner and rights of common. But the transformation of Norway from a predominantly rural society to a manufacturing welfare society, created a large and growing group of people with leisure time available. It became a policy goal for social democracy to encourage access to the countryside, including fishing and hunting as a recreational activity for the growing urban population. Formalizing the right to roam in 1957 was part of this process (Stortinget 1957 [1996]; Reusch 2012). Fishing and hunting small game without dog was part of the old commons tradition from before 1857. Now the policy was to associate these with the all men’s right to roam.

On the lands owned by the state, the policy was to make fishing and hunting of small game without dog as close to an all men’s rights as possible without creating too large pressure on the fish and game populations. This was done by requiring purchase of licence for a reasonable fee with options to limit the number of licences and the period where fishing and hunting could be performed. The state also required municipalities (and lately also counties) to follow the same practice and tried to encourage large landowners or groups of landowners to follow the same policy.

One may infer that in 1981 awarding an unrestricted right to hunt (small game without dog) to a local public within an entity that most believed to be extinct might be seen as an anomaly.

#### **5.5. The withering away of rights of common**

This investigation started out with an observation of a local uproar against a large private forest owner wanting to sell licenses to local hunters. The local uproar came some 15–20 years after the Norwegian parliament removed the section in

the act on hunting protecting the rights of the local public in private commons and 15–20 years after the county failed in creating a real servitude giving the local public the hunting rights they had enjoyed from old.

Taking note of the decision of the parliament is sufficient in a court of law. We want to understand why the parliament decided as it did and why the county was unable to recreate the hunting rights by means of servitudes. Creating a servitude like the one the county wanted was prohibited due to legislation enacted to protect the diversity of resources on the traditional Norwegian family farm. The option of asking for an exception to the rule was never explored. The question of why the parliament decided as it did is harder. We have found no obvious contemporary explanations. The long duration of the process (1857–1981) excludes a lot of explanations based on political struggles. We have to look at more long-lasting social structures to provide an explanation.

The belief that the private commons were at least insignificant may be an explanation for the government decision in 1981. But we cannot know this for sure without inspecting the minutes from the government.<sup>9</sup> Even so, the decision appears both mysterious and inconsistent. It appears as inconsistent since the same act charges the municipalities to work for extending the public's access to hunting. It appears as mysterious since the decision occurred at the level of political decisions in the government (the expert commission proposed to retain the section) and it never was commented on in parliament.

## 6. Conclusion

Returning to the perspective of Mahoney and Thelen (2010a) presented above we may say that the rules promulgated by Christian V' Law Book provides the foundation for the new layer of rules from 1857 and 1863. For the commons the new rules did not so much replace the old ones as they specified and limited their meaning. This is change mode 2, layering. The explicit form of the new rules makes them less amenable for adaptation to changes in the realities of agricultural activities. The result over time was to make the exercise of most old rights unprofitable. The rights to "mountain meadows, fisheries, fuel wood, fencing material" were less and less used. This is change mode 3, drift. After a sufficient time of non-use, in a Norwegian commons this leads to loss of rights. The concomitant rise in the value of the remainder, favouring the landowner is an example of change mode 4, conversion. But we also see change mode 1, displacement, for example, the new act on hunting and trapping from 1899.

There is one feature of Mahoney and Thelen's framework we do not find. For the period after 1899 we have not been able to identify any obvious change agent except the lawmaker. Their arguments for the decision in 1981 have left no

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<sup>9</sup> It will be interesting to see if the arguments can be other than variants of the insignificance of the private commons.

trace in public record. We need some additional explanatory factor. This is the structurally induced forgetting about private commons.

A key feature of the cultural development of the period is the development of a belief that private commons were, if not extinct, at least insignificant. Except for reminders from the Supreme Court they tend to be forgotten. But “forgotten” and “rediscovered” should not be interpreted in its literal sense. We propose here to see this phenomenon in the light of Mary Douglas (1986, 69–90)’s ideas about structural amnesia. One institutional fact making forgetting private commons easy is that they did not have their own act like state commons (the mountain act from 1920) and were after 1883 probably numerically dominated by the bygd commons. Even bygd commons did not get their own act until 1992. The occasional “rediscovery” of private commons has for example never generated interest in counting how many there were of them and which rights of common were exercised. One might suggest that they were not consciously thought about except when they generated court cases. Otherwise, if they were explicitly mentioned in some official context they were only remembered as a relic of the past without standing or status in contemporary society. This is fairly close to the conditions for structural amnesia suggested by Douglas.

We believe that a theory of the slow withering away of private commons can be understood by considering:

- *Layering*: The new layer of rules from 1857 differentiating between 3 types of commons based on ownership of the ground, and the further detailing of rights of common in the 1863 act and its provision for dismantling the private commons as defined in the 1857 act created a belief in their disappearance.
- *Conversion*: The specification of the rights of common had as corollary a rising importance of the remainder that belonged to the landowner. This made the rights of common even more insignificant.
- *Persistence of cultural ideas*: The differences between the new rules on rights of common and the ancient view of rights of common may have contributed to the rather inconsistent introduction of a rule protecting the rights of the commoners of private commons in the 1899 act on hunting.
- *Structural amnesia*: The long period of forgetting about private commons, ca 1883–1963, saw the rights of common as defined in the 1857–1863 legislation becoming less and less valuable as agricultural activity modernized, contributing to the invisibility of the commons in general and the private commons in particular. The consequences of the invisibility materialize in legislation during the period 1964–1981. In 1964 the lawmakers did not introduce a section on private commons in the act on fresh water fisheries while rights to fish in bygd commons got a section. Then in 1981 the section on private commons was removed from the act on hunting.



The key theoretical element is the way the new layer of commons institutions structures interests and makes forgetting easy. The sequence of facts found fits a hypothesis of the importance of institutions in structuring the memory of people, including the lawmakers. The withering away becomes a high probability outcome.

There is no doubt that by the 1970s the private commons increasingly were seen as an anomaly. And we may see this as an explanation of their disappearance from the law books. But why were they defined in the first place? The categorization of commons in the 1857 act seems rather arbitrary. We can read the act but are left with the mystery of the reasoning behind the definition of commons introduced in 1857 and continued in 1863 with legislation designed to make private commons extinct. Why should one create different rules for commons based on the fraction of landowners among commoners with rights to timber? We have no answer here. Unlike the case of disappearing rules investigated here we expect to find clear change agents preparing the legislation from 1857 to 1863. The legal rules introduced then had consequences not all of which may have been intended.

The withering away of commons institutions may be “Enclosure Norwegian Style”. But the consequences of institutional structuring of memory have explanatory utility also in other arenas.

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