Public, Common or Private Property Rights:
Legal and Political Aspects

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

A Presentation

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. 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.

First of all, the question of methodology. In Norway legal protection of open access resources is a product of public as well as private law decisions, the double traced system.

Figure 1: The legal framework, the double traced system (imaginary examples)

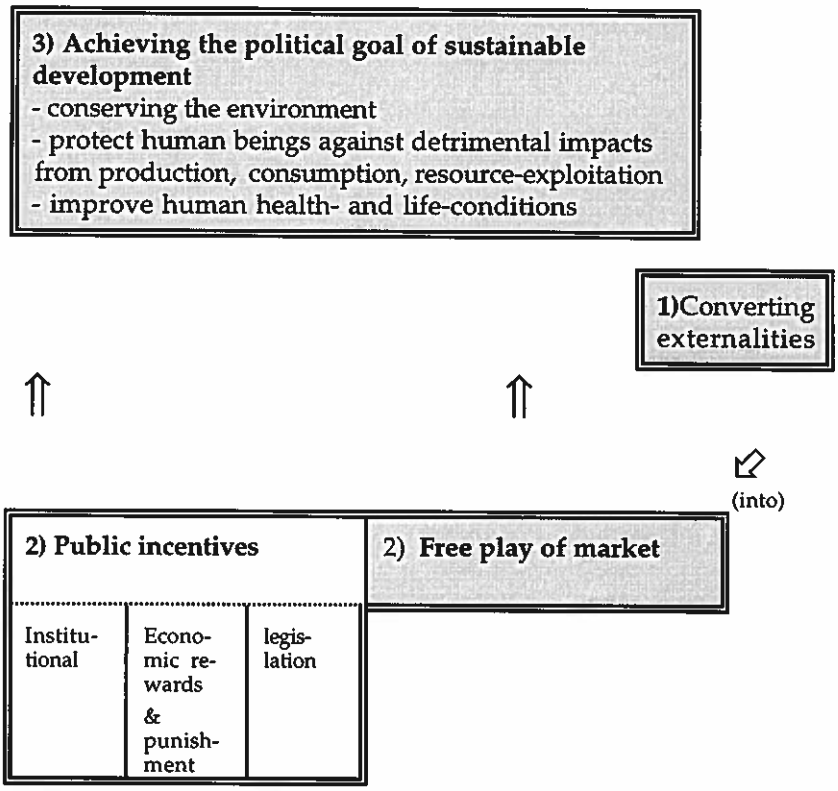
	Public law	Private law
de lege lata:	provisions of sustainability, ex. polluter pay	customary law public property rights protection
de sententia ferenda:	an evolving rule - new policy, ex. pre-cautionary principle	legal protection is emerging, not yet in strict legal terms
de lege ferenda:	decisions ought to promote sustainable goal	strong reasons for promoting a basic principle of sustainable yields

In legal terms the question is whether a **legal** principle of **sustainability** does exist. Mostly I think not, simply because few states do promote a statutory provision of sustainability. In the opposite case, however, it might be said that the principle is by character political or at least that the principle does not point out any specific legal liability or right for someone in particular, because of lack of explicitness. What is at stake then, is to elaborate principles **which possibly might** promote sustainable development. In the absence of *de lege lata* provisions, it is necessary to dig into municipal case law, *in casu* the principles of **Public Property Rights** (*Res communes and res nullius*).

Since emerging customary principles is the case, the court case law must be examined. The important task is to classify the discoveries. Do we face a *de lege lata-*, a *sententia ferenda-* or a *de lege ferenda-* situation? In the case of Norway, Public Property Rights do, under specific conditions, enjoy legal protection. That is also the case under American and French law. Another problem for elaboration, is the use of instruments. Is public command and control or incentives the answer, or do we have to rely on a modified free play of market model? At this stage, it is sufficient to mention that the achievement of

objectives does alter according to the instrument being used and the level of decision-making (fig. 2).

Figure 2: Instruments to achieve political objectives

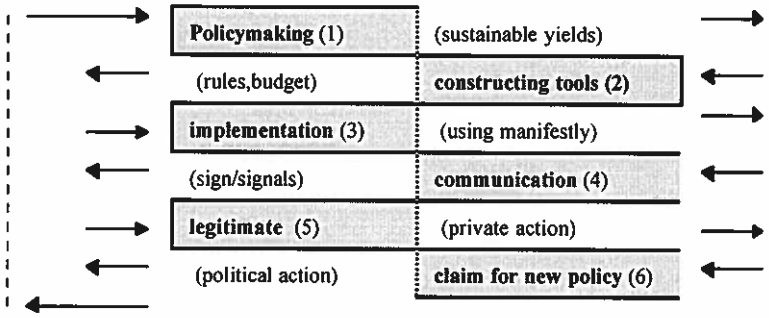


Public Choice or Atomized Choice? Market - or Non-market Decision Making?

"The tragedy of the commons" (open access resources) is 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. have survived for centuries without any governmental body managing the common pool resource without over-exploitation. (David Ralph Matthews, 1993). Why?
One popular answer to the "tragedy" is the necessity of political control through a governmental body. This is more easily said

than done, as getting stuck in the management labyrinth is a close possibility:

Figure 3: The management labyrinth: The phases (conditions) which have to be fulfilled; otherwise failure



Another theory is converting Public Property Rights into Private Property Rights. Anthony D. Scott (1989:11) is describing the march towards the quota and license-based fisheries. The exploitation of resources is licensed and the licenses are being tradeable - see R. Hannesson 1984. 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-scheme, 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 are the conditions for making self-governing conservation regimes work? My basic idea (Ørebech, 1991), is - as also well captured by Victoria Curzon-Price (1991:28). - "that if the right of private individuals to clean air, water etc. was 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 intention 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 bust 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: 115-120).

The possibility of achieving sustainable yields by means of free play of market, depends on whether Public Property Rights enjoy legal protection (fig. 4). If - I anticipate that decisions having environmental consequences are 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 discusses 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: 26).

The evolving Market System - as a basic resource distribution mechanism - and the shrinking state intervention system (often called the welfare-state model) necessitate 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.

Is the public sector an outdated regulation mechanism? Lots of sustainable development-theorists still seem to emphasize the importance of political control to achieve a balanced society of ecology. Is such a conclusion based on pure intuition? Håkan Hydén once said: The possibility of adjusting the ongoing development by means of public control and command, depends upon whether the efforts made are corresponding to the present "rules of the game". To day the legitimate answer is "market". The possibility of adjusting the direction lies within a redefinition of market distribution mechanism.

Common and Public Property Rights: What is it? A Contribution to the Making of Analytical tools

Obviously some scientific disapproval on "the tragedy of the commons" is to be written on the account of confusion of ideas. When using the notion Common Property Rights, does the author think about "open-access" or "closed-access resources"? Gordon (1954), Hardin (1968), Munro (1982) and Wetterstein (1990) refer to "common property" - which in Anglo-American legal tradition does symbolize a joint utilized closed access resource - but seem to deal with the theoretical problems of Public Property Rights, i.e. an open access resource.

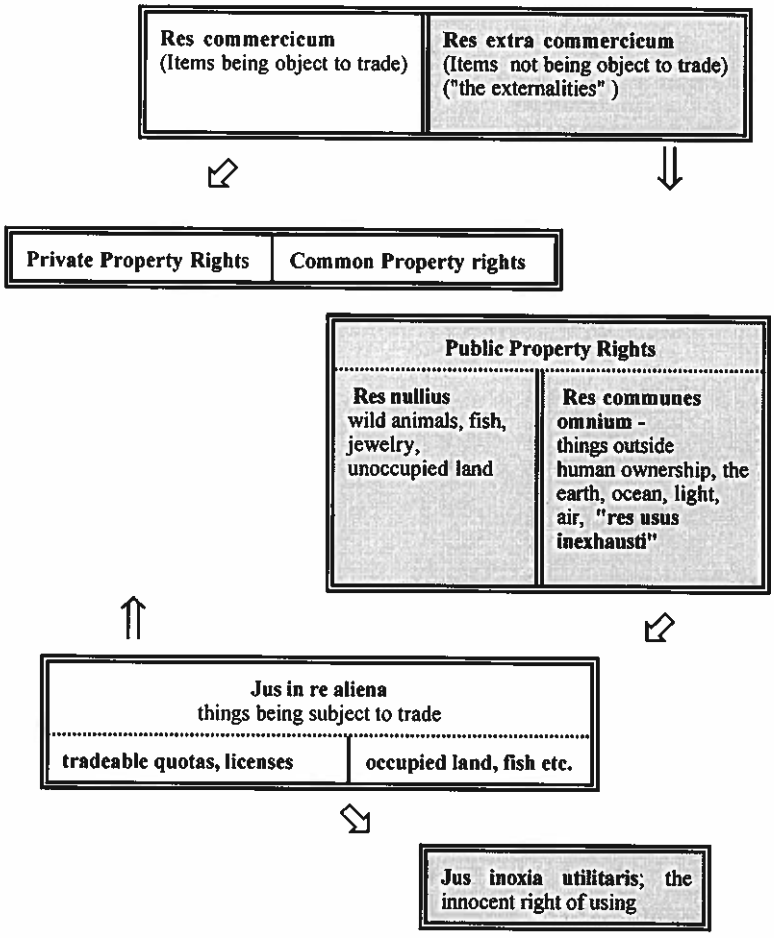
What are "Common Property Rights" and how to understand and manage these rights? The Common Property Rights problems have for years been subject to interdisciplinary studies under The International Association for The Study of Common Property, which - as a goal - has obtained the

"deeper understanding of how and why institutions of common ownership can manage resources in an equitable and sustainable way" (IASCP, 1993: 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, does need a precise conceptual basis. Otherwise we will never achieve the "deeper understanding".

Where to start? Does ancient law offer 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 therefore rely on these Roman legal notions.

Figure 4: The Roman law notions of rights



Objects (lat. Res) are things, material or immaterial things. According to Roman Law two main categories of objects exist: **Res commercicum** that is, ordinary goods having market value. **Res extra commercicum** ("the externalities") are objects not subject to market transactions nor a market value. These are inalienable. One solution to "the tragedy of the commons" is to privatize "the commons" i.e. the transformation into **Private Property Rights**. This is the carrying idea underlying transferable fisheries quotas. Hannesson, 1985 "dismantle" the tragedy by terminating the commons. No commons, no tragedy of the commons! (fig.4, 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 include two different kinds of legal objects: "**Res nullius**", being the name of wild animals, fish in the ocean, jewelry and unoccupied land (Henry Sumner Maine, 1891:245). 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: 310), that is the "**res usus inexhausti**" - the inexhaustible values (Fredrik Chr. Bornemann, 1863:105-106). 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: 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 labelled as "Common Property Rights". It is unlikely to believe that the lax conceptual use of the word would bring us the deeper understanding we are striving for.

Anglo-American Common - and Public Property Right Notions

So, what is it, the notion of Public Property Rights? Are we able to dig deeper into the conceptual landscape? Anglo-American legal theory is referring "public rights" to the usage of open access resources. (See e.g. Lawrence C. Becker, 1977 and A.V. Lowe, 1986:1 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 should not be intertwined 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, 1974:215). Presumably the "public rights of fishing" are based upon the Kings ownership to the

seabed of rivers, bays and fjords (Ørebech, 1988:134). 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.

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 is 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 is a realistic attitude, depends on the legal protection being offered. As concluded in my study of Norwegian legislation (Ørebech, 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 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 rights' legal protection might provide the necessary stepping stones for achieving self-governing sustainable societies.

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

The Social Context: "The Free-rider" and other Difficulties

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

A prerequisite: The selfishness of human beings

The self-interest of human beings is a "free play of market" motive power (Adam Smith, 1793). A new regime of sustainable management must take advantage of this selfishness. How to direct selfishness towards a sustainable self-governing regime? Do protected Public Property Rights direct private "selfish" decisions towards sustainable yields?

A minimum condition for having "the market 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.

The coase theorem

Apparently the free play of market 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 an optimal level

of resource deployment (Coase, 1960). The optimal market outcome is either resulting from more correct decisions or through creation of a 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 market value.

Social justice

John Rawls (1972) is 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.

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. These basic needs governed by Public Property Rights regimes do have a special legal status.

Values protected by inalienability rule are not due to market transfer. Nobody might bargain on behalf of mankind concerning the ozone layer destruction. Even though inalienable rights are not subject to trade and accordingly have no market-value, the possessors are at liberty to assert their rights.

The free-rider

"The economic man" is a presupposition for the logic of free-riders in the play of freemarkets. The theory of games is 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: 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. 5). Property- and liability-rules oblige aggressors to keep out and pay damages by transfer of rights.

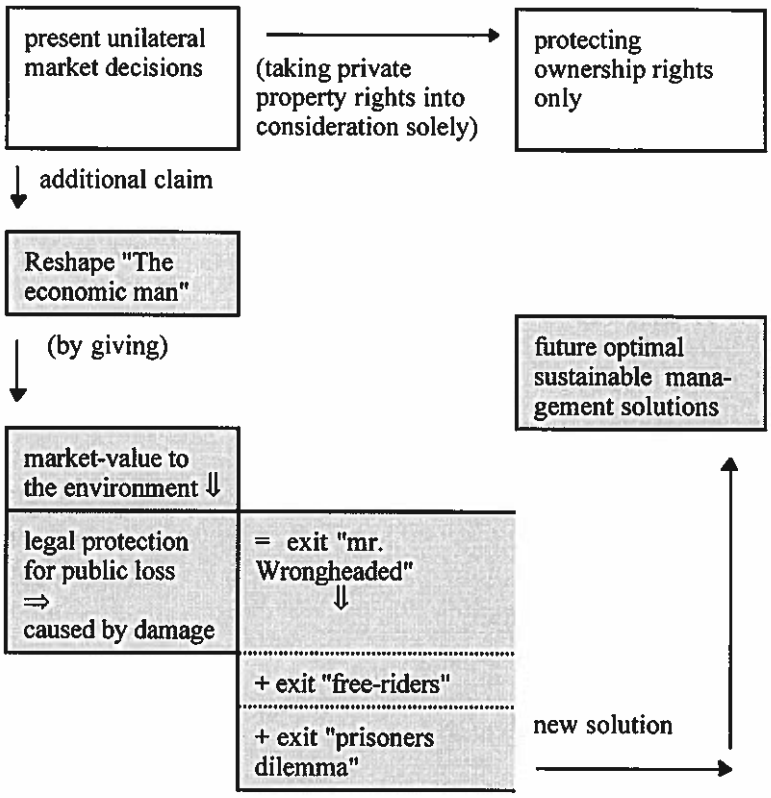
The prisoner's dilemma

Another threat to self-governing, sustainable management regime is the result of "prisoner's 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 therefore how to eliminate cross-pressure situations like the "prisoner's dilemma". How could a regime of free play of market avoid such consequences? Is it possible to build in frameworks which inevitably would cut the "Gordian knot"?

"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: 231-265). The answer is to construct a new legal framework so as to build a more sustainable basis for rational private decisions.

Figure 5: Directing private market decisions towards sustainable management: Presuppositions which must be fulfilled



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 neither unexpected nor impossible.

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 prisoner's 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.

Theoretical difficulties

From a traditional point of view a Public Property Right is "no mans right" (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, forests etc. are common property [i.e. public property, the way I use the conception 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" (Wetterstein, 1990:78). 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, under the citizen suits systems.
>
> 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's claim of compensation for loss of fishing-grounds caused by littering of the sea-bed.

None of these cases relate to the thesis of "the detrimental competition argument", "pure economic loss", "loss incurred by third party", "lack of economic value" or "the floodgate argument". The myths of legal science have not suffocated the legal protection of Public Property Rights.

Do Public Property Rights enjoy Private Law Protection?

According to rather widespread 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, 1990:78, note 18. In the same direction Westerlund, 1988 :177).

These conclusions are myths rather than reality. 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 (Ørebech, 1991). Let us look at the arguments given for this not being so.

"The detrimental competition argument"

This argument is not valid 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, 1987:281-82). The same conclusion can be drawn regarding the loss of Public Property Rights (Ørebech, 1991:85 ff.). This argument can not be decisive.

"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 are assumed to be outside the category of physical integrity, the Public Property Right is not subject to compensation (Fleischer, 1983:585). 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 (Ørebech, 1991:06. In the same direction, Kleineman, 1987).

"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, 1983:586). Another Norwegian is however saying that there was 'no acceptable reason that such loss in principle should be exempted from compensation' (Per Augdahl, 1983:426). I agree to the latter author and conclude that this argument can not be decisive.

"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 exeptions, 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 person's desire to use or obtain money (Herman Scheel, 1893:432). 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 are 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.

"The floodgate argument"

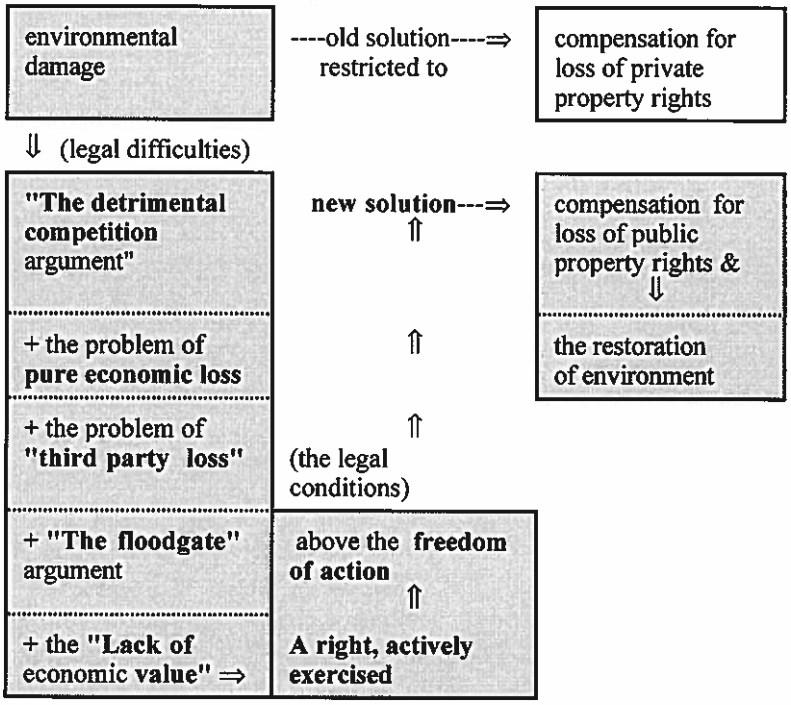
This argument emphasizes the juridical-technical difficulties of delimiting liability for loss of Public Property Rights in cases of mass injuries i.e. single instances of tortious conduct that might cause damage among a large class of plaintiffs. By this reason compensation could not be awarded for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

The argument is not convincing. Only those who de facto have exploited the resources are 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 (Ørebech, 1991:176).

Anyway; 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, i. e. citizen suits, enforcement suits and natural resource damages suits (Ørebech, 1991:174-175).

Figure 5: Legal protection to Public Property Rights: Some difficult legal theory requirements



The Public Property Rights: Special Conditions to Obtain Legal Protection

Public Property Rights possessors are in general not subject to legal protection. Several conditions must be met. In this section I shall briefly outline the main conditions.

The freedom of action

Action exceeding the common freedom of action is illegal. I.e. the concept of unlawfulness (Denmark & Norway "rettsstridighet"). 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 (Ørebech, 1991:196 ff.).

The participation requirement

Public Property Right's legal protection presuppose actual participation or exploitation. This is contrary to Private Rights, which do enjoy legal protection even if the property is not being utilized,. 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 stability and intensity (The Norwegian Supreme Court of Justice, Norsk Retstidende (Court of Justice Report), 1969:1220 and 1985:247). If so, Public Property Rights do attain legal protection.

Conclusion

According to 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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