LEGISLATION CONCERNING THE NORWEGIAN COMMONS

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1. Terminology, characteristical features and historical background.

The English word "commons" as used here, is a direct translation from the Norwegian word "almenning", and this terminology could easily lead to misunderstandings. The word "commons" should in no way be interpreted as "nobodys property". The Norwegian commons, and the various resources and "usages" in the commons, are definitely owened by somebody, but the crucial aspect is that it is a kind of collective or "group" ownership. Or to put it the other way round, the commons are property, but not individualized. The main point is that the commons are not subject to open access, but on the other hand they are more open than individualized property, and more open than land owned jointly by some individuals.

There are two other important concepts that are difficult to translate. The first is "almenningsrett", which is the legal right for a farm, a group of farms, or people resident on farms, to traditional use of the commons. This concept is termed **"Right of common"**. The second concept is the Norwegian "bygd", or "bygdelag". This is the local settlement unit that the commons in question "belongs to", here translated to **"parish"**. The important thing to note is that "bygd" in this sense is not identical with modern (or ancient for that matter) administrative units.

The commons dicussed in this paper cover approximately 32.000

square kilometers, which is about 10% of the land surface of mainland Norway. The land is socalled "outfields"; forests, high mountains and the like. The norwegian word for this type of land is "utmark", which litterally means "fields outside the core farm area". The term "waste" could also probably be used.

The ten percent figure is the one given in contemporary official statistics, and all these commons are located in the southern part of Norway. It should however be noted that vast areas of outfields in northern Norway, that is the three counties of Nordland, Troms and Finnmark, is state land of some sort, with various rights for the local population. For the last couples of centuries this land has not been classified as proper "commons", even if the land definitely is "public" for practical puposes, specially for the local population. This situation might be in the prosess of change, due to recent court rulings and local political actions. The status might be canged from "state land" to similar kind of commons as we are concerned with here. So may be in the relative near future the figure of 10% will have to be much enlarged. State land in Finnmark alone coveres more than 40.000 square kilometres.

It should also be mentioned that large areas of mountainous outfields are held in joint, traditional ownership by groups of private farms. This is not called "commons" either, the norwegian term is "sameige", which litterally means "owned together". But in this particular case we have the conceptual construction that the land is owned by farms, which means that the share is an integrated part of the property.

So altogther, besides the commons proper, which are our concern here, there are huge areas of outfields (waste) held in other types of public and nonpublic collective ownership.

The main resources and use of the commons today are (Sevatdal

1994):

* forest (timber, fuelwood)
* pasture
* secondary summer farms with cattle grazing ("seter")
* fishing
* hunting
* tourism and recreational use
* hydroelectric power

Nature conservation (protection) should be mentioned as a kind of "use", as several national parks and other types of protected areas are to be found in the commons.

There are two different types of commons; "State commons" (Statsalmenningar) and "Parish commons" (Bygdealmenningar). They are closly related, but still so different that the enactment is made in different laws. The main difference between them is the title, or ownership, to the land itself, or more precisely; to the ground as such. The State is the owner, in a rather limited sense though, to the State commons, while a local group of farms, or farm owners, have a similar type of title to the land in Parish commons.

In 1992 the Parliament enacted new legislation on the commons. The laws are not new in the sense that the substance of the legislation is new, far from that, but in the sense that previously scattered and fragmented legislation (statuary law) and traditional law were codified and consolidated. The legislation on the commons are now codified in three different laws; one on Parish commons, one on the use of the forests in State commons, both dated June 19. 1992, and a third on all other uses and managemnet in State commons, dated June 6. 1975 including later amendments.

The legislations concerning the commons are very ancient. Probably they are the oldest of all our legal institutions that still have significant practical value. The principles,

rules and regulations originated in an age before remote wasteland, mountains and outfields at large were objects for exclusive ownership, and before there were organized state institutions that had the power of legislation and enforcement of laws. In short; the principles and rules governing the use in the commons are older than the Norwegian state itself, i.e. from before the 11th. century.

The legislation on the commons, right from the the district or provincial laws prior to 1274, via the first general lawbook for all Norway of 1274, to the present laws from 1992, is based upon one basic principle; the use of the commons should be as it has been of old. This does not mean that the use and the legal situation in the commons have not changed, neither that the commons today are as they vere of old. In fact the area of the commons were far more extencive before than today, sales and malpractice of nibbeling away have been at work, but still this principle is important to understand why the rights in the commons are so closely linked to historical developments. It slows down, so to speak, the prosess of change in use, and change in legislation. This point is stressed in the law propsition (Ot.prp 37) p. 16:

"Central features of the present legislation can be traced right back to a periode when huge tracts of forests and mountains were not objects of ownership, but remained areas for joint usage for the farms in the neighbouring parish. The Right of common is supposed to have been basically a right for **everybody** (Norwegian "allemannsrett), leaving each individual free to any use he might chose; cut trees, send cattle for grazing, hunt and fish etc. Naturally the use of the area were dominated by the people in the adjacent parish, and gradually the notion developed that the resources belonged, with exclusive right, to the local people."

This has the practical consequenses for us today, that when legal disputes (litigations) occur, for exemple about who has

Right of common and who has not, or what precisely the Rights of common comprise, one has to search back in history, quite often far back, to find the relevant sources of information. This also means that such court proceedings generally are very costly and timeconsuming.

The study of jurisprudence concerning the commons as an academic field, has never been extensive at our universities. Practically all scientific literature on the subject is written by practical lawyers, working in districts where there are commons. Names to be mentioned are Meinich Olsen, Solnørdal, Rynning, Scheflo.

The commons, togther with other types of collectively owned outfields, were not entered into the official taxrolls and cadasters as ordinary property units. They can, in principle, not be alienated. This is now stated in the laws, and the phrasing goes usually like this: "common land can normally not be sold", or "not sold with the following exeptions". One such important exeption is cultivation and settlement. This has not always been so. In the 17th. century and later also, the King sold huge tracts of commons. As we will show below, this is the reason why we have two types of commons today; State commons and Parish comons; the Parish commons originating from State commons. From 1821 sales have been prohibited by law (with an exception for the periode from 1848 to 1857). This prohibition also includes subdivision of Parish commons, these could otherwise have been subdivided among the owners, if the group by consent had decided to do so. But throuhout the centuries the commons have always been a reservoir of land for reclamation and establishment of new settlements, which clearly require alienation of land.

The most central aspect of the law of the commons are the rights to use - the Right of common - for the **farms** in the so called "almenningsbygdelag", i.e. the parish the commons belong to. These rights might be of many different types,

according to the kind of commons (mountain, forest etc.) in question, and the caracter of traditional farming and other rural occupations in the district. The most important right today, from an economically point of view, is the timber right in the forest commons, but pasture is also important some places. In historical perspective the rights to "sæter", a kind of secondary, summer cattle farm in woods and mountains, were very important, but not so today. Hunting and fishing are still very important, but the main perspective have changed from subsistence to recreation.

The Right of common may be seen as a kind of "real" easement, in the sense that the right "belongs" to a farm, but is not entered into the general concept of easement. That the Right of common differs from ordinary positive easement is seen by its origin, and is also seen in cases of alienation and subdivision of the farm. If the farm is subdivided in such a way that a new farm is established, this new farm gets full Right of commens, without reduction in the right of the original farm. Such subdivision will thus be at the expense of the "owner" of the commons, or at the expense of the whole local community in case the capacity of the commons is fully utilized before the subdivision. This is very different from "normal" easements, in that case each new farm established by subdivision gets its share of easements from the share of original farm only. This different principle for Right of commons is established by rulings of the Suprime Court on several occations, see Rt. 1912 p.785, Rt 1925 p.1032, and Rt.1931 p.110. In the last case the court said that "the Right of common is according to its historical origin of such a special nature, that standard property law, valid for normal property rights, can not be applyed without reservations".

The Right of common can not be separated and alienated from a farm at all.

2. Principles for "Right of common".

There are five principles that govern and characterize the "Right of common". It must be stressed that we are now talking of the "real" Right of common, that is the rights belonging to the farms in the parish. The right to hunt and fish is of a different nature; it is persons, not farms, that posess these rights. The rights to hunt and fish in **state commons** cannot be claircut classified as proper Rights of common, as all persons permanent resident in Norway have an equal, but limited right to fish and hunt in these commons, conditional on payment. We should rather call it some sort of general public right, but resident local people may have, and in most cases they have, an enlarged (extended) right compared to others. But all these local people have the same right, with no regard to occupation or relasionship to farms or farming, the question of permanent residence within or outside the local community is decisive. In **parish commons** the rights to fish and hunt is a proper Right of common, we may say for people living on farms in the parish, not for people in general, neither within or outside the parish. Now for the five principles mentioned above:

1. It will be understood from what we have said so far that the concept of "farm" is an important issue for rights and access to the resources in the commons. So what is a farm? In practical jurisprudence the question most often asked is how small a landed property unit might be, and still be conceptualized a farm in our context. It goes without saying that this question also has social and political implications in the local community. There are many court rulings in this matter, the most basic from 1914, Rt. 1914 p.35, which states that Right of common belongs to "every property (holding) unit in the parish, which according to its features and actual use, can be said to be agricultural in nature". It is not a condition that the holding is large enough to sustain a family houshold. In reality holdings down to 0.3 - 0.4 hectares agricultural land have been assigned Right of common. The criteria in the court ruling sited above are now entered into

the legislation of 1992, for both types of commons. A minimum limit of 1 hectare was proposed by the law commission, but the politicians in the parliament rejected such a fixed figure.

2. The concept "parish" (bygdelag) in this context is also a central issue of dispute and court rulings. It is a very typical concrete (factual) question, in general the parish is said to be the group of farms that have Rights of common! In our context that is clairly a tautological statement, but the reality is that the boundaries for the parish has to be based upon available information on usage of sufficient old age. Normally the parish will be a geografically continuous area adjacent to the common, but not necessarily. Administrative boundaries, past or present, are in principle of no relevance. In reality the boundaries for the "parish" (bygdelag) often concurrence with administrative boundaries, old or new.

3. Right of common cannot be disclaimed from a farm, even the owner have no valid right to do that. This is also a difference to ordinary easements. A court ruling from 1931, Rt. 1931 p. 110, stated that a reservation made by an owner of a farm to the effect that a subdivided and sold parcel shold have no Right of common, was not binding for the buyer.

4. The principle that Right of common is linked to a farm, not to the acutual person in posession of the farm as owner or tenant, has important implications for extent and quantity of the resources that each may extract from the commons. The quantities are restricted to the actual need of the farm, not to what the persons in question may desire to extract. These needs may differ from farm to farm in the parish, and the needs may also change ower time. A large farm will need more timber material to maintain the buildings, and more pasture for its cattle than a small one. But a small farm may increase its fodder production for winter consumption, and so rightfully increase the number of cattle and consequently the need for pasture during summer.

5. The exemples above also touch upon another principle; a farmer may claim that all the needs in question should be met by usage in the commons, independantly of what resources the farm may otherwise comprise. An owner may thus claim that all needs for pasture, building materials and fuelwood of his farm should be extracted from the commons, even if he posess large grasing areas and forests, exclusively owned by his own farm.

3. State commons, parish commons and private commons.

Originally there were only one type of commons. They were called "The King's Commons" and at the time of Christian V (17th. century) they were regarded the property of the king (with a special status though). The codification of laws in 1687 (NL 3-12-4) states that "if anybody sow grain or cut grass in the commons without licence from the bailiff, then the King owns both crop and hey".

It was the sales of commons in the 17th. and 18th. century that started the differentiation that resulted in the three known types of commons, mentioned in the socalled "forest law" of 1863; state commons, parish commons and private commons. Most of the sales concerned commons with timber, because the King needed money and those commons were the most valuable. The buyers were partly locals with Right of common, partly owners of sawmills and other private persons.

In the contracts for sales of commons to private persons, the reservation was regularly taken that the right of the locals had to be respected after the sales. Which was logical; the King could naturaly sell only what was rightfully owned by the Crown. After the sales a private person owned the commons in the same way as the King had formerly done, and these commons were called "private commons"; signifying that the ownership had passed from the public to the private regime.

In some cases the buyers were not outsiders, they were the

locals with "Right of common", or a limited group of them. In these cases the commons were called "parish commons".

The forest law of 1863 made it compulsory to have the private commons subdivided between the private owner on one side, and the locals with Right of common on the other. This is supposed to have taken place, at least for all private commons with timber. The owners share became an ordinary private property, the other part a parish commons. So the present parish commons originated either directly by sales of state commons, or indirectly by way of private commons.

The exact nature of the King's title (ownership) to the commons has been much debated. This question was (finaly?) settled by a ruling of the Supreme Court as late as 1963, Rt. 1963 p.1263. The conclusion was that the position of the state was that of a genuine owner, not a kind of administrative authority, or some sort of weaker position, as had been argued by some before 1963. The factual issue in this particular case was the right to develope hydroelectric power, which is most valuable and belongs to the owner of the land. The ruling of the court was fundamental for the nature of the states ownership to the commons.

It follows for exemple that ground rent for leasehold sites belongs to the state. However, in the case of leasehold of sites for cabins for recreational use, which is very common in the mountains, the rent has to be shared equally between the state and a local fund, at the disposal of a local board. But this is a grant by law to the locals on the part of the state.

Even if the position of the state is that of genuine ownership, it has priority after the Right of common when it comes to extraction of resources. In the case of hydroelectric power, that use is not at all included in the Right of commen, and belongs consequently totally to the land owner. But with

regard to timber and other resources, this is different. The locals have for example a claim to all their farm needs for timber and fuelwood from the commons, and only what is left when that need is satisfied belongs to the state. So in general the Right of common puts very heavy restrictions on the income possibilites normally possessed by an owner. It should also be remembered that if new farms are established in the parish, the Right of common is enlarged at the expense of the owner.

The authority of management in state commons is shared by the state and a local board called "fjellstyre", which litterally meens "mountain board". In case there are timber rights in the commons, there is also a third party, the so called "almenningsstyre" (common board), responsible for the management of that particular use. The members of the "mountain board" are apointed by the local (municipal) government, and its authority is stated in the act of June 6th. 1975, § 3. The members of the "common board" are elected among, and by those with timber rights.

In the periode from 1908 till 1945 a special judicial commission, the socalled "Høyfjellkommisjonen", were at work with clairification of legal aspects in the high mountains. More precisely the mandate of this special type of court was 1) to determine the boundaries between state commons and ordinary private public land, 2) to determine if a certain area was state commons or not, and 3) to pass judgements in disputes concerning Right of common. The commission worked with, and finished 26 so called "felt", that is "areas", all located in southern part of Norway. The dominant methode they applied, beside studying documents, was to hear witnesses, first and foremost on the use of the land in question, as far back in history as possible. The statements of the witnesses were recorded in great detail and published, which is not the case with ordinary courts. So the minutes of the commision are very important sources for information about land use,

traditional law etc. for these areas.

The commission did not work in the northeren part of Norway, which means that the legal situation in the mountains in the counties of Nordland and Troms is not clairified in the same way. Finnmark has an altogther different legal history concerning land ownership. By an act of June 7th. 1985, a new judicial commission were set up for Nordland and Troms, with almost the same mandate as the commission of 1908. Huge areas in these counties were claimed by the state to be state owned land (public land) of a special cathegory, which left the state with a much stronger ownership position than in state commons. As a direct result of some rulings of this commision there are state commons, but probably no Right of common, in these counties too.

Land ownership in Finnmark has, as mentioned above, a very different legal history, and is at present a relatively hot political issue. An advisory commision of specialists in different fields, and local representatives from different groups, the socalled "Comission for Sami rights" are at work. The outcome of this prosess might very well be that some sort of commons, in the sense we are dicussing here, are to be established in Finnmark also. At present most of the land in this county is public, owned and managed by the state, with special rights for local groups.

Parish commons are owned by those with Right of common, or a majority of them. Ordinarily the group of owners and the group of rightholders are identical, but exeptions occur. The system of management is much simpler than in state commons. There is only one decisionmaking body - the board of the common - representing both the owners and the rightholders. This board takes all decisions concerning management, but it should be noted that it is not a public administrative body; it belongs to the private, not the public sector.

The management of the forests are the main concern in parish commons. Several of them run sawmills as well as other processing industries. There is an emplied director in charge of the day to day mangement, and it is required by law that there should be a masterplan for the management of the forests.

The Right of common to timber and other materials and fuelwood in the commons, comprised originally the right for each individual rightholder to cut what he needed according to his wishes. Successive restrictions in this individualistic behavour have been imposed. First in the form of requirement of recognition by the bailiff, later, in 1937, enactment on possible compulsory cooperative management of the parish commons. Cooperative management means that all operations in lumbering etc. are made by professional employed staff. The rightholders then have to buy the materials they are entitled to, with a discount corresponding to the economic value of their right.

In state commons individual operations, conditioned on recognition, have dominated. After the new legislation in 1993 cooperative management can be made compulsory also in state commons, but only with the consent of the majority of rightholders.

Concerning private commons there is not much more to be said. Allmost all of them were subdivided according to the enacment of 1863 and successively disapeared. It is not known if some still remains, but in case they are of minor importance.

4. Final remarks

Our primary aim have been to present the legal principles concerning the two types of proper commons; state commons and parish commons. At present they comprise approximately 10 % of the surface of mainland Norway. To fill out the picture it is

important to note that there are other cathegories of ownership, both in private and public sectors, which are "common" in some sense.

In public sector state land in the three northern counties are mentioned.

In private sector the most important is land held in a kind of joint quasi-ownership by farms, very common for private land over the timber line, in all parts of the country. The term "quasi-ownership" is used when a share in the ownership is inalienably attached to a property unit, most often or originally a farm. The popular saying is that "the farm owns a share", even if it is quite obvious that in a judicial sense a farm can not be a legal person (subject) owning anything. Commons of this kind have an entirely different history, and are goverened by other laws based on other principles. Altogther it is fair to say that "commonness" of same sort is the dominant type of ownership for land and resources ower the timber line.

There is a striking feature concerning the historical evolution of Norwegian commons of all types; the lack of local formalized organizations for management and protection of the commons. There seems to have been no legally recognized local body before 1857, since then local bodies have evolved slowly for most types of commons. This does not meen that there have been no social institutions on the local level for management and governance of common resources, but such institutions seem to have had a poor power base in the legal system. Undoubtedly this lack is one of the reasons for erosion and the nibbeling away from the commons during the centuries. For day to day management amongst the users, general law and traditions might be good enough, but were not sufficient to protect the right of the local **communities** against those with power and will to encroachment, both private and public, within and outside the local community.

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