CAPÍTULO VI

"LAW OF ENVIRONMENTAL COMMONS: BEYOND PUBLIC AND PRIVATE": RESEARCH PRESENTATION

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INTRODUCTION: PROPOSAL AND CONTEXT

Through this text, our goal is to present, very briefly, the project entitled "Law of Environmental Commons: beyond public and private" (*Direito dos bens comuns ambientais: para além de público e privado*). The focus is not to explain its conclusions but presenting its goals and showing why we consider this approach relevant for the studies on Environmental Law. By doing this, we intend to discuss how this research relates to our vision regarding the *Theory of Environmental Law* and its task as discipline and/or as a field of study and research by the lens of the commons.

This project was presented in two other events, at Florianopolis/Brazil[1] and Lima/Peru[2], partially modified. During the *II Seminário Direitos Humanos e Sociedade*, entitled "*Direitos Humanos, Estado Democrático e Direitos Sociais*", the project was presented relating the problem of commons with the issue of human rights. The project is linked to the Research group *Direito Ambiental Crítico* / DAC (or: Critical Environmental Law), which has as a hallmark the intersection between Environmental Law, Theory of Law and Political Ecology, among other disciplines. The research is developed in *Universidade de Caxias do Sul* (UCS), a University from the State of Rio Grande do Sul which provides master and doctoral degrees in Environmental Law[3].

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1 The Summer School Brazil/Australia was held between 27th November and 7th December 2017 at Federal University of Santa Catarina (UFSC). SILVEIRA, Clóvis Eduardo Malinverni da. The Study of Law and Environmental Commons: a proposal by research group DAC. *In*: LEITE, J.R.M; MELO, M E.; RIBEIRO. H. M. (Orgs). *Innovations in the Ecological Rule of Law*. São Paulo: IDPV, 2018, p. 110-130.

2 The XVII Biennial Conference of the The International Association for the Study of the Commons (IASC), entitled "In Defense of the Commons: Challenges, Innovation, and Action", was held in Lima, Peru, from 1th-5th July 2019. SILVEIRA, Clóvis Eduardo Malinverni da. The Research Project "Law of Environmental Commons": Beyond Public and Private. 2019. *Anais do XVII Biennial Conference of IASC* (The International Association for the Study of the Commons): "In Defense of the Commons: Challenges, Innovation, and Action". Lima, Peru. 1th-5h July 2019. Disponível em: <http://dlc.dlib.indiana.edu/dlc/handle/10535/10610>. Acesso em: 14 nov. 2019.

3 The submitted proposal for creating a doctoral program, implemented in 2017, demanded to explain and to justify the lines of research, according to the history of the Course

The project addresses the problem of the commons applied to Environmental Law. The term "commons" is interdisciplinary and touches on key issues, concerning: a) the possibility of living together, using and sharing natural and symbolic resources in a sustainable manner; b) the need to understand ecosystems, biodiversity, cultural heritage as something else than properties or commodities – and yet something worthy of legal protection. From our point of view, the "commons' problem" is both theoretical and practical and inspires deep reflections on the purpose of Environmental Law Theory. For this reason, we formulated a research project that could, at the same time:

a. understand/problematize various theories and concepts about the commons, useful to all the researchers;
b. apply these theories to help us analyses concrete legal issues and categories;
c. use case studies to reinforce theoretical discussion.

Prior to starting more applied studies on the subject, it is necessary to organize the terminological field, and understand the conceptual roots of the "common", either understood as the utility of all; the wellbeing of a community; a good of shared use; a community jurisdiction or some

and its agenda for the next years. It was an opportunity for conceiving a new group of research. The first line of research, in UCS' master's and doctoral programs, is related to *public policies and economic [sustainable] development*. The second one deals with *environmental rights*, that is, the protection of rights related to the environment. Even though many of the main environmental themes (water, energy, biodiversity, and so on) can be discussed, *a priori*, from these two points of view, these two lines are very different in its proposals, as well as in an epistemological direction. In *line 1*, the prevalent perspective is that of the State and its duties, and its guided by the proposal of evaluating current policies and formulating new ones. In *line 2*, the point of view is that of the society – that is, the proposal is defending rights of the society as a hole, social groups and the citizens, and the environment itself. The research group DAC is mostly related to the line 2 above, and studies environmental rights from both perspectives, that of the Environmental Law, in a restricted sense, and that of the Theory of Law. For this reason, the newly created group dedicates his efforts, since March 2017, to study *Theory of Environmental Law*, trying to bring these two areas together.

conception of democratic actions around common interests. For this reason, the project was conceived as research of a theoretical nature, which has no immediate application in terms of public policies or justice system; instead, it aims to construct a theoretical framework, providing tools for other studies, subsidizing researches of a more restricted subjects and more practical studies and applications.

The research was conceived around three logical steps. First, to compare all the main meanings of the terms "common", "commons", "common good", "common goods" in the history of thought, seeking for its possible significance to the environmental law, in both theoretical and practical senses. Second, to develop theoretical tools to analyze cases and specific topics of Environmental Law, especially in the sense of revealing the implicit meanings of the legal categories and the way they are applied in concrete issues. Third, developing case-studies and using the findings to enrich theoretical and conceptual discussion about the commons and the limits of environmental law. This panoramic description shows how this methodological proposal is consistent to a critical approach on the Environmental Law Theory, which we consider to be urgent, more than useful.

THE ENVIRONMENTAL LAW AND THE COMMONS (OR: LAW OF THE ENVIRONMENTAL COMMONS)

The research project deals with the possible meanings of the terms "common/commons/common goods", reflecting about the meaning of the "private" and the "public" spheres, since the advent of legal modernity, but also considering the echoes of antiquity and medieval period. It was thought as the basis of an epistemological proposal around the *commons* as a key issue for Environmental Law: not only in the sense of protecting the commons through law, but also as a project to rethink the task of the Environmental Law Theory, as a discipline or field of study.

Protecting the environment is protecting the common ground of living – that is, social and natural foundations of life, material and symbolic aspects of existence. That's the reason why it is necessary to clarify the history of human thought on the "common(s)", looking for its possible uses in the theory and practice of Environmental Law and, above all, on the protection of the rights related to the environment.

In this research, we agreed to call *Law of the environmental commons* the study of Environmental Law, thought as legal protection of the "commons", that is, common goods of material and symbolic nature; common values; common knowledges and common/collective political action, directly or indirectly related to the protection of the environment, in the broad sense.

The central assumption is that these goods, values, knowledges and forms or organizing social life, once based in some form of solidarity or co-responsibility, shared production or fruition, are (each day more) subjected to abusive expropriation or silent degradation, by both private and state action. We should take the examples of natural resources in general, ecological processes, culture and knowledge, biodiversity, the quality of human life, work environment, urban environment, among others.

Thus, we assume that the *commons* is a key term to investigate human thoughts, human action and the institutional justification for the aggressive processes, which are leading us to a collapse of ecological foundations of life and of social institutions. This approach may contribute to an incipient *Theory of Environmental Law* (or an *Environmental Theory of Law*?) whose task is *to formulate a systematic understanding of the difficulties that modern rationality and legal-political institutions usually create, concerning the enforcement of so-called rights to the environment*, particularly in Brazil, but also in comparative law and international law.

The theme of the *commons* has a special impact on the functioning of the research group, since the most applied studies, related to the specific themes of environmental law, use the procedure of "mapping" the discourses on the commons, as a theoretical reference for their reflections and arguments. If we look at the studies of the research group members, this pattern can be

observed in many subjects, as biodiversity, regulation of new technologies, social exclusion due to urban planning, water resources, environmental impact assessment, hydraulic fracturing, petroleum, extractivism, agriculture and even the federal budget or public services in general.

The *commons has been* conceptualized in many ways: as a self-governed system of managing resources; as a political category; as a wealth belonging to society and so on. In all those issues mentioned above, the problem of the commons is always there, implicitly or explicitly.

Some cases reveal the paradoxes of State action in environmental management, when economic power is a determinant factor and the discretionary power of the public administrator has no limits. It happens in such a way that is inevitable to conclude that the State, and public institutions in general, often became a private tool. Economic powers (both private companies and foreign public companies) use public institutions to guarantee concentrated gains, with the depletion of constitutional rights of people.

There are many examples of how the subject of the "commons" contributes with other individual studies and even research projects related to the group, in such a way that the proposal is being able to congregate many other efforts and subjects, creating a positive dialogue and offering new challenges.

THREE STEPS OF THE RESEARCH PROJECT

The proposal of the current research project was formulated through three specific tasks, which are three logical moments of the research. In short, we intent to develop the following:

a. a cartography of concepts about the commons, as it appears in the literature;
b. an analysis of legal categories which embodies the problem of the commons (especially in Brazilian legislation, but also in international norms and comparative law);

c. case-studies that may allow us to understand the concrete meaning of these legal categories, asking if and how they promote and make viable "enclosuring" processes of the commons or, alternatively, if they protect systems of shared benefits on natural and cultural wealth.

These moments are not strictly chronological: once each one feeds the others, they can and shall overlap. The first task is the starting point; however, once the process began, case-studies (step 3) lead again to step 1, and so on cyclically.

a. The first step is mapping the commons, that is, reconstructing the main uses of this concept (and its related expressions) in the history of ideas (in philosophy, theology, politics, law, economics, among other subjects and disciplines). This kind of study is justified because hybrid uses on the term "common" (mixing different meanings and theoretical traditions) usually produces misunderstandings and erroneous conclusions. It also confers false legitimacy to certain ideological contents, to the detriment of others. Since it tried to map a plot of concepts, usually confused by legal literature, this founding research serve as a basis for studies committed to more practical results and with more evident social utility, in specific legal matters.

Radically different meanings – yet communicated in some way – can be found, for example, in Aristotle (1998) and Cicero; in a political-theological sense in Santo Agostinho (1996) and St. Thomas Aquinas. In humanities, there are a plot of expressions related to the roman radicals *Cum* and *Munus*, which integrate the expression "common".

Expressions like *common good*, *common goods*, *the common*, *the commons*, *commonwealth, common law*, *common sense*, and so on, derives from the same radicals, but acquired completely different meanings. The word "commons" has a certain meaning when referring to customs, specially from traditional popular culture (Thompson, 1998), and the way it relates to law and rights. A long tradition refers to the legal meaning of "res communes" in Roman law, and it is crucial for understanding the regimes of property in

XXIth century, what was added and what was lost. Historical "communist" movements and intellectuals of all kind consider different meanings of what the "common" is.

One of the most effective critiques of private appropriation and "commoditization" of the commons comes from the concept of "enclosure". This notion which alludes to the *Enclusure Acts of English Parliament*, occurred between the 17th and 20h centuries, which turned land previously held in common into private properties.

The general idea is that these processes where not only violent and abusive, but rendered possible the primitive accumulation, present in Marx's early (2017) and late (2013) writings; however, the accumulation continued to be extended to other areas, becoming a central phenomenon nowadays. Harvey (2003) called "accumulation by dispossession" this need from of destroying to accumulating, typical from capitalism epoch. Several prominent authors somehow address the problem of the "new enclosures", "silent plunder" or "theft" of commons, analyzing violent and abusive appropriation of environment, culture and knowledge – like Boyle (2008); Bollier (2003); Klein (2001); Ricoveri (2012); Shiva (1997); Hart & Negri (2001; 2014; 2016); Zizek (2012).

Economists like Nobel prize Elinor Ostrom (1990) have shown that collective management of common resources can be more efficient and sustainable than the logic of privatization. Many authors oppose in a consistent way the famous *Tragedy of Commons* de Hardin (1968) – like Heller (1998) and Gordillo (2006). The protection of the common goods or resources of all humanity may be considered the great challenge for Politics and Law in the XXIth Century. The discussion on "commons" is at the heart of cutting-edge topics of law and social sciences today. For example, the theme of the "global public goods" and the international cooperation (KAUL; GRUNDBERG; STERN, 2012) is an attempt to address the issue from a specific point of view, which is criticized by many as a depoliticized perspective (LAVAL; DARDOT, 2014, pp. 485-487).

There are several traditions, and dozens of lines of reasoning around these terms, which are crucial for our subjects of study, and are commonly used in a hybrid form. In addition to a terminological confusion, this conceals illegitimate or arbitrary ideological contents, and masks the real meaning of the discourses, especially in decision-making processes.

In a preliminary bibliographic research, we find some few but very well-succeed attempts to do this kind of mapping, like Laval e Dardot (2014) and or Linebaugh (2014). However, our scope is to bring this discussion to the field of environmental law. Based on exploratory bibliographical and documental research, we intend to systematize, for didactic purposes, the various etymological meanings of the *commons* that apply, directly or indirectly, to Environmental Law. This cartography serves as a basis for case-studies in specific legal matters, of all members of the group.

b. The second step is mapping legal categories and rhetoric notions which contains the problem of "common" in Law; that is, understanding how the ideas about the common are reflected in the current legal rationality and discourses. Or in what way certain contents reverberates in the formulation and application of legal categories, whose declared or assumed function is the protection of environmental goods, as the "common good of the people", "social function of property", "diffuse interests", "public goods", "environmental services", and "ecological risk".

The proposal, then, is to analyze central legal categories of environmental law in the light of the main traditions and academic debates that converge on the common or related expressions (or that take the problem of the common as a starting point). The procedure here is no longer synthetic, but analytical, revealing contents that do not appear explicitly. The starting point, however, is the mapping as carried out in the context of the first task. This will allow us to understand the legal categories from the point of view of the results produced.

For example, the environment, according to the Brazilian Constitution, is intended for the "common use of the people". Thus, it can be

considered as a "common", in the sense that it is not a public good (a wealth which belongs to the State), but it is not a private good, also. It's a heritage that belongs to the society (to the Brazilian people, if we took the territorial basis of law, having all mankind as a beneficiary). Strictly speaking, it cannot belong to anybody, neither to an institution, nor to a private person, and it's supposed to be protected as so. Certainly, this legal concept works at the level of an ethical argument. However, environmental protection is consistently less effective than the protection of private property. We should ask how, and why, and this is a promising path.

On the other hand, the State, which is designed (or, at least, expected) to protect public goods and values, often becomes a mechanism for private appropriation of these same goods and values whose defense is their duty. This theme certainly requires approximation between the Theory of Law and the Social Theory, and converges with traditional debates, such as the (neo-Marxist) concept of *accumulation by dispossession* (Harvey, 2003), and the notion of "market society" (Polanyi, 2000), for example. This proposal demands a return to the study of property, answering how the exercise of property rights, in legal modernity, implies the degradation or emptying of common, social or collective rights. It fits very well with an historical approach, in a way to discover that legal institutions, commonly presented in an ahistorical *aura*, was created or reformulated according to certain interests and needs.

c. The third step is using these "mapping" of the commons as a tool to study cases and concrete issues, that is, to carry out applied studies from the perspective of the mapped categories. The proposal, therefore, is to investigate how legal (and political) terms are used in decision-making, echoing these traditions, formed around the problem of the *common*, in a decisive manner.

A simple but enlightening example is that concerning the Convention on Biological diversity and the Brazilian law (lei 13.123/2015). The Law 13.123/2015 *regulates* "access to genetic resources and associated traditional knowledge and benefit sharing for the …sustainable use of biodiversity", according to the Convention of Biodiversity. The Law defines generic heritage

as a common good, which is intended for the use of all. It echoes the way that Roman law classified goods, as a *res privatae* (private goods); *res publicae* (public goods); *res nullius* (nobody's goods, goods which belongs to nobody yet); *res communes omnium* (common goods, or goods which belongs to everybody).

History of law reveals that modern State empowers the right to property in a unique and unprecedented way. It's the most consistent of all rights, we should say it is the DNA of our law systems. The public institution, in modernity, was turned into a legal person, in a certain way that public goods has a private form, or the same legal structure of commodities, which are bought and sold. The *res nullius* is a private property, temporarily without an owner, but also reflecting the structure of commodities, since are destined to become private anytime. The common goods, which had been forgotten by modern legal systems, return in the last decades as things (or values) that cannot assume private form, because have no owner, not even a (public) legal person. But this occur mostly in a rhetorical scope, because of the way our legal institutions function.

Using Roman Law categories, it becomes clear that the biodiversity, the genetic heritage and the traditional knowledge, are not really treated as commons, by the law 13.123/2015. If we look closely, although these goods and values are rhetorically called commons, they are in fact *res nullius*, that is, things waiting for its owner. That is not what the law says explicitly, but that's what can be read in the details, in an implicit form. Instead of establishing *common* rights over these goods – rights of communities, concerning a shared use, production, fruition or protection, the law organizes its economic exploitation. Even if we share economic benefits of these exploitation in a fair way (which certainly is not the case), this procedure reproduces a logic by which the world is a collection of commodities, and the law is a tool build to organize its exploitation. All the concerns about ecological functions and the importance of common knowledge appear mostly as a moral discourse, with no juridical guarantees.

For instance, if the authorities seek to justify that the law was approved without consulting indigenous and tribal people, in disagreement with International Labour Organization (ILO's Convention n. 169), they might use the term "common good", or another analogous expression, like *public good*, *common interest,* or even *national interest* This usage of "common good" as a "political-theological" notion, derived from a certain intellectual tradition, promotes, according to Laval e Dardot, antidemocratic postulates. In Aristotle the "common good" was something fair and beneficial to all. In Cicero, the Roman Consul, we can find the distinction between the benefit of people and the benefit of public institution, but the people's benefits prevail over the benefits of the State. However, in the fourth and fifth century it happens a reversal of priorities: "to pursue what is useful to the community" became a kind of a justification to submit the community wishes to the benefit of the State. There is a large tradition in both Political and Theological philosophy dedicated to subjugating the "common benefit" to the will of a certain authority, whether it be civil or ecclesiastical, depending on the epoch (LAVAL; DARDOT, 2014, p. 28-32).

Therefore, the expression "common good" should be read, most of the time, as a code message for *imposing* a decision with no legitimacy, or even an illegal or unconstitutional issue. That is the case, concerning disrespect of principles and procedures for participation and consultation of indigenous people (ILO's Convention n. 169) and many other matters, when public authorities "choose" the rules they want to enforce or leave without effect. The authority doesn't justify its decisions anymore, once it monopolizes what is good for the society. If a justification is made, it can no longer be contradicted, since it is the expression of the common good.

This topic, in addition to the previous experiences of the researchers, gave rise to the research project entitled *"Genetic heritage and associated traditional knowledge: analysis of the researchers' perception of public and community universities on the new legal requirements of access and benefit sharing"*, which has been developed with the support of Brazilian agency CNPq (which is part of the Ministry of Science and Technology) since February 2019.

This Project is developed with rigorous analytical methodology (it includes applied research regarding the purpose, exploratory in relation to the objectives and the mixed approach (quanti-qualitative) regarding the procedures. The goals are: a) describing the national legal scenario and international cooperation that involves access to genetic resources and traditional knowledge through bibliographic and documentary research; b) collecting data on the perception of the Federal and Community Universities in the state of Rio Grande do Sul, with activities covered by Law 13,123/2015, regarding obligations established in the norms for the management of genetic heritage, as well as the access to associated traditional knowledge (this date will be produced through interviews and questionnaires, answered respectively by managers and researchers of those universities); c) assess the extent to which the criticism and resistance of the researchers find support in the norms, in order to generate content for future awareness and legal support in understanding and complying with the legislation.

Although this is an autonomous project, it articulates with the main project about the commons. The study undertaken here provides very interesting data for the theoretical reflection on the common goods, and the conceptual tools derived from the study of the commons are very useful to study the Law 13.123 /15. Genetic resources and heritage, as well as traditional knowledge, are (or should be) itself *commons*. The way researchers understand their own duties concerning these resources is an essential part of their protection.

DISCUSSING THE COMMONS IN ENVIRONMENTAL LAW THEORY

Therefore, what do we mean by *Environmental Law Theory* and why it concerns the *commons*?

First, the way we imagine it, *Environmental Law Theory* is not a synthesis of the law expert's opinions, neither a description of the case law. But it is not a merely speculative knowledge, also. The proposal is trying to

understand Environmental law as actually practiced in the real world – not only borrowing knowledge from the natural sciences, but also borrowing methods of social sciences in general.

The research group name, "Critical Environmental law", is a kind of *puzzle*, related to the intentions above. On the one hand, it is being said the environment nowadays is in a serious/dangerous condition – therefore, critical. So, it's urgent, for all mankind, doing something more. It is critical, so to speak, to question our cultural standards and our legal systems, not only accepting passively the way it functions, but exercising a creative imagination. On the other hand, it refers to strengthen a critical knowledge, in the sense of rejecting dogmatic approaches, through reflexive skepticism and rational analysis of facts and discourses.

It is important to note that some other authors use similar expressions to assign a critical perspective concerning the Environmental law. For instance, Philippopoulos-Mihalopoulos also use the term *environmental critical law*. Although our conception is different, it shares at least some important assumptions. See, for example, the sentence below:

> Situated in this wider ecology of unhomeliness (no all encompassing *oikos*) and miscommunication (no unifying *logos*), environmental law finally faces its foundational paradox: that its conceptual limits are both potentially all-inclusive (since every societal problem can be seen as more or less environmental) and devoid of any content (since environmental law can no longer distinguish its 'object', namely environment per se). The traditional imaging of the environment as the thing that turns (French virer) around a stable pivot (a distilled sense of pure humanity) has been discredited in view of the collapse of the boundaries between the natural/human/artificial. In order to address this permeability, environmental law has the opportunity and responsibility to construct an adequate theoretical base for its role in environmental protection (PHILIPPOPOULOS-MIHALOPOULOS, 2017).

The environment cannot be conceived as an idealized and purified nature around a stable axis (an idealized and purified humanity). It is extremely important not to forget the inseparability of natural and social elements, as well as the inseparability of the material and the symbolic spheres, especially when thinking about the environment in political or legal matters.

The commons paradigm, so to speak, provides valuable insights to discuss the gap between state law and the practices of real communities (urban or rural, small or large) that denote a healthy metabolic relationship between human beings and nature.

The conceptual tools found in the literature about the commons allow us (Silveira, p. 24) to critically analyze, on a case-by-case basis, what kind of relationships between social actors and resources are established through legal categories. It is inevitable to think that *common goods*, which had been forgotten by modern legal systems, have returned in the last decades as goods or values that cannot take private form, because they do not have an owner, not even a (public) legal person: collective rights and diffuse, public goods that the doctrine declares as non-state, goods of public or social interest, goods of common use, goods belonging "to all" or "to the people".

Many values, in Brazilian Constitution, are situated in the social sphere: neither individual property, nor public-state property. It is necessary to discuss, however, to what extent this occurs with a rhetorical scope, because of the way modern legal institutions operate. Along with the description of the social and legal facts, is also deeply important seeking to understand what is inherently *unecological* about modern political/legal systems and rationality. In this sense, the philosophical notion of *totality* is not abandoned, although not used in a dogmatic or totalizing way, but considered relevant as a critical notion. We need to criticize the State-Marked duopoly (WESTON; BOLLIER, 2013) embedded into legal categories: *private* and *public* spheres, persons, goods, procedures: the way these concepts were transformed historically, how they affect our institutional imagination, and how they operate in decision-making.

PARTIAL CONCLUSIONS

Modern era, through State-Market duopoly, denied the commons as a dimension of law and justice – it's simply not part of the legal architecture. For this reason, it is so difficult both to create and to enforce rights and policies related to the commons. State law should evolve to recognize and protect collective persons, collective goods and collective forms managing environmental resources; at the same time, protecting it and recognizing it´s autonomy. It's needed to assign legal content to social systems which use material or symbolic resources through creative and sustainable manners – not for dictating rules, but for protecting collectivities who share spontaneous regulations and trust. The research project entitled "*Direito dos bens comuns ambientais: entre público e privado*" aimed to construct a theoretical framework, providing tools for other studies, subsidizing researches of a more restricted subjects, empirical studies and applications

From a legal point of view, the *commons* is a principle that gives visibility and priority to what is not easily understood neither in the private/individual sphere, nor in the state-law sphere. The commons concern to a collective and relational sphere of life. It has points of contact with private/individual business and with State law; however, correspond to a completely different logic, which is collective and relational.

The commons may (in many cases shall) be protected by State Law, since its autonomy is guaranteed. That is a complex challenge, since modern State, for the most part, acts as an instrument destined to privatize common values, spaces, wealth. The State itself must become "a *commons*", rather than a machinery designed for private appropriation of resources: a quest for a renewed democracy.

The *commons* are a key issue to the Theory of Environmental Law. The research project presented here in a few words made clear we should make a distinction between (a) an Environmental Epistemology applied to Law (focused on the incorporation of environmental knowledge into the study and practice of environmental law) and (b) an Epistemology

of Environmental Law (focused on critical and ecological reflection on the legal and political institutions of modernity). Thus, the "common" would not constitute an environmental principle, in the sense of a norm, but it can be considered an epistemological principle that allows us to see beyond the structuring dichotomy of legal modernity: the public and the private spheres, persons, goods.

Through State-Market dichotomy, Modern Era denied the commons as an important dimension of law and justice. It is difficult both to create and to enforce rights and policies related to the commons in general, especially because *relational* aspects of live are not a relevant part of legal architecture. Law operates, most of the time, identifying goods and persons. The State and the private corporations are legal persons, operating as owners of goods and wealth, just like natural persons.

State Law is not (yet?) prepared to conceive the *commons* as a relational category; as systems of managing and sharing values/resources for common benefit. In this sense, State law should evolve to recognize and protect collective persons, collective goods and collective forms of exercising/protecting them; at the same time, protecting it and recognizing it´s autonomy. For example, it's needed to assign legal content to social systems which use material or symbolic resources through creative and sustainable manners – not for dictating rules, but for protecting collectivities who share spontaneous regulations and trust. Of course, this is not only a legal issue, but also a political, economical and cultural problem.

According to these observations, it is not enough to operate Environmental law with ecological sensitivity and ethics, without noticing the inherent obstacles, posed by the legal architecture itself. In other words, more than applying Environmental Epistemology to traditional Law, we need an Environmental Epistemology of Law. It means we should try to demystify to what extent legal categories and instruments are committed to the state-market duopoly in its very essence, in concrete issues. Depending on the context, State Law can both promote or place barriers to the sustainable management of common goods and values, social bounds and rules which turns these values

into commons. The research project, presented here very briefly, aims to construct a theoretical framework, providing tools for case-studies in which these issues can be identified.

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