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# Sustainable Development by means of Market Distribution Mechanism.

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**Abstract**

My contribution is interdisciplinary, laying particular stress on legal- and social science. As the governmental decision process is subject to management barriers (fig. 1), the exit of Political Resource Distribution Control is my point of departure. Having documented its inability to cope with the problem of sustainability, I turn to the Market Distribution Mechanism as the appropriate instrument. As Market arrangements suffer from institutional weakness and failures, the problem then is to develop a strategy of integrating the full social cost of mismanagement of resources and pollution, into all private costs. Or in strict legal terms; how to protect Public Property Rights? Scientifical disagreement on the issue of the "tragedy of the commons", might be written on the account of confusion of ideas as authors using the notion of common property rights seems to think of "open-access regimes", i.e. Public Property Rights. For the sake of deeper understanding it is important to develop one single international unilateral and harmonized set of legal notions. The old Roman legal institutions of **Res nullius** (wild animals, fish, jewelry and unoccupied land), **Res communes omnium** (objects excluded from ownership such as the earth, the oceans, light and air), might be applicable (fig. 3). **Having chosen** the Market Distribution Mechanism as sustainable development strategy, we have to look up whether this system is potent of avoiding heavy problems which usually destroy open access regimes, such as **"the Coase theorem"**, **"the free-rider"**, **"the game of hold out"**, **"the prisoners dilemma**, etc. (fig. 4). Probably the Market Mechanism Strategy might have fallacious consequences if the framework is not carefully considered. In my opinion such a strategy is dependent upon whether open access resources do have market value, and consequently whether Public Property Rights enjoy legal protection. Being so, I look into the legal argument which mainly have fallacious consequences to the legal protection of Public Property Rights such as the thesis of "the detrimental competition argument", "pure economic loss", "loss incurred by third party", "lack of economic value" and "the floodgate argument" (fig. 5). Such theoretical arguments has not blurred the courts from allowing Possessors of Public Property Rights legal protection provided that destructive multiple, conflicting use of "the commons" (open access resources) must exceed the freedom of action and that the "owner" of a Public Property Right, is the one who actually have participated in the exploitation of the open access resource. All this conditions being fulfilled, Public Property Rights must be taken into consideration when deciding upon matters influencing on environment and resources utilization. Ignoring this obligation, owners of Public Property Rights might claim compensation or retrieving possession of the Rights being damaged, in court. Thereby all decisions affecting the environment and resources, would have to take the "externalities", into account.

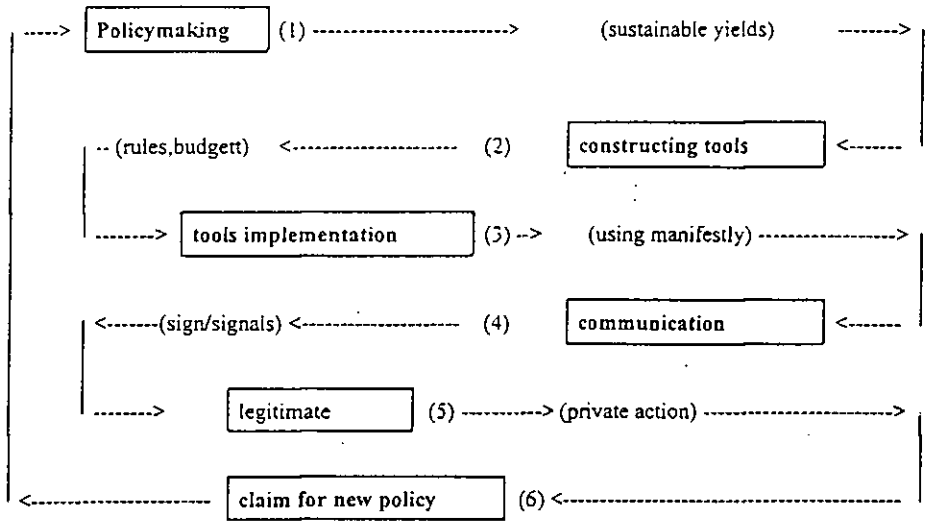
# 1. PUBLIC CHOICE OR ATOMIZED CHOICE? MARKET - OR NONMARKET DECISION MAKING?

> "Much of the world is dependent on resources that are subject to the possibility of the tragedy of the commons".
>
> Elinor Ostrom ( 1990) p. 3.

"The tragedy of the commons" (the open access resources) seems to be an accepted and well-known truth. However; what is the tragic about the commons? In fact ground water basins, grazing areas, open access fisheries etc. has survived for centuries without any governmental body managing the common pool resource and keeping it from being overexploited (David Ralph Matthews. 1993). Why?

One popular answer to the "tragedy" is the necessity of political control through governmental body. This is more easily said than done, as getting stuck into the management labyrinth is a close possibility:

Fig. 1: The management labyrinth (1): The phases (conditions) which have to be fulfilled; otherwise failure




Another theory is transferring Public Property Rights into Private Property Rights. Anthony D. Scott (1989 p. 11), is describing the march towards the quota and license-based fisheries.) The exploitation of resources are being licensed and the licenses are made negotiable (transferable) - see R. Hannesson 1984.. For example the right to fish is made transferrable by means of quotas. Similarly, the right to manipulate common, clean air might be privatized and made tradeable by the means of Emission Reduction Credits. According to these scientists, ignoring the privatization-project, over-exploitation and breakdown of resources are anticipated.

However; is it necessarily so? Is the attainment of sustainable yields by means of distributive plurality decisions - within the frames of the free market play - possible **without** exclusion of access by transferring Public Property Rights into Private Property Rights? How to make sustainable management an inevitable result from atomized marked decisions? What is the

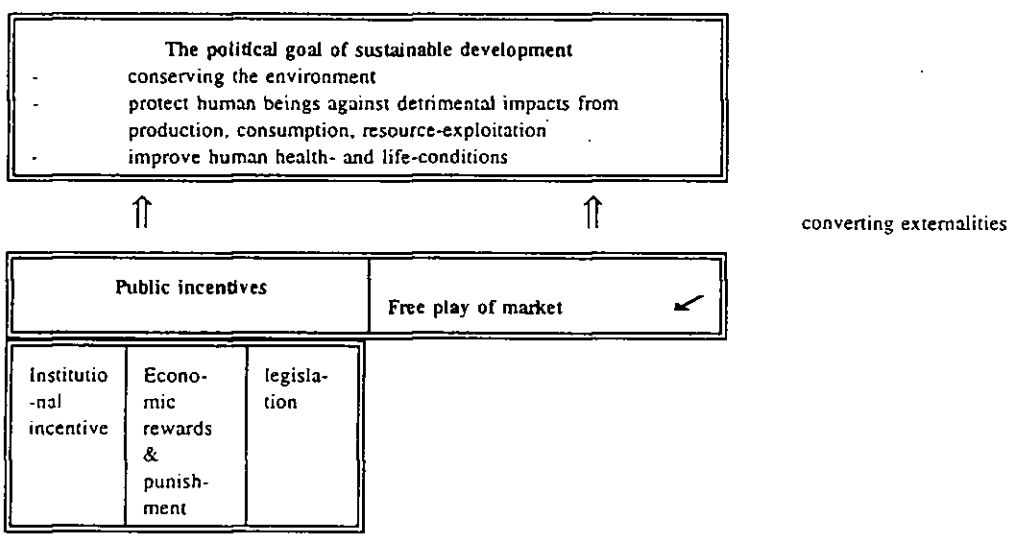
conditions for making self-governing conservation regimes work? My basic idea (Örebech. 1991), is - as explicitly stated by Victoria Curzon-Price (1991 p. 28). - "that if the right of private individuals to clean air, water, etc. were recognized by the courts, "class action" suits permitted and appropriate damages awarded against polluters, one would not even need Emission Reduction Credits (ERCs) to guarantee cleanliness". It is my ambition to survey the legal field of Public Property Rights to find out whether this recognition has taken place.

A solution is to establish permanent trust funds as a mechanism for converting rights to non-renewable resources into rights to renewable. In periods of economic boom and boost the trust fund should be used to restore a self-reliant economy emphasizing conservation of resources, to minimize detrimental effects of such cycles so as to adopt ecologically sound policies (Prets & Robinson. 1989 p. 115-120).

The possibility of achieving sustainable yields by means of free play of marked, depends on whether Public Property Rights enjoy legal protection (fig. 3). If - I anticipate that decisions having environmental consequences is taken out of the regime of governmental, political control - private decision-makers are obliged to take Public Property Rights into consideration when deciding on environmental issues, sustainability is the ultimate result. But then several presuppositions must be fulfilled. This paper discuss a strategy of sustainable development by allowing Public Property Rights legal protection. In strict economic terms we are faced with the problem of integrating the "full social cost of pollution ... into all private costs" (Victoria Curzon Price. 1991 p. 26).

The evolving Market System - as a basic resource distribution mechanism - and the shrinking state intervention system (often called the welfare-state model), necessitates the rethinking of Market Decision framework (fig. 2). My task is to look for vital Market decision elements which might improve the system, to see how far reaching market decision could be prepared for sustainable development.

Figure 2: Different kind of political measures




Is the public sector an outdated regulation mechanism? Lots of sustainable development-theorists still seems to emphasize the importance of political control to achieve a balanced society of ecology. Is such a conclusion based on pure intuition?

## 2. COMMON AND PUBLIC PROPERTY RIGHTS: WHAT IS IT? A CONTRIBUTION TO THE MAKING OF ANALYTICAL TOOLS

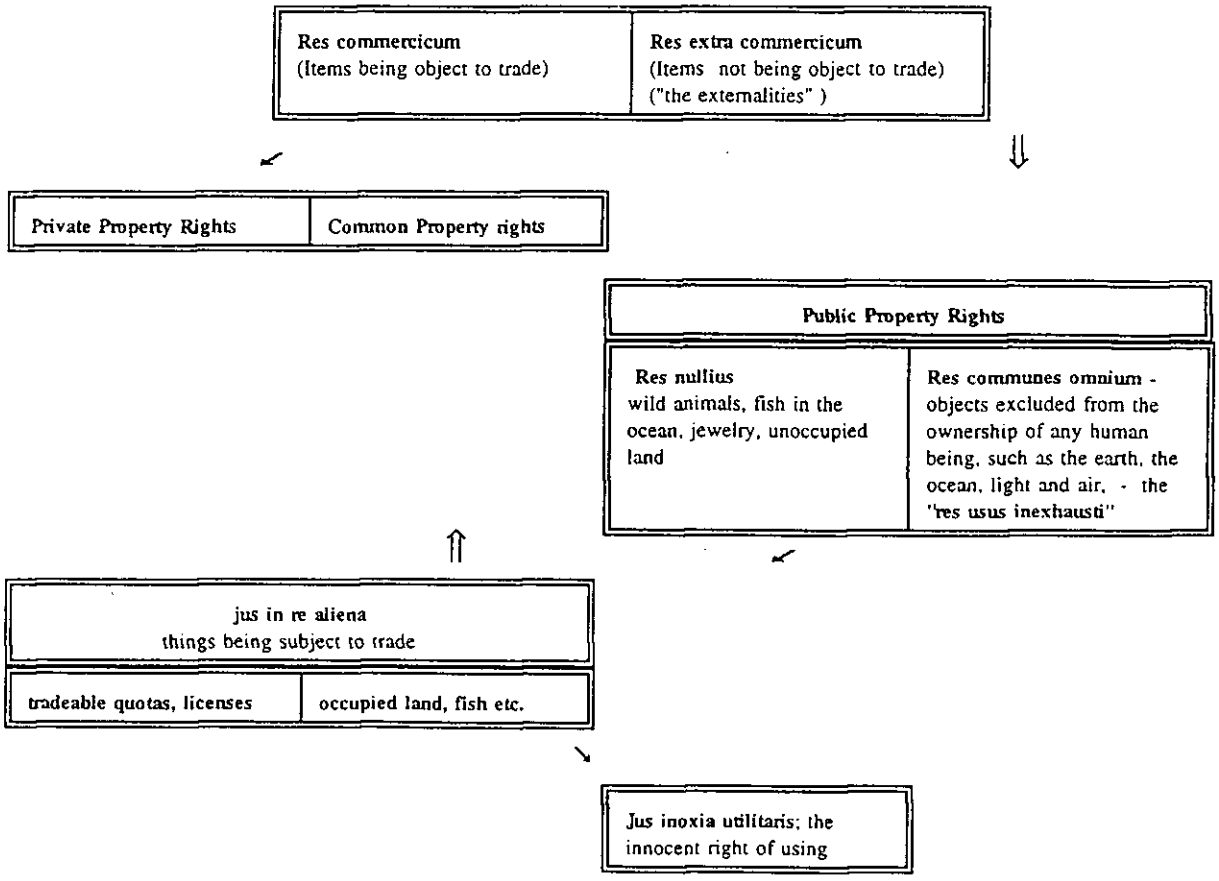
Obviously scientifical disagreement regarding the tragedy of the **commons** might be written on the account of confusion of ideas. When using the notion **Common** Property Rights, do the author think about "open-access" or "closed-access resources"? Gordon (1954), Hardin (1968), Munro (1982) and Wetterstein (1990) talks about "common property" - which in anglo-american legal tradition does symbolize a joint utilized closed access resource - but seems to deal with the theoretical problems of Public Property Rights, i.e. an open access resource.

What is "Common Property Rights" and how to understand and manage these rights? The Common Property Rights problems have for ears been subject to interdisciplinary studies under The International Association for The Study of Common Property, which - as a goal - has obtained the

> "deeper understanding of how and why institutions of common ownership can manage resources in an equitable and sustainable way" (IASCP 1993 p. 4).

To get there we need a common and harmonized set of concepts. As the american political scientist Vincent Ostrom stated at a MAB-conference (The UNESCO Man and Biosphere Program) the human way of understanding runs through definitions and notions. Obviously discussion of different items under the umbrella of Common Property, do need a precise conceptual basis. Otherwise we will never achieve the "deeper understanding". Where to start?

Figure 3: The objects being the arena of legal dogmatic thinking and the connection to the notions of rights



Do ancient law offers a fully developed set of legal instruments? Having examined the old **Roman law**, I think so. The anglo-american, latin-european, german and nordic cultural and social systems are to some extent, founded on or at least influenced by, the old **Roman legal institutions**. From this we may draw some basic distinctions, which could be helpful when analyzing Common Property as a system of Rights, which is our topic. To come to terms with the problems I therefor rely on these Roman legal notions. Objects (lat. Res) are things, material or immaterial things. According to Roman Law two main categories of objects exists: **Res commercicum** that is, ordinary goods having market value. **Res extra commercicum** ("the externalities") is objects not having a market nor a market value. These are inalienable. One solution to "the tragedy of the commons" is to turn every res extra commercicum into res commercicum. That is transforming these interests into **Private Property Rights.** This is the carrying idea underlying transferrable fisheries quotas. These scientists (see i.a. Hannesson, 1985) do solve the tragedy by terminating the commons. No commons, no tragedy of the commons! (fig.2, under the column of **jus in re aliena**)

However turning this theory down, we have to go deeper into the Roman Law empire. Res extra commercicum do consist of two different kind of legal objects: **"Res nullius"**, being the name of wild animals, fish in the ocean, jewelry and unoccupied land (Henry Sumner Maine. 1891 p. 245). This group of "res" is subject to occupation. The latter category is the **"Res communes omnium"** - being objects excluded from the ownership of any human being, such as the earth, the oceans, light and air (Carl Goos 1889 p. 310), that is the **"res usus inexhausti"** - the inexhautible values (Fredrik Chr.Bornemann 1863 p. 105-106). The legal and political situation under these two regimes, are rather different. Obviously one may not treat res communes omnium the same way as res nullius. The lawyers in ancient Rome did not (Oscar Platou. 1914 p. 30).

The res nullius might be occupied. The occupier has become a **Justus possessor.** The res nullius has then turned into **jus in re aliena**, being subject to trade. The act of land occupation does however not terminate basic "Common Property Rights" being utilized by the public. The public might still execute **Jus inoxia utilitaris**; the innocent right of using. Enjoying the jus inoxia utilitaris is however legally as well as politically, different from enjoying i.a. the open access fishery. As indicated; there are big differences between phenomenons having had the label of "Common Property Rights". It is unlikely to believe that such a lax conceptual use of the word would bring us the deeper understanding we are striving for.

## 3. ANGLO-AMERICAN COMMON - AND PUBLIC PROPERTY RIGHT NOTIONS

So; what is it? Are we able to dig deeper into the conceptual landscape? Anglo-american legal theory are labelling "public rights" to the usage of open access resources. (See e.g. Lawrence C. Becker. 1977 and A.V. Lowe. 1986 p. 1 ff.). The notion of "Rights of Common" is the name of Private Property Rights. Fishery is such an example, the "common of piscatory" is an easement, which is not to be mixed together with "a free or a several fishery" being the notion of co-ownership. "Public rights of fishing" is the name of Salt Water fisheries as well as Tide River fisheries (See Lord Hailsham of St. Marylebone. 1974 p. 215). Presumably the "public rights of fishing" is based upon the Kings ownership to the seabed of rivers, bays and fjords (Peter Örebech. 1988 p. 134). Accordingly, it is reason to believe that "the tragedy" being imposed on some legal rights, does concern the Public- and not the Common Property Rights. I am discussing the Public Property Rights in the continuation.

The purpose of this presentation is to elaborate the legal conditions for directing private market decisions towards sustainable resource management within the framework of Public Property Rights. My aim is to study whether a shrinking public law sphere is - or at least might be - compensated by increased private law market liabilities. My special interest is the legal protection of Public Property Rights, as I believe that an evolving legal protection would create important steps toward a more sustainable society. Such a conclusion is however dependent upon whether Public Property Rights enjoy legal protection or not. Before entering the details, let me present some main points.

## 4. HOW TO CONSTRUCT A "SUSTAINABLE" MARKET DISTRIBUTION MECHANISM?

The problem of sustainability, i.e. to internalize the externalities, is a process which might be identified with a governmental action-project. As documented however, market failure are not necessarily corrected by recourse to public-sector solutions. Public bureaucracies are themselves subject to serious problems of institutional weakness and failure (as demonstrated above). My approach is to rely on individual- or class-action before the courts, protecting "the externalities" (*res nullius* or *res communes*).

What is then, more appropriate than to "repair" market failure by changing the source of failure; the market system itself? Doing so is to redefine the notion of "externalities", by **giving market value to the "Public Property Rights"**. Producers are then forced to internalize previous external interests. By doing so, the first step is a dogmatic legal comparative anglo-american and norwegian analysis of the Public Property Rights legal protection. To which extent do Public Property Rights enjoy legal protection? Whether this being a realistic attitude, depends on the legal protection being offered. As concluded in my study of Norwegian legislation (Örebech. 1991), Public Property Rights enjoy some legal protection.

If insufficient legal protection, the next step is to make clear the *de lege ferenda* (legal policy) situation and provide environmentally leading nations with all the good arguments for supporting a changed legal situation. If the enlarged legal protection is a practicable route, we substantially reduce the need for governmental action and consequently decrease tax pressure. What is more important is that public right legal protection might provide the necessary stepping stones for achieving self-governing sustainable societies.

The model of sustainable development must be thoroughly discussed so as to avoid the gaps of misfortune. This is my task in the continuation.

### 4.1. The social context: "The free-rider" and other difficulties

The purpose of this paper is to elaborate the legal conditions for directing private market decisions towards sustainable, open access resource management. First I am presenting some difficulties which the legal regime has to overcome if free market private decisions shall maintain sustainable management. Secondly I introduce conditions whose fulfillment is important for achieving the goal of sustainable management. The construction of a new sustainable development strategy must keep clear of the difficulties mentioned.

### 4.2. A prerequisite: The selfishness of human beings

The self-interest of human beings is a "free play of marked" motive power (Adam Smith. 1793). A new regime of sustainable management must take advantages from the selfishness of human beings. How to direct selfishness so as to achieve a sustainable self-governing regime? Does protected Public Property Rights direct private "selfish" decisions towards sustainable yields?

A minimum condition for having "the marked of ecological decisions" work, is to give market-value to the environment ( E. Dahmén.1970). Destroying the environment shall be expensive! Only decisions which are environmentally indifferent are free from injunction- and liability rules. Before establishing industries, initiate fishing etc. every effort shall be made to secure that the activity (according to the precautionary principle) is acceptable. The entrepreneur himself shall provide for this being effectuated.

### 4.3. The Coase Theorem

Apparently the free play of marked is producing unintended effects. Accordingly the market regime needs adjustment. The purpose of constructing a system of legal rights is to secure optimal market outcomes; that is to establish optimal level of resource deployment (Coase. 1960). The optimal outcome of the market will then either be the result of more correct decisions or through creation of framework in which advantageous bargains (between for instance polluter and the public) - can be realized. The possibility of achieving the goal of sustainable development depends on whether the right to resources do have marked value.

### 4.4. Social justice

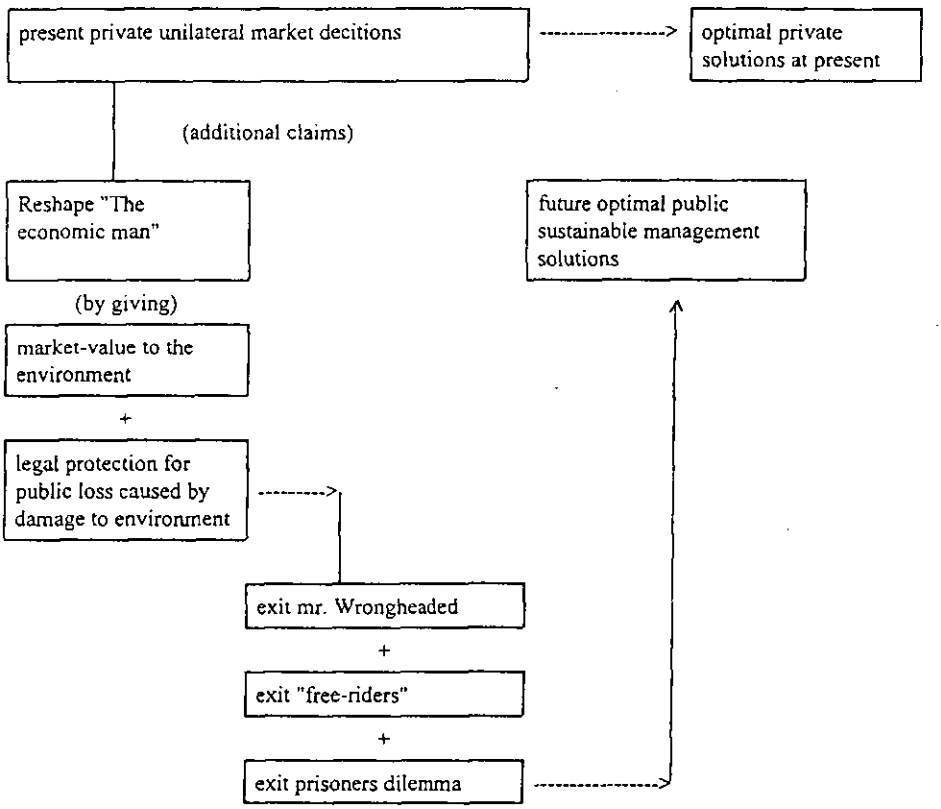
John Rawls (1972), are stating: "The social system is to be designed so that the resulting distribution is just however things turn out". A social system which destroy the ecological balance and the basis for human habitation, is not resulting in "just distribution" of resources. A system of sustainable market-regulation must be legitimate. Otherwise a social system would not survive (Ronald Dworkin. 1986). Such a society must be avoided.

### 4.5. Inalienable rights

"Market value" is not the sole answer to the problem of sustainable yields. Basic needs (clean soil, air and water) do require an absolute legal protection, market value or not. The term inalienable rights is reserved for rights which cannot be renounced because the right-holder cannot be without it (Diana T. Meyers. 1985). The field of inalienable rights comprises i.a. of res communes omnium. This basic needs governed by Public Property Rights regimes, do have a special legal status.

When a right is protected by an inalienability rule, transfers of any sort are prohibited. Nobody is, for instance, allowed to bargain on behalf of mankind concerning destruction of the ozone layer. Even though inalienable rights are not subject to trade and accordingly have no market-value, the possessors are at liberty to assert their rights.

fig.4: Directing private market decisions towards sustainable management: Presuppositions which must be fulfilled:




### 4.6 The free-rider

"The economic man" is a presupposition for the logic of free-riders in the play of free-markets. The theory of games are pointing out **the wrongheaded** as the winner of the "game of hold out" (J. von Neumann & O. Morgenstern. 1947). As the management of sustainable market must be legitimate, such a result is not just and should be avoided. An issue of utmost importance is how to get rid of "free-riders" (Jon Elster. 1985 p. 231-265). By granting Public Property Rights legal protection, the "free-riders" could possibly be eliminated: Nobody is allowed to take the free-ride as every "ride" has obtained its price (Fig. 4). Property- and liability-rules oblige aggressors to keep out and pay damages by transfer of rights.

### 4.7. The prisoners dilemma

Another threat to self-governing, sustainable management regime is the result of "prisoners dilemma" (Rapoport & Chammah. 1965). The choice of "economic man" is either to play the role of selfishness or to change the legal system. The logic of the situation is lack of cooperation between the collective traders (Mancor Olson. 1982 and R Axelrod. 1984). An important issue is therefor how to eliminate cross-pressure situations like the "prisoners dilemma". How could a regime of free play of marked avoid such consequences? Is it possible to build in frameworks which inevitably would cut the "Gordian knot"?

### 4.8. "The game of chicken"

"A prisoner" - who is "a chicken" - is choosing the legislation alternative. "The dominant prisoner", however, would neglect the warning signals of catastrophe and chose a non-sustainable management-strategy. Because the "chicken-way" is most expensive - by having the highest transaction cost - most possessors of Public Property Rights would possibly chose the road leading to catastrophe. According to common knowledge, solution of collective action presuppose that distributive decisions are being replaced by collective plurality decisions. (Jon Elster. 1985 p. 231-265).

The answer is to construct a new legal framework so as to build a more sustainable basis for rational private decisions.

### 4.9. A just and legitime solution

The sustainable management regime is part of the substantial question discussed at all times; how to stabilize social societies by means of human activity. The theory of balanced society is i.a. used for legitimating higher income tax and to remedy public dearth of money (J.K. Galbright. 1969). I am looking at the stabilization problem from a legal point of view; the use of legal framework for limiting human activity.

The legal way is of course, one among many remedies. In a situation of heavy cross-pressure, the problem of legitimating a policy creating a strategy for sustainable development, should not be overlooked. Given the tendency, first noticed by de Tocqueville (1835, 1951), for the modern state to convert political disputes into legal questions, a legal solution to the sustainable development-problem is either unexpected nor impossible.

## 5. ACHIEVING SUSTAINABLE YIELDS. LEGAL CONDITIONS. LACK OF LEGAL PROTECTION?

In the continuation I discuss the legal arguments which mostly appear to have fallacious consequences to Public Property Rights' legal protection. Legal protection is more than liability and compensation. It is also a question of due process of law, procedural rights, penal law protection, expropriation etc.

As indicated one solution to the problem of "free-riders", "the prisoners dilemma" and other problems dealt with in the theory of games, is to acknowledge legal protection to Public Property Rights. Roughly outlined the goal of sustainable management, may be achieved by means of sufficient legal protection to the possessors of Public Property Rights. In casu; does public and common property rights enjoy legal protection against feasible damage caused by multiple use of the sea? The question is whether or not Public Property Rights can be abolished without legal basis and compensation? This comprise internal fisheries conflicts as well as external conflict between fishing and other marine industries.

### 5.1. Theoretical difficulties

From a traditional legal theory point of view a Public Property Right is "no mans right" (Steffan Westerlund. 1988). According to Wetterstein, "there exist no rules covering compensation for the infringement of commons in different countries. The overall picture is that no such compensation is paid. The general opinion is that air, water forest etc. are common property [I.e. public property, the way I use the conseption here] (res communes) and that nobody has individual rights to them ... For this reason fishermen, etc. have often been refused compensation in cases of pollution of the sea" (Peter Wetterstein. 1990 p. 78). It is my impression that this conclusion is too pessimistic as regards the question of legal protection.

First of all: I think the theoretical points discussed in the preceding sections mainly is of "local" scandinavian nature. Even though Wetterstein is presenting a world-wide approach, I have not - outside the scandinavian legal area - found any sign of similar theoretical difficulties. Some examples:

> 21 owners of fishing vessels were granted - according to Common Law - compensation for loss of fishing-grounds caused by the petroleum industry (Lake Entrance Fishermen vs. Esso Exploration & Production Australia Inc. - arbitration, Supreme Court of Victoria at Melbourne - case no. 3260/76).
>
> Liability for the petroleum companies has been proved in the case of oil-spill catastrophes such as "Exxon Valdez" (arbitration) and "Amoco Cadiz" (Se Lloyds Maritime Law. North American edition Vol. 6, No 9 May 1, 1989 and judgement at District Court of Illinois of 1 november 1988 - MDL Docket No.376). Compensation was given i.a. for restoration of the environment.
>
> A french legal decision (Tribunal de Grande Instance de Bastia (Corsica) between "the fishermen of Bastia" and the industrial company Montedison & Sibit S.P.A - Judgement of 4. July 1985) recognized the fishermen claim of compensation for loss of fishing-grounds caused by littering of the sea-bed.

Not in any of these cases the thesis of "the detrimental competition argument", "pure economic loss", "loss incurred by third party", "lack of economic value" and "the floodgate argument" has suspended the liability for loss of Public Property Rights.

### 5.2. Does Public Property Rights enjoy private law protection?

According to common (nordic) legal wisdom Public Property Rights do not enjoy legal protection. "In the Nordic countries the criterion followed also seems to be that common rights in clear air, water and land are not protected by tort law. This is true even though economic loss can be proved, e.g. when fishermen experience loss of earnings since they are no longer able to fish in polluted waters ... Sometimes fishermen are nonetheless allowed compensation in different jurisdictions by reason of special legislation" (Wetterstein, 1990 p. 78 note 18. In the same direction Westerlund, 1988 p. 177).

These conclusions are - in my opinion - too pessimistic. As documented by Jan Kleineman.

1987, a general customary law development has taken place relating to the liability for pure economic loss, in Sweden and elsewhere. As damages striking Public Property Rights partly is a case of pure economic loss, the same tendency can be observed in this field (Örebech, 1991). Let us look at the arguments given for this not being so.

### 5.3 'The detrimental competition argument".

This argument is not void as it is neither distinguishing between fair and unfair interferences nor contribute an explanation of how pure economic loss is to be dealt with in the legal system (Kleineman, 1987 p. 281-82). The same conclusion can be drawn regarding the loss of Public Property Rights ( Örebech, 1991 p. 85 ff.). This argument can not be decisive.

### 5.4 'Pure economic loss"

"Pure economic loss" (non-physical damage) and "violation of physical integrity" (physical damage) is a main distinction in the law of damages. According to traditional knowledge the latter is subject to legal protection for damages, the first category is not. As damages hitting the enjoyment of free access resources is assumed to be outside the category of physical integrity, the Public Property Rights are not subject to compensation (C.A. Fleischer. 1983 p. 585). I disagree that the distinction between "Pure economic loss" and "violation of physical integrity" is solving any problem as to the question of liability or not (Örebech, 1991 p. 106. In the same direction, Kleineman, 1987.).

### 5.5. 'Loss incurred by third party".

In these cases the loss depends on an injury or damage suffered by a person other than the party that suffers the economic loss for which he wants to claim damage. According to norwegian legal theory compensation is not appropriate for this kind of loss (C.A. Fleischer, 1983 p. 586). Another norwegian is however saying that there was 'no acceptable reason that such loss in principle should be exempted from compensation' (Per Augdahl. 1983 p. 426). I agree to the latter author and conclude that this argument can not be decisive.

### 5.6. 'Lack of economic value"

Compensation can basically be claimed for economic loss. Non-economic damage is protected when based on special legislation, which, with few exemptions, is not present in the case of loss of Public Property Rights. This is why some authors conclude the way they do (Fleischer 1983, Westerlund 1988 and Wetterstein 1990).

However, what is crucial is to define the notion of pure economic loss. How to evaluate economic value? One point of view is to look at the damages influential on a persons desire to use or obtain money (Herman Scheel. 1893 p. 432). A more popular point of view is to observe whether or not the actual interest has got market-value. In the first case we are facing an economic value, otherwise not. As Public Property Rights is not tradeable such rights lack market-value. These rights are - in this theory - a non economic value, and hence not subject

to compensation. As it is impossible to draw a legally valid distinction between economic and non-economic values, such an argument might not be decisive regarding the question of legal protection.

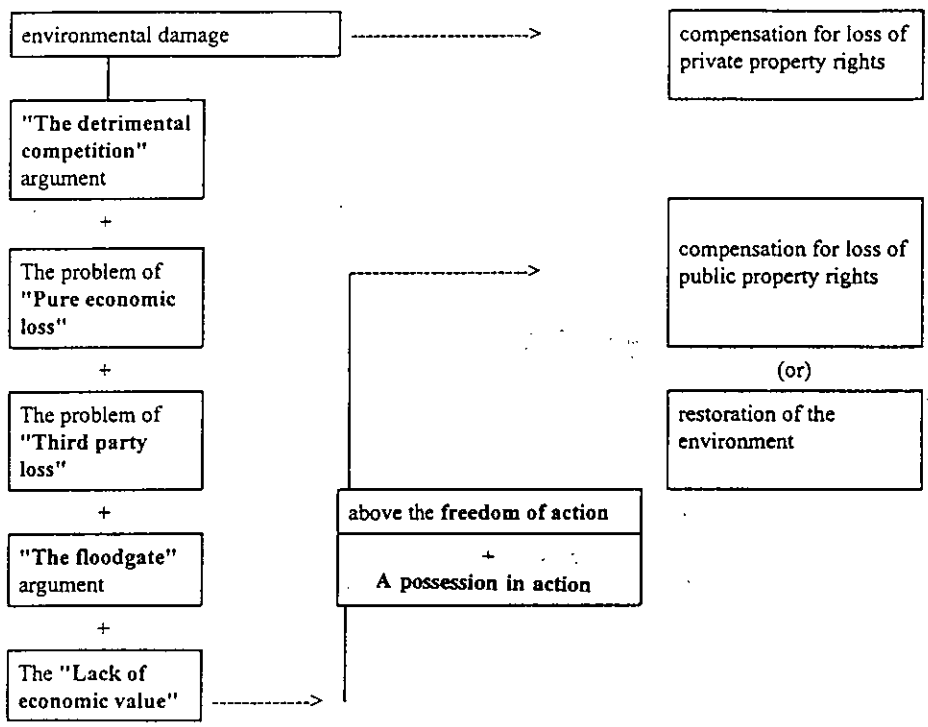
### 5.7. 'The floodgate argument"

This argument emphasizes the juridical-technical difficulties of delimiting liability for loss of Public Property Rights in cases of mass injuries i.e. single instances of tortious conduct that might cause damage among a large class of plaintiff. By this reason compensation could not be awarded for loss of Public Property Rights (Wetterstein. 1990 p. 79).

The argument is not convincing. Only those who de facto have exploited the resources is subject to legal protection, e.g. compensation. People having fisheries, picking of wild mountain berries etc. as an hypothetical possibility, are not in the status of being subject to Public Property Rights. They are, not at all, possessors of rights (Örebech. 1991 p. 176).

Any way; the floodgate argument is not decisive as legislation could prescribe all plaintiffs to make joint action e.g. by means of american law institute of class action (Örebech. 1991 p. 174-175).

fig. 5: Legal protection to Public Property Rights: Some legal difficulties:



## 6. THE PUBLIC PROPERTY RIGHTS: SPECIAL CONDITIONS TO OBTAIN LEGAL PROTECTION

Possessors of Public Property Rights are not in general subject to legal protection as several conditions must be fulfilled. In this Chapter I shall briefly outline the main conditions.

### 6.1. The freedom of action

Activity exceeding the common freedom of action is forbidden. This is the concept of unlawfulness. The question of unlawfulness is decided on the basis of customary law or special legislation. A lawful action which detriment Public Property Rights, is not subject to liability of any kind (Örebech. 1991 p. 196 ff.).

### 6.2. The participation requirement

Public Property Rights differ from Private Property Rights as possessors of the latter do enjoy legal protection even if the property is not being utilized. As regards the Public Property Rights, it is quite opposite as the possessors participation in the exploitation of the open access resource, is compulsory. That is; the open access resource must be in use so as to make evident that the right has been exercised. Otherwise no legal protection can be claimed. A non-utilized Public Property Right is subject to termination without compensation and liability for anyone.

The utilization must be firm; it should be carried out with certain stability and intensity (The Norwegian Supreme Court of Justice, Norsk Retstidende (Court of Justice Report) 1969 p. 1220 and 1985 p. 247). If so, Public Property Rights do attain legal protection.

## 7. CONCLUSION

According to anglo-american, french and norwegian case law, legal subjects utilizing Public Property Rights do - under certain conditions - enjoy legal protection. Some important externalities have then become private costs. The increased liability does substantially improve the Market system as a distribution mechanism of free access resources. By the adoption of a new legal system transforming externalities into internalities, humanity is directed towards a sustainable society.

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