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Against the wind -
On Reintroducing Commons Law in Modern Society[1]

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This paper examines the conditions for common property institutional designs in modern societies. Since the age of Enlightenment, modernisation has taken the form of a parallel growth of the significance of the state and the significance of the individual, at the expense of the intermediary or secondary groups or collectives of various kinds. With a modern notion of overburdening and high transaction costs of the mature state and a disrupting alienation of the individual, the search for institutional solutions that are "neither market, nor state", has intensified both in academia and bureaucracies. However, such efforts often clash with many of the values of modern western society as they has developed during the last 200 years. The paper analyses a case from Northern Norway where the political struggle over the reintroduction of Commons Law for Mountain areas revealed some of these contradictions - especially in relation to the ideas underlying the 20th century "welfare state". The case also shows why many suboptimal solutions in modern resource management are favoured because of the value attached to individual freedom and equal treatment by the state - even when these contradict the sustainable governing of a resource. While institutional designs based on smaller collectives are perceived as less attractive because they involve less individual freedom, more duties and more inequality. The lessons from this is then used for a discussion of the role of common property institutions in the process of modernisation.

Enlightenment and sustainahility

Commons are basically collective rights, or more precisely "property rights held in common by a social group". Traditionally commons have always been closely connected with ground - or fixed property. Only recently has "New Commons" been invented that are disconnected from the ground and where the common property is movable assets or some abstract construction like trust, budget balance or a sustainable future. But as collective rights both traditional and "new", commons are contrary to all the dominant trends in what we know as modern society. This is because the essence of the long and profound social

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processes of modernisation, industrialisation, rationalisation and "westernisation" has been the simultaneous strengthening of the role and rights of the individuals and the role and rights of the state. This increased role of both the individuals and the state has almost exclusively been at the expense of the role and rights of intermediary collectives. It was primarily the nation states that spearheaded the massive "enclosure" process in Europe, which "solved" the agrarian problem and broke the back of the rural collective institutions. As an advantage to both individual freedom and to social evolution, this transition was hailed by early sociologists (Durkheim 1893).

But in reality the assault on collective rights started much earlier, with René Descartes and his belief in a practical science that should make man the masters of nature. In his "metaphysics of modernity" he shows a promised land where a series of inventions shall produce for mankind, effortless, the full enjoyment of all the fruits of the planet and the good health. (Descartes 1637). This Cartesian start of the "modern project" was jolted by the Enlightenment that produced the moral philosophy necessary for the dominance of individual freedom over collective responsibility - demonstrated effectively by the enormous growth in individual movable property during the next 300 years. The "modern project" was carried a long step forward by Saint-Simon and his disciples, consciously transforming the natural human aggression and ruling instincts into a drive towards "development" and industrial growth (Rich 1994). Thus the social sciences of August Compte, Emile Durkheim and Max Weber, with their search for efficient, rational organisations and healthy societies were born as children of the modern project and have both in their constructive and in their critical capacity aided modernisation as we know it.

Despite early warnings of the aggregate effects of the incentive systems built into the "modern project" (Weber 1922), the massive accumulation of individual and state wealth accelerated during the project period. Weber even warned that the mastery of nature and the advanced rationalisation of human organisations connected to the industrial growth represented a threat towards the basic idea of the Enlightenment - the very freedom of the individual. The fundamental property rights that has shaped the design of the basic social institutions of the modern age, is also an incentive system that goes on producing future institutional arrangements (North 1990). Such property rights have in the "modern project" generally been transferred from "no-ones" property *(res nullius)* or from "common property" *(rescommunes)* to the property of the newly constructed nation states, and to some extent also from "common property" *(res communes)* to individual property.
From the property of the state - called public property *(res publica)* there has been a gradual transfer of property to individuals or corporations - this is what in

more simplistic terms has been termed "privatisation". Transfer has through history been in the form of sales in order to secure loyal subjects to the crown or in the form of issue of government concessions or quotas in order to rationalise an increasingly cumbersome government resource management system.
It is important to remember that this element in the "modernisation project" is quite old and that it was to a large extent ideologically motivated: The goal of "progress and human well-being" was linked to individual freedom also in the possession of things. Other ways of owning than the full individual ownership *(dominium)* was seen as obstacles to development and had to be eradicated. (Grossi 1981). The state was seen as the most efficient instrument to facilitate this kind of transfer from common property to individual property, consequently a number of such transfers went via the state as an intermediate possessor. This also had some familiarity with the legal inheritance from the European middle ages, where the "big compromise of the commons" granted the king the right to settle new settlers in the commons, while the "commoners" maintained their right to "harvest from the commons according to their needs."

One example from the High North can illustrate how the ideological elements related to the way of owning was more explicit in the early period of the "modern project" than it is today: Major Peter Schnitler was around 1750 examining the uncertain national border between Norway/Denmark, Sweden and Finland in the Samii area of Finnmark. In his rapport to the Danish King he makes the following note:

> "These Sea-Sami hamlets are undivided and have no particular name, and from this the effect must be that what is common to many, is neglected by each in particular.....This *Communio Bonorum*, therefore, which is harmful to the State, is in all other places abolished long ago, and the difference between Yours and Mine is introduced. Because property stimulates the urge to Work, Work makes one rich and Richness induces Thrift and Close-fistedness with ones' accumulated assets."

And he recommended to the King to start the issue of individual leases to Sea-Samii for their places, with prospects of purchasing these as "allodial property" once the leaseholder had become "sufficiently wealthy" (Sandvik 1993).

This blunt exposition of the ideological basis for changing the fundamental property rights in large parts of Europe is interesting because it is expressed so clearly so early by a trusted and influential civil servant. Only 150 years later is the process of "enclosing the commons" completed and Max Weber writes his penetrating analysis of the "Protestant Ethic and the Spirit of Capitalism" (Weber 1904). Here he questions some of the aggregate effects of the incentive systems

established by the "modern project" and expresses a deep pessimism towards this as a sustainable social form.

In the age of High Modernity, there is a revived pessimism towards the consequences of the modern project and a fundamental doubt also towards the incentive systems inherent in the project (Giddens 1990). This is intimately linked with a growing awareness of the human risks and the environmental problems produced by industrial growth and the deterioration of biological and cultural diversity produced by the "global enclosure". (Daly & Cobb 1989, World Commission on Culture and Development 1995). Even without a full biospheric vision, or a deep ecology philosphy, there is sufficient agreement on the flaws in the modern project to spur a number of attempts to redirect the path of further modernisation. Most of these attempts, both in the philosophical and in the political sphere, are summarised in the "sustainability discourse": This discourse agrees that "the social and economic changes must be within certain limits - so that the process of development does not undermine itself, but disagrees on how this aim should be reached (Lafferty & Langhelle 1995). The fundamental new element in this discourse is, however, the growing awareness of the need to govern the development process itself - or to "steer" the modernisation in a certain direction.

Linked to the "sustainability discourse" is also a debate on the correct way to govern the basic prerequisite for development - the natural and the humanly enhanced resources. Which kind of governance give the most sustainable, efficient, just and legitimate use of the planet's resources, and how does changes in governance influence on the basic incentive system in the modern project itself ? If public hierarchies cannot secure sustainability and efficiency, and if markets cannot secure sustainability and legitimacy, is there a third way to govern human relations to biophysical resources?. The governance of Common-Pool Resources - or the "Commons" as an appropriate institution for collective action - has been advocated as a solution to many of the problems that rids both state and market solutions (Ostrom 1994).

But "Commons" were institutions that belonged to the pre-modern world, where the basic idea was not "enclosure", but the true "Genossenschaft" where people were bonded to each other in "co-proprietorship". While optimal for legitimate collective decisions related to sustainable harvest and maintenance of the resource, this "bonding" of the individual has by later centuries been interpreted as an unjustified limitation of the individual freedom. To "cash in one's part of the commons" and be free to move was an essential part of the great modernisation project. The consequential dramatic increase in movable individual property was thus the essence of this long epoch.

The Legacy of Historical Injustice

Students of modernisation are repeatedly surprised by the strength of the forces of history. From their dormant existence in the "depth of the populace" they are sometimes awakened and brought into the modern political discourse. Especially when the historical legacy is connected to injustice done towards a community or a specific group of citizens, such awakened forces can assume considerable strength and even erupt into violence. Often it is issues connected to "rights" of different kinds and origins that awake the hottest sentiments. It will therefore be useful to explain briefly the complicated history of "northern commons" in Scandinavia in order to better understand the background for the attempts to reintroduce Commons Law in this highly modern society.

The developments of the Scandinavian North, and the role of the state in the course of events might be so unique that there is little scope for comparison with other areas. The institutional developments might be "path dependent" in such a way that the present institutions carry with them the unique history of intended institutional choices, mistaken or unintentional choices as well as random events (North 1990). Like learning cannot easily be dislearned, once new institutional ways have been adopted, the societal niche is occupied and there is no going back to the old ways - even if the new institutions prove to be poor ones. This poses some major questions:
Is the uniqueness so exceptional that it precludes useful comparisons and is the irreversibility of institutional development so hard that it also preclude us from using the "lessons of the past" for any worthwhile future purpose?
Or are the processes of modernisation and rationalisation sufficiently similar around the globe to permit useful comparisons. And if so, will some of the unique elements of the north help in revealing the true nature of the modernisation processes.

The position taken in this paper is that it is particularly useful to take a closer look at the footprints that history has left on the present institutions governing forests, berries and pastures in the Scandinavian North because:

- The contribution to the institutional web from trials and errors of the resource users of a territory can be compared to self-evolved local resource governing institutions in similar environments in other territories. Such comparisons of property rights regimes that analyse the individual and group incentives in the different systems and their success in relation to long term sustainable governing of resources, is the core-programme of the CPR-literature.

- The contribution to the institutional web from the acts through history of Kings and States and Lawmakers can enable us to compare the efficiency of different property rights regimes relative to long term sustained economic growth of nations or provinces. In addition to this, the religious or conceptual ideas underlying political or legal acts can be brought in to aid analysis aimed at reaching conclusions about the policy implications of particular histories for new states at the outset of "new" paths. This is the core-programme of the institutional approach to the problem of change in history.

Therefore the historical legacy is useful in different respects and should not be omitted. However, it is necessary constantly to keep in mind in what kind of analytical framework the various imprints are utilised. It is the state that specifies and enforces the property rights in its jurisdiction. Thus a history of the tendency for the state to produce inefficient property rights and a consequent failure to achieve sustained economic growth, is an analysis of change in history that utilises one or more models of the state (North 1981). While a history of the workings of a certain incompatible system of individual and group incentives that make up a property rights regime that produces non-sustainable governing of resources, is an analysis of institutional change. Although linked in many ways, there is a need to specify when one move between these kind of analysis.

One important characteristic footprint on The Scandinavian North is that there from ancient times been equitable jurisprudence at the provincial level. In 1275 King Magnus Lawmender *(Lagaboeter*) put together his "Country Law", inspired by the Jutland Law of King Valdemar II from 1241 (Berman 1983). The first Country Law of Norway was influenced by canon law, but draws heavily on the written law from the three provincial assemblies/courts *(ding)* of Norway: The Law of Eidsivating, The Law of Gulating and The Law of Frostating. These three bodies of law were mainly a codification in the 11th and 12th century of the existing Customary law in the different parts of the country. This Customary law therefore consisted of rules that through trial and error had gradually developed since the ages of the great migrations and through the Viking age and had been transferred orally from one generation to the next. The oldest judicial instruments in Norwegian Law are the allodium rights *(odelsrett)* and the commons rights *(allmenningsrett),* these had a prominent place in the regional laws (Ot.prp.nr.37 1991-92). Especially the Law of Frostating, which covered the middle and Northern part of Norway, had detailed rules concerning commons rights. Rules tended to be different from one province to the next, reflecting the differences in topography, climate and culture. The provincial assemblies/courts, which dates back to pre-Christianity, were initially "self-governing" and independent of the king and the church, and could make changes to their laws as they deemed

appropriate in order to accommodate new developments of demographic, technological or cultural character.

The legal unification of the country in 1275 was hailed as a great step forward for the emerging nation. However, it meant that at the provincial level the capacity and competence to resolve conflicts by making and changing rules gradually disappeared. The provincial assemblies/courts gradually became more pure judicial courts and are today the secondary courts *(lagrett)* in a 3-tier national court system. This was of fundamental importance for the distant north, as it was in the absence of equitable independent jurisprudence at the provincial level that the King under Supreme Rule could usurp property rights - in many cases as " a solution" to conflicts over rights between various groups of Northerners. It also meant the use of more standardised designs for local regulations for property rights and resource use, and in cases where these were believed not to be applicable to northern ecology, no institutions at all.

The fundamental principles of the rules concerning commons rights are particularly interesting for the discussion in this paper. The ancient Customary Law rules regulating the commons were copied from the laws of the regional assembles/courts and became an important part of the first Common Law, the "Country Law" of 1274. Already here the rights of the Kings to hold "divided property rights" in the Commons were written into the Law. This law was in 1604 translated into Danish and called "Christian IV's Norwegian Law". In 1687 this was replaced by the "Norwegian Law of King Christian the V". It is difficult to decide whether the changes from the 1604 law to the 1687 law regarding commons involved substantial changes or were merely a modernisation of language. At that stage it is possible that rules were introduced which constrained the use of common forests to the "needs of the members of the community for firewood, construction materials and farm use", but it is unclear whether this was not also the intent and the consequence of the older laws. One important change took place around 1687 - after introduction of Supreme Rule. From now on, the basic governing institution for the Commons, the Commoners Assembly *(Bygdeting)* gradually lost all their powers to state officials and were reduced to mere listening audiences.

However, in terms of legal categories, a recent court ruling (1991) concludes that the basic nature of Commons have been mainly unchanged from the old Customary Laws until the 1687 law (Utmarkskommisjonen 1990). The rules for the commons in the "Norwegian Law" survived in its original wording until January 1 1993 and did thus represent a more than 1000 year unbroken tradition of oral and codified Customary and Common Law. Although the relevant rules mainly specified rights and duties towards the commons, and gave no rules for

governing institutions, it will be useful for the analysis below to present the wording of the relevant regulations:

King Christian V Norwegian Law; Book III,
Chapter 12 On Miscellaneous that to Rural Commoners pertain.

1.§
Thus shall Commons be, as has it been from ancient Time, both the upper and the outer. Falls there brawl over Commons, and the one side holds it is Commons, but the other side it is someone's own, then must the one who says to own, forbid the others and pursue the case in Court.

3.§
Every one shall enjoy *Scetter* (summer alpine pasture) in the Commons that belong[2] to his village. Summer pasture shall be in the mountains as it has been from ancient Time. Signs for *Scetter* must no man move, unless to move to a place where no man is harmed. To *Scetter* shall be held the proper conduct, as has been from ancient Times and there shall meet horn against horn, and hoof against hoof. Every one can make herding houses in the Commons, who will sit there during the summer.

4.§
The King's Bailiff shall not give any man a Place to clear in the Commons, unless it by rightful inspection is found that this in time can be cleared to a taxable farm *(skattebol)*. If thus built and given to someone as his leasehold, he shall then make fence around it within Year and Day and not move it, and have his mark on all sides of the Farm, to be permitted.

5.§
If someone sow Grain or cuts Hey in the Commons without the permission of the King's Bailiff, then the King owns both Grain and Hey.

6.§
Commons Forest can everyone use, who lives there, to whom it belong[3] from Ancient Times, as far as it is for the need of everyone for Firewood, for necessary Building Timber and for Farm's Use. Who cuts more forest in Commons and burns fires without Permission for Clearing, as it is said, is to be charged the same as the one who cuts in another man's Forest.

There are four important features in this early law:
One is the protection of the Commons in the first §, whereby those who claim private property rights have the burden of proof. This was believed to apply to commoners, clergy, lords and kings alike.

[2]Literally the Norwegian text translate into "Commons that lay to his village" *(Bojgdelav)*. In Norwegian this is a stronger expression than the geographic expression "is adjacent to". I have therefore translated this into "belong to" which implicates property rights that are weaker than the expression "owned by".
[3]ibid.

Another is the access to the commons for everyone that belonged to a certain valley, fjord or coastal plains. The right to summer alpine pasture and the right to harvest forest products - including berries, fish and game - was not restricted to owners of farmsteads, but applied to every member of the "community".
A third is the rules for sustainable governing of the commons. Although the Kings were eager to increase the number of tenants, encroachment on the commons was restricted in the law - thus the Commoners had protection against the very King they shared the Commons with. The "Rightful Inspection" placed the responsibility for the economic viability of a new farmstead - which now also would include the income from the reduced Commons - on the King. Through the inspection process, however, the commoners could voice their objections to reductions in the "carrying capacity" of the commons.
A important final point here is that this law applied to the whole country, it is no mention of an exemption for the northern provinces to the rules of the Norwegian Law.

These basic rules were in force until 1993. They were in 1857 and 1863 supplemented by regulations regarding the administration of Forests Commons , where the institution of a Commons Governing Board were introduced. But here we find the first deviation from the principles of the Norwegian Law. Now the rights to harvest timber from Forest Commons applies not to everyone, but only to the owners of farmsteads in the community, the rest of the community is now excluded from the group exercising these "user rights."
Gradually also the other features of the "Norwegian Law" were eroded by piecemeal legislation. A new Law of Hunting and Gathering (1899) and the modernised Laws of the Commons (Fjelloven i.e. "The Mountain Law") of 1920 and 1975 deviates from another of the principles in The Norwegian Law, by opening the Commons for all nationals - regardless of community membership - to harvest "insignificant resources" like berries, lake fish and small game. In some respect this was the logical consequence of the earlier splitting up of the commons by restricting the use of needed timber products to only the owners of farmsteads in the community. But this also meant that the concept of "every-one" was now interpreted far beyond the intention of the "Norwegian Law" and became the foundation for the legal construction of a new kind of "right" - Everyones' Rights" *(Allemannsrettighet).* This was akin to an old «right of way» - for everyone to travel across someone's property *(tjod)* and the right that landless had to hunt for food in forests and mountains. But in the last 90 years this new concept of "Everyone's Rights" has been written into various laws that grant all nationals some of the rights that only "everyone" in the village used to have. Examples of this is the right to hike and to undertake innocent harvest of lake fish and small game. Thus the concept has in the public debate frequently been confused with Common Property Rights *{Almenningsrettighet -from "al-*

gemeine" where gemein (germ.) = communis (lat.)), which always is limited to the group to which the property is common. The similarity in spelling and pronunciation of the two concepts also contributed to this confusion. The modern social-democratic state has promoted the concept as a democratic right with seemingly long traditions and with the State as the only viable and legitimate protector. But in most respects the concept of "Everyone's[1] Rights" is a misnomer to the history of law, as a mixture between "no-ones' rights" *(res nullus)* and the various concepts of freedom in Natural Law. (See also Rynning 1928 and 0rebech 1991). It can further be shown that the right to harvest from natural resources for everyone in a nation or in a confederation of nations does not have long traditions in western legal history. Such rights have always been tied to membership in communities where the members to some extent have been obliged to fulfil certain con-elated duties and where they had a chance to control each others activities. However, in jurisprudence related to the North, the concept of "everyone's' rights" has during the modernisation process gained ground at the expense of the traditional legal instruments from Customary Law: allodium and commons rights.

For the Social Scientist, however, it is quite explainable that as part of the overall modernisation process, collective and excludable goods like fishing and hunting rights are made into public goods (Hechter 1987). It is also explainable that it is the new and emerging state that is the principal agent for such a transition, as this strengthens the state at the expense of the collectives or secondary groups that competes with the state in producing identification for its individual members. Today there is only left a symbolic difference in price for members of the local community and for other nationals with regard to hunting and fishing licenses.

If there has been any hidden agenda on part of the state and the national legislators from the 17th century and up to present day, this must be the persistent efforts to weaken the Customary Law principle of collective rights in commons as a foundation for governing natural resources and to gradually replace this with two allegedly more "rational" forms of property rights: private property and state property. This must be seen both as an ideological influence from new philosophical currents in Scotland and on the European Continent, and as a consequence of a conscious strategy to establish a colonial and later, a national rule in the North.. Because other states were also interested in the riches of the North, the capacity for self government in the north had to be curtailed. While ensuring jurisdiction over the northern territories was a crucial element of Norwegian foreign policy during the Middle Ages, it could not be an end to itself. (Bj0rgo,Rian & Kaartvedt 1995). The long term prize was the potential for the emerging state (union) economy to transform these northern riches into a trade surplus with other States. During the long period of mercantilism (1550 - 1790)

the main motivation was to transform this trade surplus into a surplus of gold and silver for the Treasury. The Hanseatic league was not allowed to establish any cities in the North, with all the trade privileges to the north granted to the single Hanseatic city of Bergen, their activities could more easily be monitored by the King. And the spontaneous and lucrative Pomor trade with the Russians of the White Sea was curtailed until the liberalisation of 1789. After that it expanded - and gave both the Russian White Sea area and Northern Norway a significant economic strength. - until the trade was eliminated by the Russian Revolution in 1917 (Niemi 1992).

The reason why the legal regulations regarding Commons in the old Norwegian Law survived for so long, were not merely the heavy symbolic values attached to local commons and the political strength of the farmers in the Central Valleys in the South. Also in the North, the ideas of commons rights to forests was deep-rooted and hard to extinguish. The Governor of Nordland writes the following in a memoranda from 1850:

> "The right of the State to these Forest Commons is furthermore not completely undisputed. In any case do the Commoners *(Almuen)* in such districts where we have Forests Commons, hold that the State in ancient Times did not make any Dispositions over these - as anyone who lived there was then free to use these forests as he pleased. And this preposition is argued with a Confidence, Determination and Ease, that does not leave much Doubt about its correspondence with the Truth.
> Certainly the State has for a period long enough to yield prescriptive rights, managed the forests by allowing logging only after application and against a fee to the state. But regarding this Fee, there is the Peculiarity that the size of the fee is decided by the Commoners themselves, at the Common Assembly *(Thing).* Because of this, one could be tempted to believe, that the Government from the beginning has assumed Authority over the Forests, not because they were believed to be State property, but to prevent Destruction by free Logging and that the Fees should only be for the payment of the established Monitoring Arrangement. If this is the case, and I am inclined to believe that it is, the Forests Commons - notwithstanding those forests that belong to individual Farms - should again be transferred to the municipalities - who now have got their local governments" (Arveschoug 1850).

The Governor further in his memoranda pointed to the fact that the state management of the Forest Commons was the reason for their bad state. Because the State would not finance a satisfactory monitoring system, "strangers" could use the Forest Commons almost without constraints, while the local commoners

had no right to sanction these strangers. The resulting destruction of the Forest Commons implied that "they were not significantly useful to the Commoners" (NOU 1980:41). What the Governor here describes is a classical case of the state induced "Tragedy of the Commons", and his proposed solution to the tragedy was to transfer the responsibility for governing the resource to local government. In modern language, the Governor proposed an introduction of a more efficient property rights system in order to improve both the productivity of the forests and reduce the monitoring costs. In a way he was trying to implement the subsidiarity principle 140 years before the Mastricht Accord of the EU.
However, the Governor's plea for his Province was not successful, instead the sad state of the Forest Commons, and their low usefulness to the local community, was used as an argument for a strengthening of state ownership rights and increased state monitoring.

Local self-government in the form of municipal elected councils have since their creation in 1837 repeatedly claimed management rights over local natural resources in the North. Although such claims were often endorsed by the governors of the northern provinces, they were persistently resisted by the state - often with reference to the disputed rights to the areas and the difficulties involved in delimiting the circle of rightful users. Most often, the real reason was internal opposition within the Government Administration, notably in the Forest Administration, to any ceding of state property rights to local level organisations. In this respect an old-fashioned and slowly dying law of the commons was more useful to the state than a political battle over abolishment of the ancient rights of communities or the transfer of such rights to "modern" local governments run along the lines of party politics. It is worth noting that this corresponds with developments in most western democracies, where law, through active legislation or through intentional negligence, increasingly becomes an instrument of the state, and where Customary Law regulations that protect the intermediary institutions of which the individual is also a member, is gradually becoming eroded by the state (Berman 1983).

On the material side, the changes in ownership structure proceeded faster than the development of new jurisprudence rooted in the old Customary Law. After the Protestant Reformation, a large portion of the properties of the Catholic Church were confiscated by the "Crown" in 1537, in the northern provinces this amounted to large tracts of farmland, forests and mountain pastures. The new State Church never exercised the kind of checks and balances on the Crown as the independent papal church did. Consequently we find an increasingly more active state in the north throughout the 17th, 18th and 19th century - persistently attempting to secure territorial jurisdiction and through various paths acquiring state property rights to northern forests, berries and pastures. As we shall see,

some of the ways state property rights became entrenched, was through indirect ways of selling and repurchase of Commons. This were government actions that it is hard to believe were preconceived for a span of more than 150 years. Still, they are the facts that northerners are faced with today.

Thus it was the other path of constitutive development, the legal path consisting of court cases and High Court rulings that had to carry the burden of the lack of innovative adjustment to the Customary Law heritage. Often the State has taken the disagreements with local communities to the courts, but in many cases the disputes have lasted for as long as 150 years. This has through history created a massive legal legacy of lower court decisions, special legal commissions rulings and High Court rulings. Taken together they reflect both the great variety in cultural, topographical and climatic conditions, and the changing ideologies through the centuries regarding "efficient property rights". In most respects today's "Law of the Commons" is decided by the accumulated court cases and their interpretation by lawyers and administrators. Existing law in this field is thus produced by the legal path, by purchases, confiscation, disagreements and accommodations. One important result of this is a development from a medieval epoch of fairly uniform rules for Commons throughout the whole country to a modern situation of pragmatic and piecemeal jurisprudence.

It is important here to understand that since the state combined a number of different roles, it could exercise a powerful influence on the design of property rights through the centuries. It was the state that granted permission to clear new farms in the "King's Commons". The state officials measured the farmsteads, placed the border stones and wrote the title deeds for the semi-literate peasants. Later the State also provided technical assistance and agricultural credit for fanners as well as infrastructure for the larger community. This placed the state officials in a number of negotiation encounters with individual peasants and local communities. One should think that this would enable the state to apply uniform substantive rationality and over time achieve an efficient property rights structure that would generate long term economic growth. But the outcomes of these encounters and court cases did through the centuries produce variety rather than uniformity. In some areas individual farmers were given generous individual rights to forests and mountain pastures. In other areas the state took over the Commons of the villages [or districts] and forced the peasants to enter into contracts for use of pasture and logging. Thus, this powerful position of the state did not result in a homogenous property rights structure for the country, nor in an efficient property rights structure in the north. It is, however, important to note that this kind of court- and case-generated diversity is different from a "sociodiversity" that has evolved from the bottom up, as a result of people of various cultures crafting their own institutions to cope with a varied and

challenging environment. Today's users of northern forests, berries and pastures are therefore not a strong web of plural corporate groups, but rather a diversified collection of individuals at the mercy of an inconsistent state.
In connection to this it is interesting to note the declining role of the Commoners' Assembly *(Bygdething)* in the communities or at district level, though they still existed as "survivals" until after "modern local government" was introduced in 1837. This ancient institution for self-government was probably crucial in the running of the outer fields as commons, and was able to make temporary changes and accommodations depending on climatic and demographic conditions. However, the exact process involved in the withering away of the *Thing,* still remains to be analysed.

One of the most important footprints of history is the result of the special ownership history of the North. Here the case of Finnmark is special, as this part of "unregistered state lands" has been used by the nomadic Samii from times immemorial and was not part of the emerging Norwegian State during the Saga and Early Medieval times. It was not part of the Frostating jurisdiction, thus the Common Law that evolved here cannot be assumed to reflect the ways and cultures of the Sami. In the treaty of Novgorod from 1336 this was land still to be colonised, but where Russia and Norway agreed on who could collect tax in which areas (Orebech 1991). A special Legal Commission on Sami Aboriginal Rights to land and water *(Samerettsutvalget)* is expected to reach its conclusion in 1996, thus these questions will not be dealt with here. However, the reader should keep in mind that there is a close conceptual connection between the commons rights questions discussed below and the rights of indigenous peoples. In addition, most of the north is an area of mixed settlement, thus both encounters and resolutions between Sami and Norwegian, Swedish, Russian and Finnish is an important part of the historical legacy.

Today the Law of Commons *(Fjelloven* - modernised in 1920 and in 1975) does not apply in Northern Norway - apparently because there were no Commons in the North when it was enacted. Still there is no doubt that the rules of Commons in the Norwegian Law of 1687 also applied to Northern Norway.
The historical question is then: How did it happen that a part of a country is exempted from a national law ?
The political science question is more complicated : How is it possible that even after the High Court in 1991 ruled that there are Commons *(Statsalmenning)* in the North, the Law of Commons is still not enacted here and the State sees no need to do this "because there are no Commons rights *(Almenningsretter)* for the local communities in these commons" - those that that might have been there are now certainly "lost".

First it is necessary to take a closer look at some of the long historical lines - or the "path dependent developments."
In 872 AD the first King of Norway, King Harald I *("Hårfagre")* took "as his property all the lands, waters and seas" of the newly assembled kingdom. This has later been interpreted as King Harald's robbery of the allodial rights of the free farmers. In the light of later developments, it could rather be perceived as the initial robbery of the Commons rights of tenant farmers, peasants and Sami. However, the property rights of that which is not someone's own *(eignir mans)* but commons *(almenningr),* kept changing during the first 400 years of the kingdom, where some kings relaxed the property pretensions while other kings tightened the control over the commons in order to extract more tax or combat political opponents. Contrary to Tarangers conclusion in 1892, it is possible to interpret the various royal acts *(réttarbót)* as political adjustments of the distribution of property rights according to the demands of national security and national economy (Taranger 1892). The two basic legal categories of "someone's own" and "commons", especially the "outer and the upper commons" *(hin ofra* and *hin ytra)* remained unchanged up to present times. Although the interesting concepts of "divided property" relations from Magnus Lawmenders Law can be interpreted as nested commons institutions, most facts from the Saga-period and the Medieval Age point towards an interpretation of this kind of kings' property rights as national jurisdiction and a right to extract contributions *(leidang),* fees and from around 1300 AD also taxes (NOU 1994:21). This kind of owning for the purpose of taxation is different from the kind of all-inclusive Crown Property *(dominium)* that we find after the reformation and the introduction of Supreme Rule. A crucial point in the modern debate is whether possessions, by whatever unjust methods they have been acquired, after a span of time becomes property by prescription. And an equal crucial point is whether there is a fundamental difference between individuals and states regarding such property rights. This is a crucial point in the works of Proudhon, who raises serious doubts about the Right to Property as a Natural Right (Proudhon 1966). More specifically he questions the principle of prescriptive property rights in the legal doctrines and sees this as the same as to bestow a privilege upon someone. The fundamental question would then be whether a State can grant itself the privilege of prescribed property rights? And whether such privileges can be sustained when the alleged long and cemented practice is perceived as unjust by a majority of community members?

In 1666 the Danish/Norwegian King sold "Crown Land" in the North to private merchants in order to raise money for prolonged wars in Europe. These lands were bought back by the King in 1682. It has been argued that the Commons were part of this sale/rebuy and that they through this operation changed character from jurisdictional state lands to "purchased state lands". On purchased state lands the state should have the same set of property rights as a private

owner, i.e. a sovereign right to manage, exclude others and alienate the lands. In spite of the underlying principles of Customary Law and the Norwegian Law that Commons cannot be alienated, the dominating theory in the central ministries in the later part of the 19th century and at the beginning of the 20th century was that this rebought land had now changed character and had become "purchased state lands" where no commons rights could apply. This theory was not refuted until archive studies in 1969 revealed that the King in the north had no stronger property rights over undeveloped lands than in the rest of the country (Robberstad 1969). These concluded that the Commons were not included in the sale of the Crown Land in 1666, and that even if it had been, the 16 year alienation-period would in any case have been too short to produce any legal consequences. A Legal Commission therefore in 1990 ruled that what was Commons in 1666 had legally remained Commons up to present time, but it also ruled that since the state had effectively prevented the communities from exercising their commons rights for a period of 150-200 years, these rights must be regarded as lost (Utmarkskommisjonen 1990). This ruling was confirmed by a High Court ruling in 1991 (RT 1991[4]).

In two of the districts *(fogderi)* of the North, however, the King deliberately sold the King's Commons for immediate cash requirements, thereby violating the intent of the Norwegian Law. In 1750 the Rana and Vefsn Commons - including the high mountains, were sold to the Merchant Petter Dass - a nephew of the famous priest and poet Petter Dass. The main income to Mr. Dass was the pasture fees (bo*ygsel)* of the Sami pastoralists , who were promised "continued use of the places or stretches where no clearings can take place and no Sedentary can take up farming". But his prime motivation was to increase clearing of new farms in the commons and thereby increase the cultivation and the economic growth in the district. Through a greater promotional activity than the King had exercised and various kinds of support and credits, he intended to be a beneficiary landlord *(jorddrott)* to the new settlers. His activities, and the activities of subsequent proprietors of these commons, did result in increased farming activity - at the expense of "favourable places" for the Sami (Sandberg 1965). The proprietor families sold all their lands to the state in the 1890s, who then sold the farms to the individual farmers, while keeping the mountain areas and the water falls as "purchased state lands" without commons rights to farmers or local communities. Due to the length of the time these areas were on private hands, the sovereign ownership right of the state to the Commons in these two areas has not been challenged in court. Thus it still remains unclear whether these areas should be considered "purchased state land" or King's Commons where no Commons Rights apply.(See also NOU 1975:17 and NOU 1977:29).

[4]Rettstidende 21/1991: 1311-1334

In 1761 the Commons of Troms district were sold to Merchant Hviid, mainly because of the unclear status of the commons in the 1666 sale. Here there was no special provision for Sami pastoralism, mainly because the tax income here *(lappeskatt)* was a head tax and not a pasture fee - thus there was to the proprietor no competing use of the area and not in his interest to have this kind of limitations entered into the contract. However, the respect for the commons rights of the existing commoners was entered as a provision, but was of small relevance when large scale clearings in the large pine forests of Troms started under the private proprietor of the Commons. When the cleared farms were sold from the proprietor families directly to the farmers or to "The Association for Abolishment of Serfdom in Skjervoy" towards the end of the 19th century, the commons rights were believed to have followed this sale, except for some limited forest areas which were resold by the Association to the State (Utmarkskommisjonen 1991). This was since 1899 contested by the state, who for a long time has claimed that the state holds original and sovereign ownership rights to all mountain areas in Northern Norway *(Statens Hogfjell),* and that these are not to be considered as King's Commons with all the rights that this can imply to local people and all the restrictions this places on the state as proprietor. This view has had a final defeat in several High Court rulings, which concludes that there are only two kinds of state ownership, King[1] Commons where the Laws of Commons apply and "purchased state land" where the state is the sovereign owner (RT 1986 and RT 1991[5]).

Thus the footprints of a lengthy history is still with us, even those that were set by steps that have later proven to be wrong. Professor Absalon Taranger concluded in a 1892 dissertation to Nordland Province *(Amt)* that there had been done injustice to the Northerners by the state usurping the property rights of their commons. But, he continues, after 100 years there is not much that can be done about it (Taranger 1892 p.34). There was no "going back to the commons"

The moral question is the obvious one: whether injustice decreases in importance when it continues over a very long period. In the later part of the 19th century this might have seemed like correct and modern legal theory, while in the later part of the 20th century the development of international law and aboriginal law have made such propositions highly questionable.

The analytical questions are, however, more profound: What consequences did the public awareness of this injustice to Northerners - Norwegians and Sami alike - have in the years after 1900? Ironically, the real entrenchment of sovereign

[5]Retstidende 1986 :1122-1138: Stormheim and Retstidende 1991:1321-1334: Skjerstad

state ownership in the north took place mainly after the analysis of Taranger - after the "rebirth" of the independent and modern Norwegian nation state. In 1918, the High Court made a "final ruling in theory as well as in practice that decides that all forests in Nordland, which is not owned by an individual, and which in other places would be commons, is here to be regarded as state property." The High Court acknowledged that this is the result of a particular path of development that is in violation of Norwegian Law ;Third book; Twelfth chapter, but concludes - in drawing upon Prof. Tarangers pessimistic conclusion - "that this path has led to a judicial state of affairs that no longer can be changed, and that has entered into the consciousness of the public as a decisive fact"(RT 1918[6]).

Voices from Valleys and Towns

While kings, national assemblies and supreme courts have struggled with changing property rights doctrines through the ages, the local communities of the north have carried on their struggles against greedy pontiffs, harsh bailiffs, colonial extraction, forestry officials and state companies.
From the time of «modern» local government in 1837, the issue of local control and municipal property rights over the «state ground» in the north has been raised. We have seen how even the king's representative - the governor in Nordland argued for the transfer of the governing of these resources to the local level around 1850. From 1885 to 1895 the Province had its own «Commons Committees headed by the legendary priest Ole-Tobias Olsen. This committee tried through all possible political and legal means to reinstate the Commons of the Province as they were before 1750 and on par with the situation in the rest of the country. But after 10 year of struggle they lost in parliament against the advocates of continued state ownership to the vast resources of the North. With the break-up of the Union with Sweden and national independence in 1905, all the political energy was now geared towards building the new unitary state, thus local and regional property rights were not on the agenda.

After the logging rights of the ancient Customary Law of Commons were transferred to the «active farming units» by intensive legal action in the 1880s, something had to be done about the remaining commons rights. Around 1920 a legal framework was negotiated for the vast mountain commons and a Mountain Commons Law *(Fjelloven)* was passed by Parliament *(Storting).* The main struggle was here over the role of local government in the managing of the former

[6]Rettstidende 1918, page 454 :Veikvatn

King's Commons *(Statsalmenning).* As part of the general modernisation processes, it was argued, the management of these resources should now be vested in the local governments - the municipalities. But although the farmers had successfully utilised the local government structures since 1837 to strengthen local self-governance, they were now opposed to what appeared to be a de facto transfer of property rights to the municipality. So a coalition of State and farmers designed an institutional solution that would continue the co-proprietorship of the «King and the farmers» into the modern age: In each municipality with Mountain Commons there should be a «Mountain *Council»(Fjellstyre)* of 5 (at least two active farmers/pastoralists, the rest municipal politicians) who should govern the utilisation of the commons rights and the income from fishing and hunting. But the council remained a «state council at the local level», its superior remained the Ministry of Agriculture and the state remained the supreme owner of the ground. Since there was no legal category «Commons» in Northern Norway, the government did not see any need to enact the new law in the four northern provinces. Later on the southernmost of these provinces, Nord-Tr0ndelag, was included in the law after a combined legal/political process. A revision of the Mountain Commons Law was made in 1975, now the conservation and recreational interests at the municipal level was guaranteed a place among the council members. Some restrictions were also introduced on the councils powers to discriminate against non-locals *(utenbygdsboende)* in their pricing strategy for fishing and hunting licences. The issue of enacting the revised Mountain Commons Law for the whole country was raised again, but turned down by the government - «as there are no Mountain Commons in the North». However, in the law proposal that was tabled in Parliament, the government promised that if it could be shown at a later time that there were commons in the North, the law would naturally be made applicable to the whole country (Ot.prp.55 (1972-73)

In the 1000 year old Customary Commons Laws, there are also provisions for the Coastal Commons *(hin yttra).* These rules have to a large extent been lost during the various stages of modernisation of the legal framework. The State has for several hundred years had a keen interest in defining the rich fish stocks as national property to be used as a foreign policy instrument. Thus fishing rights have been defined as «every-ones rights» , a right for all nationals and with the state as the sole regulator. The modern fisher, on the other hand, has been preoccupied with mobility and have feared the reintroduction of local coastal property rights and management regimes that could prevent him from going after the fish wherever it goes. Fish as national property and a consulting state also gives the modern fisher access to other nations fish stocks, thus securing the most efficient use of his heavy capital investment. The Fishermen's Association has therefor been quite content with the state as the owner of the fish and the role as «state authorised fisherman. Consequently they have not supported fishermen

who have lost their quotas and who have taken their «stolen Coastal Common Property cases» to Court. The idea to do this stems from a widespread local perception that there from ancient times has been something like a «Coastal Commons» *(Fiskaralmenning)* in their fjord or in their archipelago. So far the lower courts have not acknowledged any property rights in the alleged Commons and has ruled in favour of the State. However, with the advance of aquaculture, sea-farming, municipal coastal zone planning, artificial reefs and other coastal environment enhancement, the question of designing appropriate institutions for «new» coastal commons have already risen (Sandberg 1995). Reintroducing some elements of Customary Commons Law in the Coastal Zone might therefore become a fertile ground for future studies.

For the Mountain Commons in the North, the deep, constitutional processes from the Saga period continued, but not along the political track. The most interesting developments have taken place along the legal track - in the courts. Here numerous cases of delineating borders between farmsteads, rural communities and state land has revealed the existence of stable perceptions and continuing practices related to commons also in the North. Through renewed investigation of old archives relating to the «King's sale of the Commons» in 1661 and 1750, it also became clear that the legal category «State Commons» *(Statsalmenning* - former King's Commons) was not lost, but was still the correct property right category for the Mountain areas in the North (Utmarkskommmisjonen 1990). As already seen, this was confirmed by the High Court in 1991, which declared the 120 year old government doctrine of «State Mountains» as dead.[7] However, the High Court added that because of the discontinuity in exercising the commons rights in the North, except in the case of some grazing of sheep, the common property rights were lost to the members of the mountain valley communities. The High court acknowledged that injustice had been done to the Northerners, but it could only appeal to the institutions along the political track to make amends the injustice done - either by new laws or by government action on behalf of the state.

On the basis of this High Court ruling in 1991, and the promise made by the government when proposing the revised Mountain Commons law in 1975, the mountain valley communities, the two farmers' associations and several political parties thought that now the Law of Mountain Commons would be made to apply in the North as well, and that old injustices should be corrected. Not quite so, a new doctrine was already by 1983 contemplated by the Government Attorney, but not officially expressed before 1992 : «Where there are no Common Property rights, it is legally not appropriate to enact Commons legislation» (Ministry of

[7] Retstidende 1991:1321-1334: Skjerstad

Agriculture 1992). This was seemingly in line with the attempts to rationalise the overall legal structure - in a modernised legal structure there should be no room for defunct or purely symbolic laws. In January 1993 the last remaining paragraphs of the old Norwegian Law disappeared, among these the medieval rule that «such shall commons be, as have been from ancient times». Thus the modernised legal structure contains fewer and fewer elements of «objective law», i.e. law that is above the influence of executives and lawmakers - and the evolution of the modern society becomes more and more the object of its own legislation (Luhman 1985). But behind the new doctrine there was another, more tangible cause: A major change in the management of State Ground Property was taking place in 1993, this should bring the bureaucratic and rigid resource management in line with the general modernisation of the state. The management responsibility was transferred from a conventional directorate with parliamentary responsibility through a cabinet minister into a State Company *(statsforetak)* with the explicit aim of running these properties in accordance with modern business efficiency standards. The majority of the assets of the new State Forest Company *(Statskog)* are the Crown Lands in the North, if these should be managed together with some 60 Mountain Councils , the efficiency and the profitability of the Company would be seriously hampered. This fear was explicitly voiced by both the administrative leaders of the State Company and the strong trade union organising almost all the company employees. Thus the High Court ruling and the resulting voices from the northern mountain valleys was seen as a threat to the success of the grand scheme for a timely modernisation of the state sector, and had to be fenced off at all costs.

But the forces of historical injustice are hard to put to rest, and the Provincial Assembly *(Fylkesting)* had to address the question in 1993 - about 100 years after it started the struggle «to bring back the Commons». The aim was to influence the National Parliament to enact the Mountain Commons Law for the North - probably against the will of the Government. The first handling of the question resulted in postponement; the matter was too complicated for the representatives, it was not properly explained and the rights of the Sami pastoralists in relation to the commons rights of the mountain valley communities were not properly analysed. A special task force was therefore engaged to work out a report on how the Mountain Commons Law could be introduced in Nordland Province and what consequences that would have for both mountain valley farmers, for reindeer herders, for urban sport fishers and hunters, for other recreational activities and for the natural environment. The task force met with one major obstacle: the group of legitimate users of the commons rights in the northern commons were much more widespread than in the south. This was due to ecological factors and was akin to the problem reported by the King's representatives in the 16th.

Century; in the North they could not recognise the community commons they were trained to deal with.
The task force considered each municipality too small to have its own Mountain Council, as the majority of the users would be non-locals. The task force therefore recommended a special northern design with «regional commons» comprising several municipalities and with common Mountain Councils in accordance with a special provision for this in the law (Nordland Fylkeskommune 1995). This would be parallel to the way mountain commons actually functioned prior to the 17th century sale of commons and it would remove an artificial antagonism between valley and town over the use of commons resources - especially fish and small game.

The recommendations of the task force were supported by the Provincial administration, who recommended the Provincial Assembly to ask the national Parliament to make the Mountain Commons Law applicable to the Nordland Province. But in spite of this the motion was not carried, after a heated debate in the assembly where also the sentiments of historical injustice was invoked, it lost with a few votes. In short it lost because the social democrats were worried about the jobs of the employees of the State Forest Company, as a result of heavy lobbying from their trade union. Also the urban hunters, who usually hunts with dogs, were worried that price discrimination and preference to locals should make hunting more expensive and hard to access. Although the regional commons design would make them «locals» as well, the national hunters and sport-fishers association was «in principle» against more local control over mountain resources and was intensively lobbying for their view. Interesting enough, also the nature conservationists preferred management by a profit seeking State Company over a regional Mountain Council with seats for conservationists.

But as the Provincial Assembly initiative faulted, more and more of the municipalities gave positive responses to the proposals of the task force. Recently a number of mountain valley municipalities have unilaterally established Mountain Councils in accordance with the Mountain Commons Law - thus challenging the authority of the State Forest Company. The idea behind this is to provoke the state to take the Mountain Councils to court. Once again, when the political path is blocked, it is worth trying the legal path to constitutional change.

Linearity or Modernisation ?

One of Max Weber's great achievements was his penetrating analysis of how the social forces set in motion by the actors, go on living their own life and in the next turn take the same actors by complete surprise. The analysis of way the Calvinists' original thriftiness/accumulation/reinvestment for redemption resulted in cold hearted capitalism is well known. So is the analysis of the virtues of bureaucratic rationality and fairness that in turn produces an iron cage of rationalisation which threatens the human freedom it was meant to safeguard. Are there such social forces set in motion by the present attempts to modernise the western States machinery, which has relevance for our discussion here on the fate of common property rights in the modern society?
Does the State run into problems of increased transaction costs and lowered legitimacy by creating agency relationships with a Ministry as principal and a State Company as agent, for instance by delegating property rights and user rights over the state forest and mountain resources to the State Forest Company (Eggertson 1990)?
We shall not attempt to answer such far-reaching questions in this brief section, only point towards some of the long term consequences of the drive towards increased state efficiency.

The State Forest Company started early to make plans for how to make a profit from the property rights it has been delegated. Already in its 1993 report it says that

> «In the future more focus will be on the income generated by our ground resources. There is a basis for a higher revenue on the products the company sells: Hunting, Fishing, Gravel and Ground. More money will thus be gathered from the market and the traditional function as a state service manager will be of less signiflcance» (Statskog 1994)

To make an economic profit for the state is the main objective of the State Company - its main formal "bonding" in the contract - and the state cannot interfere or complain too much about the way this is done. The most common problem for the principal is usually to be able to constrain the agent so that he does not make suboptimal decisions from the principal's viewpoint - or engage in shirking or behaves opportunistically (Eggertsson op.cit). Typically a State Company will have strong internal incentives to elaborate its own organisation rather than to maximise the profit for the Treasury. It is in addition costly for the State to gather complete and up-dated information on the State Company and to measure their performance in a meaningful way. Thus the power of information tend to be distributed asymmetrically between the principal and the agent, and State Companies tend to start living their own life after only a short while. Where

the state has a substantial part of its revenue from a few State Companies, as in the case of oil exporters, the hierarchical relationship between principal and agent tend to become blurred and it becomes unclear who is really governing who. Thus what is termed «lack of democratic control over State Companies» quickly becomes an issue for governments who try to «modernise the state».
In a way this is a linear development where the increasing rationalisation leads to a need for further rationalisation in order to safeguard the efficiency that was the moving force behind the creation of these companies.

But a linear projection of past strategies is not necessarily the only possible content of the process of modernisation. Neither is a fundamental break with such trends necessarily a post-modernist phenomena. The increasing transaction costs of a linear development of further streamlining can open up avenues for modifications - and still be within the modernisation rationale. Such modifications can be the inclusion of other forms of rationality, as for instance more sustainable resource management, increased decision-making efficiency, increased legitimacy of policies, lower monitoring and sanction costs etc.

The fate of State Companies are also influenced by their encounters with the market. At an increasing rate a State Forest Company will find that its "products" within the fishing, hunting , hiking and experience sector are not as "clean" as the marketing analysts might wish to believe. These products are "embedded" with cultural and institutional values and with claims of property rights for local users. Even with the advanced rate of modernisation we find in Northern Europe, the level of embeddedness of economic behaviour is more substantial than formalists and economists assume in their models (Granovetter 1985). The "modern market for Commons products" might therefore hit back at the government strategy for "modernising the state" and render a number of "business strategies" non-viable.

As part of the modernisation process, it might therefore again be room for a reintroduction of Commons Law in the High North and a transfer of property rights to the local level.

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