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ENTRENCHMENT OF STATE PROPERTY RIGHTS TO NORTHERN FORESTS, BERRIES AND PASTURES

by

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The setting

This paper is part of a larger project of comparing resource governing institutions for different northern resources. The larger project mainly uses case material from six types of resource regimes in Northern Norway, but does to some extent draw comparisons with corresponding regimes in different circumpolar jurisdictions. The main objective of this is to demonstrate how most of the current resource governing institutions are neither the outcome of a careful design aimed at sustainable resource management nor an outcome of natural evolvment through a local trial and error process. More often than not, resource governing institutions of the North are the outcome of state intervention and entrenchment of state ownership rights. Through careful analysis of property rights connected to various resource regimes, it can be shown that these often have incentive structures that are incompatible with the aim of sustainable resource use. Another objective of the larger project is therefore also to address the question of institutional changes necessary to achieve compatibility between the incentives built into the structure of rights and duties - and the overall aim of a particular regime.

The six resource types chosen for this exercise are typical northern resources: wild fish, coastal ecosystems; wild migrating salmon; birds' eggs; forests, berries and pastures - and water power. Among these forests, berries and pastures - which in the north is simply merged into the concept of the "outer fields" *(utmark)*, stand out as carrying the main burden of northern history on its back.

These areas were the bulk of the northern lands - where nomadic hunters and herders roamed where expeditions and plunderers raided and where both original and subsequent settlement took place. It was to major sections of these vast tracts of land that the original villages of northerners established rules for communal use - rules that started to be disregarded by the state from the 17th century. It was also in these vast tracts of lands that private properties called farmsteads were carved out - and from these were subsequently extended claims of private ownership to neighbouring forests and mountains. It was also in these vast areas of weakly defined property rights that the State which held jurisdiction over the area, gradually became the main land owner.

The many ways used by a state to gain full ownership rights in a northern and sparsely populated area - and the consequences of this entrenchment of state property rights in relation to sustainable governing of resources, are the main themes of this paper. The 900 year-long process does, however, contain major analytical puzzles that also could make these themes relevant for students of similar processes in other northern areas - under different jurisdictions. In dealing with this, it is therefore unavoidable to touch also on strategies of deliberate erosion of communal property rights and on strategies of conscious favouring of private property rights.

Theoretical Puzzles

In the vast literature on resource management and resource-governing institutions, forests and pastures are frequently treated as distinct categories - each with their separate dynamics of overcutting and overgrazing. Forest dwellers and forest communities are believed to have their inherent methods and their evolved rules for forest use and forest conservation. Around these kinds of institutional arrangements for governing forests a specific brand of literature is developing that draws on trees and tree species as the special features of the forest resource. The analysis of common property institutions in forestry also have to utilise concepts of the forestry literature in order to reach an audience of forest users and foresters (Thomson 1992, Ostrom & al 1993).

Also pastoralists and grass-land dwellers are believed to have their inherent methods and their evolved rules for grass-land use, stock management and pasture conservation. Around these kinds of institutional arrangements for governing pastures, a specific brand of literature is developing that draws on grass species, animal-stock properties and carrying capacities as the special features of pastures. Also here the analysis of common property institutions in pastures have to utilise concepts of the rangeland literature in order to reach an audience of herders, livestock specialists and rangeland managers (Swift and Mearns 1991, Mearns 1993).

Not very often are forests and pastures treated simultaneously within the same theoretical framework, the outstanding exemption to this is the work of Robert McC. Netting in Törbel, Switzerland (Netting 1981). Here the communal mountain slopes and meadows have combined with the privately owned village fields to form long-enduring resource-governing institutions (Ostrom 1990).

In this study we shall not only attempt to combine the theoretical concepts from forest and pasture dynamics, but also include the complications offered by activities like wild berry picking, fresh water fishing, game hunting, predator control and the gathering of certain species of grass (*sennegress* and *syregress)* and roots *(teger).* The reasons for this venture into unknown theoretical territories are the demands of the field of study itself. To the Norwegian smallholder or the Sami reindeer owner, the northern ecology has always been a totality, where all parts had to be used in order to survive. The "multitasking" households had to harvest food and "cash crops" from all possible sources and were dependent on access to a multitude of ecological niches in order to maintain this kind of adaptation. Thus the "outer fields" *(utmark)* became a resource from which the household gathered timber, firewood, berries, game, livestock pasture, lake trout and char together with grass and root materials for craft. The wholeness of the "outer fields" - and the native ideas of fisher/farmers and herders as users of these as an undivided whole - were up to the 1930s the basis for an intensive and flexible use of the northern ecology.

Thus it is important to keep intact this character of the "outer fields" throughout the analysis. This is not so much in order to make a "thick description" of today's farming and herding communities (Geertz 1973). Much of the "old ways" are gone, and subsidised, capital intensive and specialised fishing, farming and reindeer ranching have taken their place. It is important because in the Northern environments, as we know from fragmented sources, oral tradition and "survivals", the intensive use by the households of a multitude of local resources is the only known naturally evolved self-governing system that has achieved something resembling sustainable resource government.

A main theoretical puzzle is that the outcome of an analysis of resource governing institutions to a large extent depends on the initial concepts used and on the choice of the units of analysis. A concentration only on the pine tree loggers in the "King's Commons" or on the Sami pastoralists on the mountain plateau would most probably have yielded different results. It is thus the result of a conscious choice that take us to the whole "outer fields" and to the "flexible, multitasking households" as their users.

Much of the evolutionary processes during the last 400 years can then be more rightly understood as repeated attempts by the King - or the state- to limit the self-governing capacity of the northern communities by altering the fundamental property rights to the undivided whole which we have called the "outer fields". By dividing this into categories like commercial pine forest areas, noncommercial mountain forest areas, sheep pastures, reindeer pastures, lakes, rivers and barren mountains, the state has created legal categories that has made the traditional multitasking of the households increasingly more difficult. Property rights had to be redefined within these increasingly specialised frameworks, so that for instance the right to graze sheep became tied to the title deed of the active farming unit, while the right to hunt and fish was transferred from a community member's right to a national citizen's right. To each of the specialised legal frameworks has also been attached specialised agencies for fisheries, for farming activities, for reindeer herding, for forest activities, for water power development and even for cultural activities. The effect of this - and most probably also the intention - was to strengthen national sovereignty in the northern areas. The borders on the "top of Europe" were not clear until late in the 19th century and despite all their differences, the Kings and the Tsars of Denmark/Norway, Sweden/Finland, Sweden-Norway, Russia/Finland, Sweden, Norway and Russia had one strategy in common, they would not tolerate a maintained or increased self-governing capacity in the north.

Thus we through hundreds of years find active attempts from the state to limit the northern communities' property rights to the "commons" - not only to the common fish stocks in the fjords and along the coast, but also to the unified resources of the "outer fields". Contributing to this was the fact that common property rights was perceived as "quasi-ownership" - ownership with strong limitations. This applied not only to the northerners, because they could only hold such rights as members of a certain community (Berge & Sevatdal 1993). But it also applied to the State, the State's

property rights in the King's Commons were "quasi-ownership" - and this kind of constraining institution was believed to increase the transaction costs for the distant government in Copenhagen and hamper its efforts to develop the resources of the north and expand its tax-base here.

Although the study of the development of jurisprudence in the north, and of social and economic processes here, easily tempt the analysis to submerge the commons into either forest problems or pasture problems, it is important to keep the overall picture: it was the mixture of private property rights to the "inner fields" and the common property rights to the wholeness of the sea and the "outer fields" that gave these communities the economic foundation for self-governing strength.

Another temptation is to disregard the effect on resource management and self-governing capability from the ongoing deep constitutive processes in both historical and contemporary society. It has been commonly believed - also among social scientists - that it were mainly changes in technology, changes in market relations and the introduction of a new type of "modern economic rationality" that fuelled the slow, but gradual specialisation of the North-Norwegian fisher, farmer or reindeer herder .

This view misses the point made by Peter 0rebech, that there for 1100 years has been deep constitutive processes in the north that has moved along a "double track" - where one rail is the political system and the other rail is the legal system (0rebech 1991). The visible effects of these process has been the fluctuations between state intervention, state withdrawal and state neglect of the north. The notion of a "double track" is useful, but it can give the impression that the width between the political and the legal system is constant and that the process will follow a preset track. The political and the legal process have for considerable periods in the past become very close - sometimes to the extent of becoming one process. This might have been by intention of the ruler, or it might just have happened and it might happen again in the future. Also subjects - or citizens, must have access to crosscutting linkages between the political and the judicial system, if initiatives are stopped along the one path, there must be recourse along the other path. Thus the direction of the path is open towards the future, the path is made as you walk along it. We shall therefore use the term "the double path" to describe the course of the deeper constitutive processes.

In this paper it is argued that property rights to forests, berries and pastures indeed matter in the social and economic development of the north, but that their influence has been ignored largely because the attempts of the state to influence the design of the property rights started so early that no-one thought this might still have any effect in the 20th century. Not only are the legal processes concerning land- and water-rights extremely slow in a parliamentary democracy. But also some of the social and economic processes sparked by changes in property rights are very slow and work their way only through the shifts of generations. Especially are strategies that through times have proved to produce a sustainable use of local resources, tenacious to changes by intervention. Among others, Ottar Brox offers convincing analysis of the resilience of

the multitasking strategies of northern households as recent as the 1930s and during the 2nd, World War (Brox 1984). However, the transition from "Commons to Colony" did not - as Brox tends to imply - mainly take place between 1930 and 1980. The breakdown of the institutions governing the commons started probably as early as with the protestant reformation, so that we in the 1930s had a situation more resembling that of "open access" to forests, berries and pastures in the north. In many respects the national colonisation of the north depended on an "emptying" or breakdown of the local institutions governing the commons.

Another theoretical puzzle is therefore what links there are between the attempts by the state to limit self governing capacity of the north by actively seeking ownership over large areas of northern lands - and the slow transformation of flexible, multitasking northern households into inflexible, specialised and vulnerable fishers, farmers and reindeer herders. One hypothesis is that the specialisation - and the decreased robustness towards the moods of nature - is the work of contrafinality. The benevolent King no doubt meant to help the "poor and superstitious northerners" to a more rational and sustainable resource management by taking upon himself the managing responsibility. But more often than not, the specialised legal frameworks, the specialised planning and advisory agencies and the specialised subsidies and incentive structures had to be introduced as "urgent solutions to social and economic misery" and not as pure modernisation. Thus - it can be argued - many of the incentive structures created in the 17th century have worked behind the back of the state and continue to tie down today's modern welfare state to certain costly transfer payments and inefficient resource governing solutions.

Apart from a general idea of maintaining and consolidating sovereignty, the Kings - or the Crown - have not had any clear ideas of how the north should be developed. Their eyes were turned to the south and their primary interest in the north was as a reservoir of tax revenue from its natural riches. For considerable periods the northerner was only the means necessary to transform the resources into revenue. Their neglect of the north is so pronounced that they for long periods had the north sold to merchants and proprietors, because their immediate cash requirements were so much larger than their patience with development efforts. If there ever was a "hidden northern agenda" on part of the Danish/Norwegian Kings, it must have been the persistent strategy to increase the tax revenue from the north. When population became a basis for tax, in addition to property and produce, this agenda works together with the foreign policy agenda: More of the King's loyal subjects in the north strengthened the national occupancy of the territory, increased the sovereignty of the king and simultaneously increased the revenue to the state.

Typical for the Norwegian North is that there has always been a trickle of self-propelled migrants from the south towards the north, in search of adventure or as a result of famines in the plains of Finland or in the valleys of Sweden. These had gradually been accommodated within the existing institutional framework and the prevailing use of technology. But sometimes in the 18th. century we find larger public

settlement programmes in most northern areas, whereby southern people with more "modern" attitudes and more specialised knowledge were stimulated to move to the north - with a promise to receive both financial and "power" support from the state - and spiritual support from the state church . This was intended to broaden the tax base, but it also dispossessed substantial numbers of Fjord Sami and violated the common property rights to forests, berries and pastures held by both Sami and Norwegians. And, more important in the long run, it was done through a redefinition of the property rights which in the course of time produced an extensification and specialisation of fishing, farming and reindeer herding that has increased the vulnerability of these kind of economic activities.

Robert Netting suggests that the only way to remedy this kind of vulnerability - both to ecological and market fluctuations - is to work towards increased intensification and increased flexibility in these kind of resource-based activities (Netting 1993). In this perspective, the experience of the north is rather a lesson of the opposite. However, in the process of crafting institutions for a new kind of development strategies, these lessons are of high learning value. This is not primarily a question of "going back to the commons" institutions of the "Frostating law" and the "Christian IV Norwegian Law", but of purifying the institutional virtues of these arrangements for future use.

Policy Implications
- incentive compatibility on the new Eur-Asian Scene

To draw policy implications is not the main objective of this paper. The double path constitutive process in northern Norway has its own momentum where the agenda is locked in for many years to come. On the legal path the "Royal Legal Commission for Nordland and Troms" is working piece by piece on areas with disputed boundaries between private lands and state property. This commission only brings up the principles of common property rights when this is pleaded by either of the parties and has no explicit ambition to "create new legal principles" by its verdicts. However, by comparing evidence, evaluating previous cases and drawing conclusions, the commission inevitably creates legal precedence. Especially when some of the Commission's cases are taken to the Supreme Court, the final verdicts carries weight into the future - and can be utilised along the political path. Also on the legal path a "Royal Commission on Sami Rights" have been working on rights to lands and water in the northernmost province - Finnmark for the last 15 years. A conclusive report on Sami property rights is expected to be out sometimes in 1994, after this the Commission is supposed to move on to the other northern provinces. The first conclusive report is an important step in the long process of defining Sami rights in the north and this will quickly enter the political path before any constitutional changes can take place.

Parallel to this, the farmers of the north are mobilising on the political path, building upon a supreme court ruling, to have their ancient common property rights in "state property forests and pastures" given back to them. Thus, this question will be on the political agenda at the same time as the question of Sami rights. (Sandberg 1993).
As this kind of confluence of deep, constitutive processes is very rare in western parliamentary democracies, it is important that the concepts and analytical categories available for use in the public discourse are clear and sharpened. If this paper can be a modest contribution to this, it might have a positive, yet unknown policy implication.

However, to the ordinary politician, these kind of "rights questions" are uncomfortable and there is a tendency to shun them, to postpone decisions or to redefine them in such a way that they become legal technicalities or interpretative freedom for the courts. Thus important constitutive problems for large portions of nation states can for considerable periods, sometimes hundreds of years, be bogged down as lower court squabbles until they suddenly explode as "ethnic conflicts".

The opening of the old wounds of Europe and Asia has consequences which cannot be neglected. The common experience is now that nation-building, unified ideology, consumerism or modernisation did not provide sufficient ground for political stability in multiethnic and multicultural states. Even when oppression is substituted with freedom, these wounds might open and unless treated immediately, they can bleed vigorously. Often untreated wounds erupt in what has been wrongfully termed "dangerous nationalism". Thus the political implications of analysis of property rights to forests,

berries and pastures can be seen in a wider and more stern context. Very often it is also rights to these kinds of resources that assume symbolic value as the insignia of cultural identity (Gaski 1993). If the modern Nation State does not take seriously property rights claims from peoples or sections within their jurisdictions, political stability is unlikely in the long run. This means that there is an urgent need to examine closer a number of subtle strategies that have been applied by states to decrease the significance of property rights in the modernisation process: benign neglect, cover-ups, postponements or state usurpation of rights in order to "freeze conflicts".

The serious implication of this is that Nation States must take more seriously the continued legitimacy of the institutional arrangements related to property rights to natural resources and make sure that the procedures dealing with clarification, demarcations and changes to these are perceived as just, efficient and legitimate. The argument advocated here is that it is not so much a question of "having a right", as it is a question of which distribution of property rights produce an incentive system that ensures a sustainable and just governance of the resources that people depend on for their livelihood. By open and honest discussions where all parties are allowed to participate, "ethnic flares" can often be solved before they become violent conflicts. Usually it is a better solution for a state to facilitate early dialogue between people who are living together than to keep contesting parties apart from each other.

On the international scene we are repeatedly witnessing "tragedies of the global commons" - due to insufficient institutional arrangements, lack of self-restraint or lack of control. As a "World Government" does not seem feasible, maybe not even desirable, a lot of effort is put into regime, analysis (Young 1989). One has also tried to find theoretical parallels between the local and the global commons, assuming that the globe as one or multiple commons could be maintained through the participation of self interested Nation States with bonded rationality - operating within a purposely designed institutional framework (Keohane 1993). Such regimes - especially in the environmental field - are being designed all the time at international conferences, still the tragedies persist. The weaknesses of international - or even regional regimes - are not only that they require unanimous decisions to be established, but also that they need unanimous adherence from all states and non-defection from all firms and individuals within the states in order to be effective. Without a World Government this might be hard to achieve and international relation students have started to work on alternative designs that are more "robust" to defection and half-hearted monitoring.

The idea of nesting of local resource governing institutions in institutions at higher levels and working at solutions to resource governing problems from the lowest level and upwards, is one way of trying to eliminate an accumulation of insurmountable problems at the international level (McGinnis & Ostrom 1993).

Another idea is the related concept of subsidiarity, which in its original meaning *(subsidium offerre, Latin = to give help)* simply implies that a higher level has an ethical duty to give help to a lower level [only] to the extent that the lower level cannot

manage without this outside help. On the micro-level, the individual has the ultimate responsibility for her own life and shall act in such a way as to improve her own situation and shape the kind of life she wants. If the individual does not manage this, he must first call on the help from the closest "institutional circle" - the family, if the resources here are exhausted, the family can call on help from the next circle, the local community. Only if the local community - and its attached institutional arrangements of common and voluntary organisations - cannot deal with the problem, is there a role for interventions from the state. Subsidiarity therefore means that state interventions shall be subsidiary, that is they shall only be used when actions or arrangements on lower levels do not work.

To understand the role of subsidiarity in international relations, notably as a principle for the European Union after the adoption of the Mastricht Treaty - it is necessary to understand the role of the Catholic minority in Protestant Prussia. Here the Catholics had developed a multitude of voluntary and church based associations and organisations to deal with community work and social work. Towards the end of the 19th century, this web of intermediate associations were challenged by the establishment of health and unemployment security by trade unions - fuelled by socialist ideas of class struggle and solidarity against capitalists and employers. At the same time the Catholic self-help institutions in Prussia were eroded by the attempts of the Bismarck state to establish a "modern state social security system." Also the developments in America, where the doctrine of an "individual, inalienable right to private property" came under alleged attack by Henry George, worried the Vatican. This prompted the Catholic church itself to engage its sharpest scholars in the "Social Questions" and in the debate with liberalists and socialists ideologies. The result was the papal Encyclical *Rerum Novarum* (the new things) from pope Leo XIII in 1891, which was to become the major catholic social teachings for the next 100 years (Molony 1991).

In Rerum Novarum the Catholic Church was attacking both the individualism of the liberalists and the collectivism of the socialists. It criticised heavily the efforts of the free market advocates to break down the old guilds and the whole web of local level associations that binds people to each other in a multitudes of commitments. It also attacked socialist ideologies for wanting to replace cohesion and mutual understanding with conflict and class struggle (Schasching 1988). The various social groups ought to live together in harmony and equilibrium, and there ought to be an intervening web of institutions and associations between the individual and the state - these associations were to be seen as the natural tendency for humans to associate with each other. The role of the state is then not to empty these kind of associations of their functions so that the individual alone is faced with an all-powerful, though paternalistic state. On the contrary the role of the state is to protect and stimulate these kind of voluntary, confessionally or locally based associations and to take responsibility for the existence of multitudes of small and intermediate associations in order that the individuals are integrated in the societal community.

These ideas were sharpened even more in the papal Encyclical *Quadrasesimo Anno* from 1931 (in the 40th. year [after *Rerum Novarum]*), where pope Pius XI warns that it violates the divine justice that the state continue to empty the small associations of their functions and utilises the greater societal infrastructure to provide the same services as the smaller and subordinate collectivities can provide. We find similar thoughts among scholars of different confessions, already in 1840 Alexis de Tocqueville expressed fears of both growing individualism and a tendency towards "democratic despotism" of the state if there were not a multitude of intervening "free institutions" to balance these tendencies (Tocqueville 1945).

The Subsidiarity principle, as it is derived from the catholic social teachings and from its entrenchment in the German *"sosialstaat",* can then be summed up as two limiting principles:

- Negatively the principle protects the individual and the intermediary associations from intervention from the state. The initiative to be helped must come from below.
- Positively the principle places responsibility on the individual, on the family and on the close collectivity in the local community. The possibilities and resources at the lowest levels must be exhausted before the state intervenes.

When the subsidiarity principle is taken to the international arena -as it is done in the case of the Mastricht accord of the European Union, a number of problems arise. If this is to apply on the level of the European Community (now "Union"), the EU-Commission and the Council of Ministers must be perceived as the state and the separate nation states as individuals. This is also in line with the "light" interpretation of subsidiarity in the Mastricht accord: "Everything that the European Union does not have to be concerned with, it should leave to the individual member states to take care of".

The relevant Article in the Mastricht accord says that:

> "The community shall act within the framework of authority and goals set by this accord. In those areas which does not fall within its autonomous competence, the Community shall reach decisions on the basis of the principle of subsidiarity, only if and as far as the objectives of the proposed actions cannot be satisfactorily reached by the member states." (Article 3B Mastricht Accord) *[Not the Official Translation !*]

This wording must be seen as a compromise between the Commission in Brussels, the British and the German delegations to Mastricht. The British conservatives and liberals could use this formulation to continue their fight against "bureaucratic centralisation" in Brussels. For the German delegation it was important to make the subsidiarity principle an integral part of the EC-constitution, as this would answer a number of worries from the states in the German Federation. But as it is written, it is doubtful whether the "subsidiarity article" can act as a guidance at all, most probably the principle has to be interpreted - politically by the Council of Ministers or the European Parliament, legally by the Court of Justice.

However, it is doubtful that the "light" interpretation of the subsidiarity principle in the Mastricht accord will have a long standing. States and individuals are fundamentally different, they are according to the Catholic ideas underlying the subsdiarity principle, potential antagonists. The uncritical use of a principle developed to protect the human individual from the state - can therefore not be used by analogy to imply a similar kind of protection of the very state or from a supranational organisation or from a "centre" of a confederation - to which the state by democratic decision has ceded sovereignty. Such an interpretation must therefore clearly be incorrect and in violation of the basic principles of subsidiarity. The only logical exception to this would be if the national member states are dismantled and all human individuals become "European Nationals" - a highly unlikely course of events after several thousand years of struggle to establish the present European states. Thus the subsidiarity principle in the Mastricht treaty must be interpreted as an ideological program for the whole of the European Union, which by acts of ratification become morally, politically and possibly also legally binding for internal arrangements within each member state. It is then the human individuals in each of the member states that are protected from interventions from these states. The states subscribing to the subsidiarity principle shall then not take upon them tasks and responsibilities which can be satisfactorily taken care of at lower levels in the society.

A proposal of issuing all new babies born after the enactment of the Mastricht Accord with a "Citizen of the new European Union-certificate" has not been seriously considered. Still, the weight of arguments are notably shifted from the unpleasant federal superstate to the more comfortable notion of a "European Union Citizenship which will complement national citizenship without replacing it". In the aftermath of the Mastricht struggle, the European leaders see a need for more rights to control both the nation states and the Union vested in the individual European citizen: "We want a Europe close to the citizen and intervention only where necessary to pursue our common interests" (The European 1993). On the basis of this kind of political interpretation, the subsidiarity principle in the Mastricht treaty might have many unforeseen consequences when the European Parliament take a more active role in the shaping of EC-legislation and "European citizens" take their cases to the European Court of Justice to try them against state-subsidised corporations, parastatals and possibly the member states themselves. These are the uncertain, but more likely outcomes of the application of the principle of subsidiarity at the international level.

Footprints of history

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 northern 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 a major question: Is thus the uniqueness so exceptional that it should preclude useful comparisons and the irreversibility of institutional development so hard that it should preclude us from using the "lessons of the past" for any worthwhile purpose.

The position taken in this paper is that it is 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 footprints of history are 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 since 1275 there has not been any equitable jurisprudence at the provincial level. King Magnus Lawmender *(Lagaboeter*) put together his "Country Law" in 1275, 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 Common Law in the different parts of the country. This Common Law therefore consisted of rales 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 *(odelsretf)* 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 rales 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 rales 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 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 rales concerning commons rights are particularly interesting for the discussion in this paper. The ancient Common Law rales regulating the commons were copied from the laws of the regional assembles/courts and became an important part of the "Country Law" of 1274. 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 this stage it is possible that rales were introduced that 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. However, a recent court ruling concludes that the regulations have been mainly unchanged from the old Common Laws until the

1687 law (Utmarkskommisjonen 1990). The rules for the commons in the "Norwegian Law" survived until January 1 1993 and did thus represent a more than 1000 year unbroken tradition of oral and codified Common Law. Although the relevant rules mainly specifies rights and duties towards the commons, and give 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 HI,
Chapter 12 On Miscellaneous that to Rural Commoners pertain.

l.§
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[1] to his village. Summer pasture shall be in the mountains as it has been from ancient Time. Signs for *Saetter* must no man move, unless to move to a place where no man is harmed. To *Saetter* 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. 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[2] 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.
Another is the access to the commons for everyone that belonged to a certain valley, fjord or coastal flat. The right to summer alpine pasture and the right to harvest forest

[1]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".
[2]ibid.

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 have a large tax-base, encroachment on the commons was restricted in the law. The "Rightful Inspection" placed the responsibility for the economic viability of a new farmstead - which included the income from the reduced commons - on the receiver of the tax. Through the inspection process, the community at large could - at least formally - voice their objections to reductions in the "carrying capacity" of the commons.
A final point 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. Here we find the first deviation from the principles of the Norwegian Law. Now the rights to harvest timber from Forest Commons applies only to the owners of farmsteads in the community, the rest of the community is now excluded from the group exercising "user rights."
Gradually also the other features of the "Norwegian Law" were eroded by piecemeal legislation. The Law of hunting and gathering (1899) and the "Mountain Laws" 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 game. In some respect this was the logical consequence of the earlier splitting up of the commons by restricting the use of forest products to only the owners of farm property in the community. 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 'Everyones' Property Rights" *(Allemannsrettighet)*. In Scandinavia this concept has for decades been confused with Common Property Rights *(Almenningsrettighet),* which always is limited to the group to which the property is common. The similarity in spelling and pronunciation of the new construct compared to the ancient institution also contributed to this confusion. The modern social-democratic state has promoted the concept as a democratic right with long traditions and with the State as the only viable protector. But in most respects the concept of "Everyones' Property Rights" is a kind of misnomer to social science, 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 also be shown that the right to 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 able to control each other. However, in jurisprudence the concept of "everyones' rights" has gained ground at the expense of the traditional legal instruments from Common Law: allodium and commons rights. One reason behind this is that the concept has been useful to the hunting and hiking elite and to the state in its efforts to acquire property rights in a legitimate way.

If there has been any hidden agenda on part of the state and legislators from the 17th century and up to present day, this must be the persistent efforts to weaken the Common Law principle of 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 colonial and later, 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. Thus the Hanseatic leage 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. And thus also the spontaneous and lucrative Pomor trade with the Russians of the White Sea, was gradually eliminated by state interventions.

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 them.

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. 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 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 Common 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 Common Law. After the Protestant Reformation, 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 throughout the 17th, 18th and 19th century - persistently attempting to transfer territorial jurisdiction into state property rights.

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 Common Law heritage. Often the State has taken the disagreements 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 situation of fairly uniform rules for Commons throughout the whole country to a 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 farmers 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 Common Assembly *{Thing)* 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 accomodations depending on climatic and demographic conditions. However, the excact process involved in its withering 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 Sami 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 of Finnmark. 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 (0rebech 1991). A special Legal Commission on Sami Aboriginal Rights to land and water *(Samerettsutvalget)* is expected to reach its conclusion in 1994, 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 and Finnish is an important part of the historical legacy.

There is no doubt that the rules of Commons in the Norwegian Law of 1687 also applied to Northern Norway. How is it then possible that today the State holds the view that there are no Commons in the North - and acts accordingly ?

In 872 A.D. the first King of Norway, King Harald I ("the Hairy-fairy") 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 robbery of the Commons rights of serfs, peasants and Sami. However, most facts from the Saga-period and the Medieval Age point towards an interpretation of this kind of kings' property as national jurisdiction and not as the kind of Crown Property that we find after the reformation.

In 1666 the King sold the "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 changed character from jurisdictional state lands to "purchased state lands". On purchased state lands the state has 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 Common 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. The Legal Commission 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[3]).

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 *(boygsel)* 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 fanning". But his prime motivation was to increase clearing of new farms in the commons and thereby increase cultivation and 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 as "purchased state lands" without commons rights to the farmers. Due to the length of the time these areas were on private hands, the sovereign ownership right of the state to these 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).

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 has since 1899 been 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

[3]Rettstidende 21/1991 : 1311-1334

state ownership, King' Commons where the Laws of Commons apply and "purchased state land" where the state is the sovereign owner (RT 1986 and RT 1991[4]).

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 been correct 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. We shall return to these questions in the last part of the paper.

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? As we shall see in the next chapter, the real entrenchment of sovereign state ownership in the north took place mainly after the penetrating analysis of Taranger. 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[5]).

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[4]Retstidende 1986 : 1122-1138: Stormheim and Retstidende 1991:1321-1334: Skjerstad
[5]Rettstidende 1918, page 454 -.Veikvatn

The logic of entrenchment - state as the only solution

A common problem for states attempting to rule northern areas has been the agency problem (Eggertsson 1990). When the transaction costs of collecting taxes are high, as they are in the north, the agency problem will often force the ruler to design property rights structures that are inconsistent with rapid economic growth (North 1981). In many ways the recent history of the North is a case of rulers trapped in an agency problem.

It has also been shown that the development of state property rights have their own logic, and that once they are in place, they tend to become increasingly more "sticky" or entrenched. Recent work on the economic stagnation in Imperial China shows that the concept of the Emperor's ownership held in motion processes which were difficult to break and which resulted in ineffective resource use and a stagnant society (Yang 1987). However, in the Chinese system, the emperor attempted to solve the agency problem by granting more autonomy to the local level, thereby keeping a counterbalance on the growing bureaucracy.

In Russia, these kind of local counterbalancing forces did not have any impact, even if they seem to have existed in the form of the *mir.* The Russian empire developed into the giant *oikos* of the tsar (little father) - a regime where in the words of Richard Pipes: "the rights of sovereignty and the rights of ownership blend to the point of becoming indistinguishable, and political power is exercised in the same manner as economic power" (Pipes *1974).* This kind of property rights arrangements in a state is often termed a patrimonial state structure (Aristotle 1992, Weber 1968). In many respects, this basic patrimonial structure persisted after the Bolshevik revolution and is still after the liberalisation of Gorbatshov and Jeltsin one of the major obstacles to sustained economic growth in Russia (Kaminski 1992). The downfall of the Tsarist Empire and the Sovjet Empire can in addition be seen as the inability of a patrimonial state structure to deal with the agency problem.

The Danish/Norwegian King in Copenhagen was during the reign of sovereignty that followed after the Protestant reformation, often termed "father in Copenhagen". To him farmers and merchants could turn with their grievances against the hash bailiffs - the King's own agents. With no feudal lords since the Saga-period and no clerical lords since the reformation, the King was the sole landlord *(jorddrotf)* for the non-owning classes. Gradually the "Commons as has it been from ancient times" became the "King's Commons" and farms that were cleared in the King's Commons after the reformation were the King's property and the serfs on these farms were the King's subjects. In the North, where the number of self-owning fanners were low during the 16th, 17th, 18th and 19th century, the King's *dominus* was thus firmly established although he in periods lacked the financial and technical means to enforce it. Except for the Sami Province of Finnmark, this means that a patrimonial conception prevailed in the North - according to this there was assumed to be no conflict between sovereignty and ownership. While a despot violates his subjects' property rights, the typical patrimonial ruler does not even acknowledge their existence (Pipes 1974). It is on this

background we must interpret the King's violation of the Common Law principles in the Norwegian Law; in a patrimonial way of thinking everything that is not "someone's own land" is the King's land. It was also in line with these ideas that the self-owning farmers and the King's serfs should enjoy continued rights at the operational level; the rights of access to the commons and the rights of harvesting from the commons. Thus the new practice could still from the Kings point of view be interpreted as being in accordance with the Norwegian Law. But if we subdivide the seemingly uniform bundle of property rights into these two property rights at the operational level, and three property rights at the collective level, the picture changes (Schlager and Ostrom 1992). The property rights at the collective level; the rights to manage the resource, the rights to include and exclude users, and the rights to alienate the resource, were at this stage unilaterally usurped by the King from the northern communities, But the impressions made on the public by the King's agents was that the King was now just the protector of the Commons and the guarantor of his subjects' continued enjoyment of the ancient commons rights. As a non-provocative political act therefore, the design of the new institution - the King's Commons, was thus a stroke of genius and still it represented a fundamental constitutional change in the North.

At the time, however, the King's part of the institution **King's** Commons was interpreted as the significant one. This is shown by various acts of the Crown, the most obvious being the sale of the King's Commons to merchants in [1666,] 1750 and 1761. The right to alienate a property is a right at the collective level which is only held by a full owner, while a common property is characterised by absence among the proprietors of the right to alienate the property (Schlager and Ostrom 1992). Thus the King must have seen this as his own property and by selling it without a previous ruling of an independent court, have violated the Norwegian Law 3-12-1. However, none of the Northerners bonded in serfdom dared to take the King to court. There are no indications that the King had a secret strategy of repurchasing the Commons after selling them - in order to produce a change in legal status of his property. The Sovereign must be assumed to believe that he was in his full right to sell his properties as he pleased - especially when the Nation's Security was at stake. Thus the Crown's repurchases should not be seen as a sleight of hand, the 1682 repurchase was more like a reclaim of pawned lands, while the late 19th century repurchases [of Commons sold in 1751 and 1761] came after political pressure on the State.

Later interpretations of the institution have, however, seen the Commons part of the institution as the significant one: that which was not "someone's own land" was the King's **Commons** (Utmarkskommisjonen 1990) The legal commission did in 1990 make a ruling, which was supported by the High Court in 1991 (RT 1991[6]). This concluded that during the period of sovereign rale and for most practical purposes, the commons also in the Northern Provinces had been managed as commons and according to the rules in the Norwegian Law. The Commission pointed to the fact that only after the

[6]Rettstidende 1991: 1311-1334

High Court ruling of 1918 (Veikvatnet[7]) do we find a conscious strategy from the new, independent Norwegian State to redefine the property rights in the North so that The State's Commons *(statsallmenning)* should gradually become The State's Lands *(Statsgrunn)* and The State's Mountains *(Staten's Hogfjell).* And it is only now the arguments of a change in legal status of the sold and repurchased State Commons are used with full force by the State. Although Professor Taranger in 1892 concludes that after 100 year of injustice, nothing can be done, and the majority of the High Court 26 years later uses Taranger's pessimistic words to formalise the current practice in forestry as a legal principle, it was not the activities of the King in the years 1740 to 1914 that formally entrenched the state property rights. It was the active legislation and the political acts of the Norwegian Government in the period from 1918 to the late 1960s that legally entrenched the state property rights in the North. Thus the Legal Commission of 1990 finds that this is not a sufficiently long period to nullify the Common Law principles of Commons and rules that all areas that are not individually owned or specifically purchased by the state are still to be considered as State's **Commons** (Utmarkskommisjonen 1990). However, the actual commons logging, fishing and hunting rights in the concrete case (Skjerstad) were considered lost through time and the task of dismantling the erroneous body of law was left to the political path of the constitutive process.

To understand this, it is necessary to take a closer look at the techniques used by the Crown or the state to get the state property rights increasingly more entrenched, as a part of the state development strategy - and some of the contrafinal consequences of this:

In the areas north of the Arctic Circle, the timber forests are not continuous, but are found in valleys and fjord bottoms. Especially the latter held substantial forests of high quality northern pine. Before the influx of new settlers in the 18th century, people from a larger area used these forests for construction materials, but the actual local rules for harvesting of forest products are lost in the haze of the past. The local assemblies *(Thing)* that were held by [or attended by] viking chiefs, papal clerics and later by agents of the Crown, are believed to have had an important function in relation to the use of forests in a Parish or in a fjord. In addition the Fjord Sami had well functioning siidas that handled resource management in forests and mountain pastures until the beginning of the 19th century, informally - or "underground" far into the 20th century. With an increased emphasis on rule by bureaucracy through the 18th and 19th century, these old *things* gradually fell into disuse, until they were replaced by the local government reforms of 1837.

In a few court cases it is argued that these forests were "free-forests", but it is difficult to believe that this could have been the case for more that a short period of "institutional vacuum" following the breakdown of the indigenous institutions that started with the reformation. Because of the special northern ecology, the King's agents

[7]The ruling was passed 5 judges against 2 judges who held that these forests were still to be considered as Commons.

(who were mostly Danish or southerners) were not able to apply the letter of the Norwegian Law 3-12-6. They could not find the clearly defined villages *(Bejgdelav)* that bonds the use of a particular forest the way it was limited in the southern valleys. In addition the forests of the north were not merely used for "Firewood, Building Timber and Farm Use" as the Law prescribed, but also to a large extent for building boats for extensive coastal fisheries and trade. And with all powers concentrated in Copenhagen, and the Frostating Assembly abolished, there was no independent provincial legislature that could accomodate this kind of ecological differences.

With the merchant-induced - and Crown-supported - settlement programmes in the 18th century, and an increased European demand for timber, the forests were considered to be in great danger around 1740. The only solution was perceived to be the state taking upon itself the management responsibility of the King's Forests, which it did by an immediate ban on all forest activities, and the introduction of a license system with a logging fee *(rekonitiori)* to be paid to the Crown. It is this the 3rd. and 4th. voting judge (the minority) in the High Court in 1918 calls the "state's appropriation of ownership rights to the Commons in violation of the Norwegian Law 3-12-6". Apparently this was not the result of a thorough discussion in the King's Council, but was an independent act from the King's agent in the North, Bailiff Myhre, who on January 26th. 1746, instructed the sheriff in Beiarn and Saltdal to implement a temporary ban on all logging unless permission was obtained from the Bailiff. The Bailiff here copied a tax-regulation (of Dec. 28th 1745) that levied a tax for the financially desperate Crown on timber for sale from the Forest Commons of the South. In the north, where the Bailiff could not find any bonded village of forest resource users, all timber could in many respects be considered for sale and was thus taxable. It is unclear what the King's instructions to the Bailiffs were in the following years, but by 1754 the temporary ban on logging was formalised by creating permanent positions as forest-sheriffs , whose main task was to police the King's Forests and collect logging fees. (Kgl res. Sept.23 1754). It is most probable that the prime motive of the Crown was to increase the tax-base - not to acquire property rights - to the Patrimonial King this was not considered necessary as there were no real difference between his sovereign rights and his ownership rights.

In the light of hindsight, the management of forest resources could have been arranged differently at the time. A more sensitive Bailiff would in 1746 have consulted the various communities about the overcutting in the forests and strenghtened the self governing capabilities of the fanners, fishers and reindeer herders to manage their forest resources. A more sensitive Crown could in 1850 have listened to Amtmann Arveschoug and allowed him to include governing of the King's Commons among the responsibilities of the new local governments. From studies in other areas we know that people themselves, when left to make their own institutions, can design commons institutions that are nested in each other and given authority for self-governing by a state (Ostrom 1990). Thus there could in the North both in the 18th and in the 19th century, and in accordance with the Norwegian Law, have been local commons for firewood, berries and pasture, which were nested in more regional commons for timber forests and coastal fish - and which were encouraged by the Bailiff and protected

against intruders by the King. When this did not come about, it has a number of reasons, many of which have been mentioned earlier. The most important at the time were the immediate cash needs of the Crown and the need to increase the tax base.

Following unrest as a consequence of the King's sale of the Commons of Helgeland District *(fjerding)* in 1750, the Crown institutionalised the temporary ban on free logging from 1746. In a series of political acts, the use of the forests of Saltdal and Beiarn in 1772 became restricted to the residents of Salten, Lofoten and Vesteraalen Districts, in 1774 this principle of geographical bonding of users was formalised and applied to the whole Province (Kgl. res. Febr.17th 1774). In 1778 the same system of logging ban, permission on the basis of documented need and the payment of a fee *(rekognition)* was also introduced in Senja District of Troms Province (Utmarkskommisjonen 1990). In some respects the Crown here introduced bonding rules similar to the rules found in nested commons, and by requiring a documentation of need for timber - for houses, fishing-boats and trade boats, it attempted to curtail the speculative cutting of forests for distant markets and move the practice closer to the intention of the Norwegian Law, i.e. to cater for the "need for everyone who lives there". The major difference was, however, that the state now had consolidated its management rights over the Commons, after the northerners had seemingly demonstrated their inability to govern their precious forest resources themselves, the paternal state had now institutionalised a regime that produced a responsible governing of the northern forests. However, as we saw from Governor Arveschoug's memoranda, this was not always an effective governance. At this time we also find an emerging state forest sector, the forest sheriffs are made into forest officers with professional forest training and are soon to become strong advocates for state property rights to forests. It is also from the Director of the Forest Administration that we in 1914 find the first denial of any rights to logging for northerners because they "from ancient times have not cut forests for the need of their farms and thus cannot be assumed to have such rights".

To understand the dynamics of the entrenchment of state property rights, it is necessary to identify the slow processes that goes on - both in the practical adaptations of ordinary people and along legal path of the constitutive process - in this case over a period of more than 200 years.

The typical northerner was financially affected by the ban on "free logging", but his household still used the "outer fields" for a multitude of flexible subsistence and income-generating activities. Entrepreneurial logging was prohibited and construction timber was now a greater expense than before, when transport from the distant forests were the only cost incurred in addition to the actual logging work. Besides, the difference was now not significant between the "State Commons" and the purchased commons of Helgeland and Troms, also here the households had to pay logging fees to the proprietor, although new settlers were often given generous credits for construction timber.

One of the reasons why the process took so long, was the deep-rooted opposition from the farming communities, their concepts of property rights were not in accordance with the concepts that evolved in the state forest sector. One story from Beiarn in a peasant magazine illustrates this point very well:

> "Last year, in the year of 1886, the forest-master Kj0nig and his assistant Hall came to the valley, and after they had inspected the disputed stretch of forest, they made again an attempt to steal this for the State. But these were smarter than their predecessor Berbom. They called a meeting at Misvaer, with the farmers of the mentioned farms, to see if they in peaceful ways could resolve the dispute. The plot was to make the farmers acknowledge the ownership rights of the state to the land, while the use of the forest should be as free as in ancient times - in return he (the State) should be the protector of the farmer against logging by strangers. But also this was unsuccessful, the farmer would not be trapped this time either." (Utmarkskommisjonen 1990, Attorney E. Bryn)

But as a consequence of the logging ban, thefts were made and thieves were taken to court. As some thieves claimed to be acting in accordance with Common Law, a number of "criminal cases" were taken to the High Court where the thieves were convicted with stealing from state property. With an accumulation of this kind of legal heritage, the High Court was in 1918 ready to rule that "all forest in Nordland, which is not someone's private, and which otherwhere would have been Commons, is here state property" - drawing upon the high court criminal cases of 1859, 1866 and 1885[8].

Thus it is only after 1918 that the State feels it has a sufficient backing from the legal path of the constitutive process to enact legislation that formalises the entrenchment of state property rights. Now the forest commons are interpreted to include all the Commons land, also birch forests, berries-land, mountain pastures and the barren mountains, thus the loss of logging rights also meant the loss of all the other exclusive rights to the "Outer Fields". According to Robberstad the Ministry of Agriculture has by 1931 arrived at the conclusion that there does not exist any "State Commons" in the Northern Provinces and has reached this conclusion by the following a chain of reasoning which sums up the process of state entrenchment:

1. Introduction of limitations to logging through rules about state permissions and logging fees *(rekognition).*
2. Abolishment of commons logging rights through punishment for illegal use, later for "theft".
3. Introduction of the theory that when there are no logging rights, then there are also no other [exclusive] user rights to the outer fields.
4. Introduction of the theory that pasture rights are no real right, just a tolerated use from the owners point of view

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[8] Rettstidende 1859 p. 655, Rettstidende 1866 p. 236 and Rettstidende 1885 p. 602

5. Introduction of the concepts of "State Forest" *(Statsskog)* and "State Mountains" *(Statens Hogfjell),* which shall replace and extinguish the concept of Commons *(Almenning)* which can give the public associations of rights of use.(Robberstad 1969)

It is not possible to find any support in legal history for the view that there are no Commons in Northern Norway, a view which were held by the state up to 1990 - despite defeats in the courts. It is also not possible via the Ministry archives to trace what has been the political line of reasoning on this question, the possible agenda that formed the course of administrative and political decisions, remains hidden (Utmarkskommisjonen 1990).

Still, on the basis of an erroneous theory, a new legal body regulating the use of the "sectors" of the "Outer Fields" is created during the 50 years after 1918; consisting of a Mountain Law, a Hunting Law, an Inland Fishing Law, a Tourist Law and to some extent also a recent Law of Predator Control. This body of laws have in various ways, explicit or by omissions, further entrenched the state's ownership and exclusive management rights of the resources of the north.
But according to the latest ruling, even if these laws were based on the erroneous presumption that there is no Commons in the North, there is now no "going back" to a management of the "Outer Fields" by self-governing institutions and to their former state as an undivided entity. In the words of the Legal Commission this is "because these rules have been acknowledged as decisive regarding the legal position for hunters, trappers and fishers [where "everyone's rights" *(allemannsrett)* replaced Commons rights]. And because these resource have been managed by the state in accordance with laws correctly passed by parliament . . . . . these special rules must take precedence over the more general rules [about managing state commons] in the Mountain Law and be decisive in determining the legal position of these resources as of today (Utmarkskommisjonen 1990). But, the commission - and the High Court - hints that even if the possibilities for institutional change are slim along the legal path, there is nothing that should prevent such changes to be introduced in the political path - "by new legislation or by acts from the state as owner of the land" (RT 1991)[9]. It is in response to this that the Association of Nordland Fanners and the Provincial Assembly have mobilised political support for the introduction of the Commons governing institutions of the Mountain Law in Northern Norway. The crucial question here is whether the dwindling number of farmstead-owners, who became the right-holders to State Commons in the Forest Commons Law of 1857 and later in the Mountain Law, alone can muster sufficient political support. Or whether some alliances with other groups in the northern communities will be necessary. This is not only a strategic question, basically this is the moral and political question of "Whose Commons is it really " (The Ecologist 1992). Alliances with other groups might therefore involve the sharing of exclusive rights e.g. to hunting, fishing and berries with all members of the community or the municipality *(innebygds-boende),* but not with other nationals and

[9]Rettstidende 1991;p.l321, Skjerstaddommen

other Europeans. This would then be accommodations with basically the same effects as the Common Law rules of the country Law of 1275, and a withdrawal of the state from the governing of the Commons.

It is also important to note that during the period of encouraged settlement in the north, the Norwegian farming communities spread from the coast and into the interior along the fjords and the adjacent valleys. Here they encountered the Sami who had lived here from ancient times. In the 17th and 18th century the majority of the Sami were living in permanent villages in fjord bottoms or valleys, with summer and autumn camps in the mountains. The nomadic reindeer Mountain Sami were initially a minority within the Sami community. In the 1613 peace of Knarod the resident Fjord Sami *(Sjosamene)* were made Norwegian Citizens. As late as 1742-45 there were still Sami communities in most of the fjords in Northern Norway (Schnitler 1745). They based their subsistence and cash income on a flexible use of the "outer fields", fjord fishing, animal husbandry (where domesticated reindeer was an integrated part together with sheep, goats and chickens, occasionally also with cattle and horses), agriculture, logging, hunting, fresh water fishing and crafts. They often gathered winter-fodder from fields far away. Many Norwegian historians and administrators have through the times characterised this kind of mixed fishing, agriculture and mountain use as extensive, but in view of modern research it should rightly be termed an intensive use of the outer fields (Netting 1993). Every mountain pasture was utilised, every lake was intensively fished and stocked with fish, every animal was fully utilised - for meat, fats, milk and skins, even the horns and the leg-skins were made use of. This intensive use could be contrasted to the extensive use of the outer fields in modern reindeer ranching (Ingold 1980).

But at the time this kind of multiple use was a stark contrast to what was believed to be modern field agriculture with new breeds and new seeds - especially the potato. Consequently it had low esteem in the eyes of the authorities who saw it as a meagre potential for an increased tax base. However, the Crown was aware that the Fjord Sami was totally depending on their multitasking use of the "outer fields" and sought to protect their traditional use from ambitious local authorities and advancing settlers (Kingd. of Denmark 1726).

However, for most practical purposes, the state's need for tax revenue was larger than their concern for the rights of the Fjord Sami, and the Sami communities were gradually overrun by Norwegian settlers or they "went Norwegian" in order to survive. Still, many effects of the Sami heritage still persists in many northern communities. One effect was the immediate adoption of the above mentioned flexible resource utilisation and the multiple harvest of both the sea and the "outer fields". According to Brox this superior adaptation survived as the dominant strategy as long as 1930 (Brox 1984) - when the entrenchment of state property rights put the squeeze on this kind of economic rationality.

Another effect of the Fjord Sami heritage is the weak position of the farmers in many fjords and valleys in relation to the Norwegian legal framework for defining individual

property rights. While the Norwegian farmers on the coast in many cases had their titles deeds registered in medieval times and secured their property rights by payment of property tax *(landskyld)* through hundreds of years, the Sami had no titles to their places *(Finnerydning)* - apparently because the Sami tax system was a head tax *(finneskatt).* There has also been a tendency for the Norwegian legal system to acknowledge private pasture rights in the "outer fields" only in relation to cattle, thus discriminating against Sami peasants with no cattle or with only one cow around the homestead (NOU 1980:41). Therefore there were few incentives, neither with the Sami, nor with the State to register their farms. Consequently we find that areas which were originally settled by Sami, but which are now Norwegian - by buy-outs or assimilation - had their farms registered very late, in many cases after the state logging ban was introduced. Thus they have the greatest difficulties in documenting long, legitimate and continuous use of the adjacent forest and mountain areas, due to their short registered farm history as well as their inability to claim Sami aboriginal rights. In some of the areas dealt with by the Legal Commission, this has resulted in fewer private rights granted to owners of former Sami farmsteads (Utmarkskommisjonen 1990 & 1991).

An interesting question is whether original Sami property rights were in their nature similar to the Commons rights in Common Law and in the Norwegian Law, or whether the Sami had concepts of property rights totally different from known western forms of ownership. For instance Lina Gaski claims that the expression, "the area owns us" captures the core of Sami property rights concepts better than the expression "we own the area" (Gaski .1993).

In relation to state property rights, there are two sides to this. One is whether the Sami use of the "outer fields" empirically was similar to the use of commons in other parts of the country. From tradition we know that the traditional lineage association *(siida)* of the Sami was intact in most Fjord Sami communities as late as the 18th century (NOU 1980:41). This institution made equitable decisions on the use of the resources in the outer fields, but were despised by the church and were soon to be overruled by the State's agents. With the consequent degeneration of the *siida* association, it seems like the "underground property rights" especially to mountain pastures and lakes became "frozen" at a certain stage in their development and thus appeared to be tied to certain families (Gaski 1993). Pressed into Norwegian legal categories in the 20th century, these has had a tendency to be classified as private property rights to forests, lakes and pastures (NOU 1980:41). However, the actual use of the "outer fields" by the Fjord Sami and the role of heads of lineages, were probably not so different from the running of affairs in South Norwegian Commons prior to the 1857 law of monitoring and governing of the commons at the local level. Thus this actual traditional use could in many respects be categorised as a typical commons Use *(almenningsbruk)* of the "outer fields" in accordance with the Norwegian Law. As the forests in most fjords were adjacent to the farming communities, the practical adherence to the law was probably closer for the Fjord Sami than for other groups of Northernes. The main reason why this traditional use of the commons was not formalised in institutional designs, was the

absence in the North - after the abolishment of the Frostathing Assembly and the weakening of local Things - of any form of equitable jurisprudence at the provincial and local level. Thus there was no arena where coastal Norwegian Northerners, Southern settlers, Fjord Sami and Mountain Sami could meet and craft workable institutions based on the old Common Law and the traditional institutions of the Sami.

The other side is whether claims to commons rights in traditional Sami Fjords and Valleys will now have a strong legal standing after 150 years of entrenchment of state property rights in these areas. Judging from previous rulings of the Legal Commission, the Sami factor does not carry strong weight in the question of giving back the Commons rights to communities which no longer identify themselves as Sami. The areas can be ruled to be [state] Commons, but the rights can still be lost to the grindstones of an unjust history. When the Legal Comission for Nordland and Troms was established, the Sami organisations objected to it starting work in areas with Sami settlement before the Sami Legal Comission had completed their work on Sami Rights to lands and waters. The Government, and the Parliament overruled these objections, arguing that the Legal Commission should base their work on existent laws only, and not create new jurisprudence (Ot.prp.59 1984-85). But as we have seen, the work of the Commission - with specific cases- and the appeals to High Court - have revealed misjudgements of the past and thus created constitutional developments along the legal path.

In areas that today identify as Sami, the legal position is therefore still unclear, and will probably remain so for a considerable period for the areas outside Finnmark Province. An interesting test here will be the Tysfjord case, where one of the few remaining Fjord Sami communities claimed mainly private property rights in 1980, while they in 1993 claim substantially larger areas - with reference to "aboriginal property rights" and to the distribution of familial property rights that was left as the imprint of the last functioning Siida institution. Their attorney were trying to press this into the legal category "private ownership", but it could as well be categorised as rights originating from ancient commons use of "outer fields"(Utmarkskommisjonen 1993/4, Attorney Engeness).

In a mixed Norwegian/Sami community, it is difficult to see other solutions than an application of aboriginal property rights to "every one who lives there", in practice to every inhabitant in the municipality (Smith 1990).

Modern devolution processes - what's it all about?

Devolution processes are now taking place in most Circumpolar areas. The "Small Peoples of Northern Russia" are asking for more territorial autonomy. In Canada's northern Territories it has been the main issue on the political agenda since 1985. Here the transfer of jurisdictions and responsibility for administrative programs to the territories have made progress, but the success of this kind of devolution has also complicated the process of settling the aboriginal claims to land and water. As Peter Clancy correctly observes, this is "because Ottawa appears to be simultaneously negotiating the same issues at two separate tables (Clancy 1990).

In concluding on the process of devolution in Northern Scandinavia, and in Northern Norway in particular, there are many similarities with other processes of devolution. We are here witnessing a rare development in western jurisprudence, where the Common Law regulations of Commons Rights are regaining long lost ground. In many respects, it is due to the meticulous work of legal historians that this part of the double-path constitutive process has accelerated after 60 years of sloppy institution-building by government. The intensity of interaction between the development of a body of International Law of Aboriginal rights and the revitalisation of western Common Law concepts about Commons Rights is still unknown. But as part of the modern devolution processes of the north , in the near future both the northern areas of Scandinavia and northern Russia will in addition to northern Canada offer instructing examples of possible directions this can take.

Of special interest here is the interplay between the effects of the freedom of movement of people and capital in the European Union and the Union's own principles of subsidiarity. A relaxation of traditional state governing instruments over the economy usually means increased importance of property rights (Sandberg 1993). And more local responsibility for sustainable resource management, monitoring and sanctioning - in adherence to the subsidiarity principle - usually create a demand for more secure - and more effective property rights.

The main task for students of change in history is therefore not so much to study who has the rights - and who has not. The challenging task is to explore which distribution of property rights gives an institutional design that is conducive to a sustainable governing of resources and an equitable economic growth in a precarious environment. One of the arguments in this paper has been that the entrenchment of state property rights to forests, berries and pastures have resulted in a legal subdivision of this formerly undivided resource which has weakened and destroyed the flexible and multitasking economic rationality of the Northerner. Thus when subsidised and highly specialised northern agriculture, northern fisheries and northern reindeer pastoralism shows signs of stagnation and unsustainable resource use, this should therefore call for a re-examination of the distribution of property rights between the state, the private and the Commons.

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