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The commons: an innovative basis for transnational environmental law in the era of Anthropocene? The case of Latin America

by

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Abstract

The purpose of the present paper is to find a theoretical-legal basis for the recent innovative decisions by the Colombian Supreme Court of Justice and by the Inter-American Court of Human Rights on the issue of environmental justice. In order to pursue this aim, we will proceed as follows.

First of all (Par. 1), we will outline the general framework in which the considered case law are situated. The contemporary environmental degradation of our planet – especially of the so-called (environmental) commons – caused by human activity has led to a new term coined to describe a "human-made" geological era: the Anthropocene. The increasing detrimental conditions of most natural ecosystems has elicited the birth in recent decades of a new category of fundamental human rights – strictly coupled with the natural environment – the so-called "environmental rights".

In the central part (Par. 2 and 3) we will illustrate and comment on the content of the judicial decisions by the Supreme Court of Colombia (STC 4360-2018) and by the Inter-American Court of Human Rights. Notably, we will try to underline the most innovative shifts that these judgements have brought in the theme of environmental justice.

The following part (Par. 4) will deal with the question: what is the theoretical-legal basis for the innovative case-law set out earlier? We argue that this basis actually already exists, and it can be found in the theory of the environmental commons (henceforth, simply "commons"). To do this, we will first identify five core points characterising the new environmental justice approach of the considered jurisprudence. After this, we will show how these five points are almost completely mirrored by the main features of the commons, so that they can offer – we believe – a valid theoretical-legal basis for this innovative case law. Lastly (Par. 5), we will consider two theoretical objections, that can legitimately arise, and how we propose to overcome them.

Key-words

Colombian Supreme Court of Justice, Inter-American Court of Human Rights, Environmental Commons, Anthropocene, Environmental Justice.

'*What is needed, in effect, is an agreement on systems of governance for the whole range of so-called global commons*' (Encyclical Letter *Laudato Si* of the Holy Father Francis)

1. Anthropocene, the "tragedy of the commons" and the birth of environmental rights

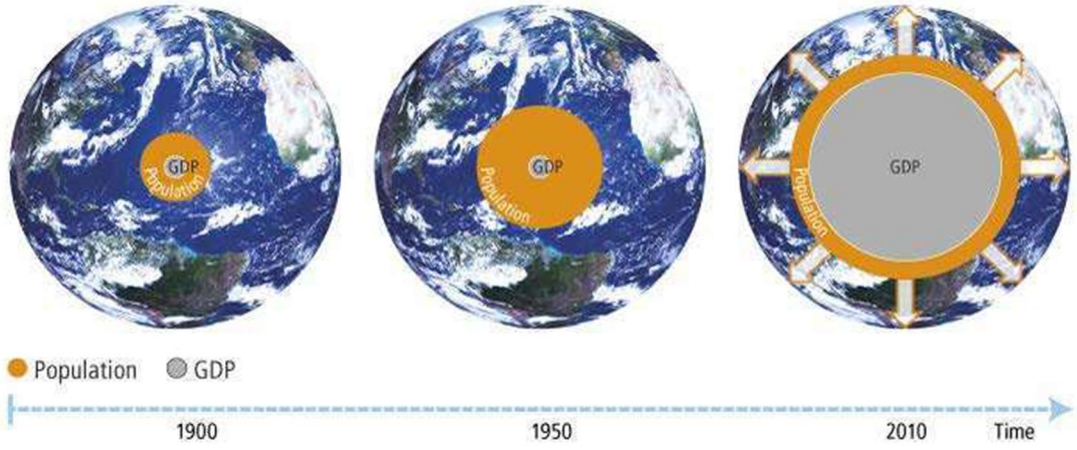
Over fifty years ago, in 1968, the ecologist Garrett Hardin published his famous article "The tragedy of the commons" in *Science*.[I] In a nutshell, the author addressed the problem of human overpopulation which, without any regulation, will inevitably lead to the extinction of those limited resources (i.e., the so-called commons, or common pool resources) present on our planet, due to their consumption. As it is widely known, the commons considered by Hardin are those particular goods that economists define as both *non-excludable* and *rival*. This entails that individuals cannot be excluded from their enjoyment (non-excludability) and the use of the goods by one individual reduces its availability for others (rivalry) (e.g. fisheries, timber, etc.).[II]

In the subsequent decades, however, the pessimistic outcry sent out by Hardin on the increasingly depleted natural resources of our planet has mostly fallen on deaf ears. These issues include climate change, deforestation, the dramatic situation of glaciers, and the list goes on. In sum, all these environmental issues, which only a few decades ago were considered little more than fantasies, have all become some of the most compelling problems to deal with in today's global agenda.[III] In other words, we could surely say, by looking at the contemporary situation of the natural resources of our planet, that the "tragedy of the commons" predicted by Hardin is actually becoming an unpleasant truth.

The rampant processes of exploitation, pollution, depletion and commodification of natural resources[IV] have been so deep and widespread in the last century that, according to numerous scholars from various disciplines, we have entered into a new "human-made" geological era called 'Anthropocene' (Crutzen & Stoermer 2000). What is meant by this term is that human activity has had such a deep impact on the planet that it can be compared to a proper geological era. Indeed,

'[a]t some point after 1950, the socioeconomic system coupled strongly with the Earth system – the oceans, atmosphere, ice sheets, soils, cycles and waterways and diversity of life that combine to keep Earth habitable – *becoming* the primary driver of change in the Earth system and this is taking place at an unprecedented magnitude and speed [Figure 1 below] (...). With increasing population and GDP [Gross Domestic Product], the human system is increasingly infringing on Earth's buffering capacity, threatening Earth resilience'. (Nakicenovic et al. 2016: 8; Crutzen & Stoermer 2000; Crutzen 2002; Waters et al. 2016; Rockström et al. 2009; Steffen et al. 2004).

In other words, the Anthropocene is 'thoroughly characterized by change, uncertainty and, probably, considerable instability in the behaviour of the Earth system' (Vidas et al 2015: 2).[V] This is a striking fact, if we consider that such conditions are not merely created by natural forces, such as in previous geological eras. To make a comparison, the previous geological era – the so-called Holocene, which lasted 11,700 years – has been characterised by a notable ecosystemic stability and resilience.[VI]



The figure shows how in the last century increasing population and GDP have been threatening Earth's buffering capacity and resilience (*Figure 1*) (Nakicenovic et al. 2016: 9)

The data emerging from the analysis of the Anthropocene are alarming. Among other effects,

'greenhouse gas levels as high as seen today may not have been seen for at least three million years. Earth is losing biodiversity at mass extinction rates. The chemistry of the oceans is changing faster than at any point in perhaps 300 million years. Our own

technology has had what is arguably the largest and most rapid impact on the nitrogen cycle for some 2.5 billion years' (Nakicenovic et al. 2016: 9; Ceballos et al. 2005; Hönisch et al. 2012; Williams et al. 2015).

Needless to say, most of the effects caused by the geological shift to the Anthropocene are not only damaging the natural environment of our planet, but they are also having a "boomerang effect" on the same agents that mostly contributed towards creating them: humans. Consequently, in recent decades (and, as we will see in the following sections, especially in very recent years), there has been a remarkable flourishing of international treaties, national laws, courts' decisions and civil society movements that focused their attention on environmental issues. The coupling of "environmental protection" and "human rights" has definitely become part of the contemporary legal lexicon,[VII] representing all those demands on the relation between human life and an environment which, as it seems, cannot be conceived anymore as something "external" to, and irrelevant for, human well-being, as a Cartesian *res extensa* ontologically divided from humans. But, on the contrary, it seems that the increasingly damaged condition of our Earth system entailed by the Anthropocene urgently calls for a redesign of the traditional conception of man in relation to nature, seeing him as an integrated part of the ecological systems of our planet which, as a matter of fact, are an essential pillar for sustaining life.[VIII]

In sum, we could certainly affirm that the Anthropocene has strengthened the link between fundamental human rights of the individual (and of communities, as we shall see) and the environment, considering these two as interrelated in a biunivocal process. For instance, Yusoff highlights how it is somehow self-evident that 'we cannot answer biopolitical problems of ecologies with the very same mechanisms that are productive of them' (Yusoff 2018: 270). Thus, in this sense, the intertwining between fundamental human rights and the environment, as well as the recognition of legal personality to "natural objects"[IX], could be feasible attempts to find innovative legal-political solutions to the tragedy of the commons.

2. The landmark judgement STC4360-2018: the rights of the Colombian Amazon rainforest

In the last 50 years, Latin American countries have experienced a long process of 'accumulation by dispossession' (Harvey 2003)[X] whose environmental consequences are imperilling the already fragile region's ecosystem equilibrium and the life of the most disadvantaged communities. (Castro Herrera 2018).

In response to this, several local, national and supranational social movements have developed, creating widespread awareness of the necessity to protect those natural complexes. This diffuse sensitivity is due to the immense richness of natural resources characterising this area and decades of violent struggles for their protection. In fact, in the last 20 years, Latin America has undergone many tensions between the above extractive development models and recognition of the rights of nature. This has been most striking in Ecuador and Bolivia, with conflict over oil drilling in the Yasuní National Park (Ecuador); deforestation in the Isiboro Sécure National Park and in the Indigenous Territory (TIPNIS) in Bolivia; and, finally, the well-known Cochabamba water war (Bolivia).

The national and supranational jurisdictional and political institutions of the region – namely the Inter-American Court of Human Rights[XI] (San José Court), the national High Courts[XII] and the constitutional legislators[XIII] – have answered these threats by recognising the environment as having its own legal personality.

In the case of Colombia, the main environmental concerns are related to the deforestation of the Amazon rainforest. Illegal mining, illicit crops, illegal logging, and forest fires are endangering the main ecosystem of the second most biologically diverse country on Earth.[XIV]

These concerns have been addressed by the Colombian Constitutional Court in several decisions,[XV] which have fostered the "ecological imprinting" of the 1991 constitution[XVI] and recognised the healthy environment as a fundamental and collective right.

Among these rulings, the judgement T-622 of 2016[XVII] is particularly important because the Court, using a *holistic jurisdictional approach*,[XVIII] granted legal personhood to the Atrato river (Pecharroman 2018). Thus, natural resources – in this specific case the basin of the Atrato River – are protected regardless of the presence of specific threats of damages to

the environment or to the rights of the human beings. In line with the Aristotelic idea that the "whole" is not equal to the mere sum of its individual components,[XIX] the protection and the preservation of the Earth system – in which the human being is a remarkably huge component – cannot be reduced to a narrow concern only for its singular components,[XX] taken in their individuality. Instead, it must be addressed to the entire system conceived as a whole, made of an interconnected web of relations.[XXI]

All these important judicial developments have been summarised by the Colombian Supreme Court of Justice in its decision of April 5th, 2018.[XXII] In this ground-breaking judgement, the Court ruled in favour of the 25 young plaintiffs seeking protection of their rights to life, health, food, and a healthy environment. The legal reasoning of the Court is of major importance not only because it is grounded on an innovative 'de-colonial thinking' (Acosta Alvarado & Rivas-Ramírez 2018), but also for acknowledging that the Amazon rainforest is a subject capable of claiming its own right to protection. In fact, the Court recognises that the Colombian Amazon rainforest has its own legal personality and the Colombian state has the duty to preserve, restore and prevent any damage to this extremely delicate ecological system.[XXIII]

Furthermore, it is particularly remarkable that the Court, through the massive reference to the different instruments of international environmental law, highlights the existence of a global ecologic order, which serves as guiding criterion for the national legislators.

The legal reasoning of the Court starts with the recognition of the inextricable connection between environmental protection and the rights to life, health, freedom and human dignity. Indeed, the judges highlight that 'the growing degradation of the environment imperils the right to health and the rest of fundamental rights'.[XXIV]

Besides, the Court establishes a cause-effect relationship between the current anthropocentric and egoistic model of development and the deterioration of the environment. This model – based on uncontrolled population growth, extreme consumerism, exploitation of natural resources – is the main culprit of the ongoing environmental crisis.[XXV] The way of escape is a profound cultural shift from a *selfish ethics*, whose mainstay is the greedy pursuit of personal gain, to a *holistic ethics*, constructed upon social justice ideals.[XXVI]

This *holistic jurisdictional approach* brings the Court to acknowledge the environmental rights of the future generations[XXVII] that have claim-rights on those environmental components essential to the life of every living being on the planet. The above rights imply that the current generation – the bearer of environmental duties and responsibilities – must refrain from all those activities which may endanger the ecological balance.

In its analysis of the case, the Court "invents" an innovative theoretical framework – the above-mentioned *global ecological public order* – whose key-elements are contained in the *corpus* of international environmental law.[XXVIII] Several environmental international treaties are consequently used in the ruling as the legal ground of the Supreme Court's rationale.[XXIX]

This innovative theoretical approach allows us to notice how international environmental law is adapted in order to be applied at national level. The above adaptation process's aim is twofold: on the one hand, the implementation of a substantial and procedural body of rights and responsibilities; on the other hand, the creation of an *environmental global rule of law*.

The internationalization of constitutional law is particularly noteworthy in the field of environmental protection. Therefore, it would be useful to apply to this area of law the concept of transnational constitutionalism (Zumbansen 2011). Environmental issues – alongside human rights litigations – offer, in fact, a good example of the ongoing changes in the constitutional landscape. Nowadays a lot of political power centres are appearing beyond the state, dealing with the protection of the environment (Najam et al. 2006) which by definition is a transnational problem. This enables the international system of environmental governance to dictate a common set of rules, whose legitimacy is no longer 'single acts of constituent power' but 'the fluid and multiple forms of authorisation provided by rights' (Thornhill 2014: 370).

This is increasingly true in light of the above-mentioned strict connection between environmental protection and human rights,[XXX] whose supranational systems of protection 'offer sophisticated legal and extra-legal mechanisms necessary to tackle both the severe impact of human activities on the environment and the human rights implications of environmental degradation' (Hajjar Leib 2011).

The coupling of human rights and environmental law – especially at the regional level – may be able to overcome the issue of the legally non-binding nature of several environmental international treaties.

3. The Inter-American Court of Human Rights Advisory Opinion OC-23/17: an environmental Latin-American *ius commune*?

The American Convention on Human Rights 1969 does not refer explicitly to the protection of the environment. However, both the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights have been increasingly inclined to recognise environmental rights, according to the well-known doctrine of the *greening* of international law (Pamplona & Annoni 2016).

The legal ground of the Inter-American Court rulings concerning the protection of the environment is the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, better known as the Protocol of San Salvador. In its article 11.1 the treaty recognises that 'everyone shall have the right to live in a healthy environment'.

The protection of the economic, social and cultural rights is assured by the San José Court, as far as possible, establishing a link to the violation of one of the American Convention rights.[xxxi]

The Court has been able to overcome the formal problem of the non-enforceability of the San Salvador Protocol using a different set of strategies.

Firstly, the majority of the Inter-American human rights system's cases, concerning environmental issues, are strictly connected to the deterioration of the essential natural resources in the territories of indigenous communities. Protecting the rights of these vulnerable communities means safeguarding the environment they are living in, due to their ancestral, but at the same time extremely innovative, worldview based on the pursuit of happiness through a more communal life, a permanent intercultural dialogue and a deep respect for the environment.

Secondly, Articles 1 (prohibition of discrimination), 3 (right to juridical personality), 4 (right to life), 8.1 (right to a fair trial) and 25 (right to judicial protection), have served in several cases as a *conventional parachute* for the right to a healthy environment.

Thirdly, the indivisibility and interdependence of human rights have been stressed on several occasions not only by the Court (García Muñoz 2017) but also by many prestigious commentators (Cançado Trindade, 1994).

Finally – as discussed below in the analysis of the Advisory Opinion OC-23/17 – the Court has recognised the environment has its own legal personality. This last development may help in all those cases where the environmental damages are not life threatening, since 'although the right to life has the potential to include protection against serious environmental risks to life, the reliance on such an expansive formulation is limited to incidents of direct threats to life' (Hajjar Leib 2011).

In the ground-breaking Advisory Opinion OC-23/17, requested by Colombia, the San José Court has once more been the advocate of an original American Convention's interpretation, aimed at guaranteeing the strongest protection possible to the environmental rights.

Grounding its opinion on the already mentioned Article 11 of the San Salvador Protocol and on Article 26[XXXII] of the American Convention, the Inter-American Court of Human Rights recognises the right to a healthy environment as a fundamental right to the existence of humankind. In developing its legal reasoning, the Court utilises different human rights approaches to environmental issues.

To begin with, the judges of San José refer to different international instruments,[XXXIII] highlighting the wide international recognition of the interdependence between environmental protection, sustainable development and human rights. Indeed, the rights to health, life and personal integrity are *greened* in order to include the right to a healthy environment.

Furthermore, following the school of thought known as environmental democracy theory (Mason 1999) – in light of Member States' obligation to respect the right to a healthy environment as a prerequisite for the protection of the rights to health, life and personal integrity – the Court creates a well-structured procedural framework of State responsibilities in the cases of environmental crisis.

The objective of this procedural framework is to ensure the conveyance of information and participation of the public at every stage of the decision-making process regarding environmental issues.

Last, but not least – because this is, perhaps, the most radical passage of the advisory opinion – the Court has recognised the environment has its own legal personality. Hence, the environmental resources (oceans, glaciers, forests, the air we breathe) are protected by the Inter-American Human Rights system not only because the rights to health, life and personal integrity depend upon human beings' physical environment, but also for the their *intrinsic* value, regardless of the existence of environmental damage.

This judicial perspective is of primary importance to the Inter-American continent in view of the already mentioned violent struggles for the protection of natural resources. Therefore, in light of the above, it is worthwhile observing the *incipit* of a Latin-American environmental *ius commune* (von Bogdandy et al. 2017). The Court, in fact, highlights the regional trend to acknowledge the legal personality of the environment in recent Latin-American High Court rulings and in the majority of the constitutions of the region.[XXXIV]

The national and supranational judicial institutions of the region are indeed building a groundwork of common environmental substantial and procedural principles, with the aim to guide the political decision-makers towards a full protection of the fragile equilibrium of the Latin-American ecosystem and of the life of the most disadvantaged communities.

In this scenario, the San José Court – due to its long-standing experience in the creation of transnational rules in the field of human rights protection – may lead the way in the process of recognition of environmental principles as *jus cogens*. A set of peremptory rules that – in consideration of their primary importance for the life of humankind – 'all States must observe (…) whether or not they have ratified the conventions establishing them, because it is an obligatory principle of the international common law'.[XXXV]

4. A theoretical basis: the commons

We believe that, due to the innovative concepts endorsed, the judicial decisions discussed above express without any doubt an innovative approach in dealing with environment-related rights and, more generally, with environmental issues.

Therefore, what we would like to argue in this section is that, in order to corroborate and strengthen the core elements emerging from the aforementioned case law, there is the need to ground them on some theoretical-legal basis. We believe that this basis *already exists*,

and it is the theory of the so-called (environmental) commons. To argue this, we will proceed as follows.

First of all, we are going to identify five main elements from the judicial decisions set out above: 1) *Holistic/Systemic approach to the man-nature relationship*; 2) *Community*; 3) *Inter-generational justice*; 4) *Environmental rights;* and 5) *Transnational environmental law*.

Secondly, we will illustrate what the commons are and present their ontological and legal core features. As it will be easily inferable after this explanation, these core features of the commons *almost entirely mirror* the five aspects emerging from the case law outlined above. In this way, we argue, the theory of the commons can offer a valid theoretical basis for the previously analysed environmental judicial decisions.

4.1 Five core features

At this point, from these important judicial decisions we have just outlined, we can identify five core points focusing on environmental justice (we will briefly outline them here, leaving a more in-depth discussion until later):

1 - *Holistic/Systemic approach to the man-nature relationship*. The natural ecosystems and all their components (among which humans are included) are seen as an interconnected web of equal relations where none of them are in a hierarchically superior position in comparison to one another. In a holistic ecological approach, humans and nature are conceived as part of a single unitary system. Notably, among other things, this aspect is also highlighted by the innovative solution of endowing natural environment entities with legal subjectivity performed by the case law set out above. This new approach in dealing with environmental issues, we will argue shortly, is expressive of an overcoming of the anthropocentric-ecocentric dichotomy.[XXXVI]

2 - *Community*. The importance given by courts' decisions to the rights of indigenous communities in relation to the ecosystem they live in is expressive of a more general approach that stresses the vital link between a community and its natural environment as carrier of fundamental human rights (right to life, right to health, etc.).[XXXVII]

3 - *Inter-generational justice*. Environmental rights (and environmental justice in general) do not only take into account issues of intra-generational justice (i.e. justice related to present generations), but they are also deeply imbued with concerns of intergenerational justice, i.e. rights of future generations.

4 - *Environmental rights*. The existence of a by-now consolidated category of rights we can define as "environmental rights"[XXXVIII] among the category of fundamental human rights. This *in fieri* catalogue of rights includes the right to health, the right to a healthy environment and the right to water and food, which are all intrinsically connected to the right to life and to the concepts of human freedom and dignity.

5 - *Transnational environmental law?* The above-mentioned case law suggest the direction for the possible creation of a "global constitution for the environment", or a "global ecological order". As previously clarified, it seems that the current instruments of international and domestic environmental law are somehow inadequate in dealing with most of the environmental issues of today, which usually manifest themselves in a trans-national fashion, creating effects that transcend national borders (see climate change, pollution, depletion of fisheries, and so on).[XXXIX]

4.2 What are the commons?

There is no universal consensus, especially among legal scholars, on the taxonomy of the "commons". However, despite this fact, we can affirm that there is a widespread agreement on the core features of this category. Indeed, the commons are considered as goods that

'are neither private nor public. Nor are they understood as a commodity, as an object, or as a portion of the material or immaterial space that an owner, private or public, can put on the market to obtain their so-called exchange value. The commons are recognized as such by a community that engages in their management and care not only in its own interest but also in that of future generations' (Capra and Mattei 2015: 149).

As we can see, this definition is very broad. Traditionally, scholars include in the commons all the natural resources that are essential for life and that we all share equally: the air, the oceans, rivers, fisheries, lakes, glaciers, forests, etc. We said we define these commons as "environmental" commons (or, in this paper, simply commons) and they constitute our object of interest now.[XL]

As we hinted at the beginning, the global commons probably represent the category of goods that have been (and are) the most affected by the Anthropocene effects. As a matter of fact, it has been highlighted that

'[i]n the Anthropocene, Global Commons are an integral part of the Earth system and can no longer be considered to be exogenous to human development and prosperity. The resilience of critical biomes, for example the Amazon rainforest and the Arctic, which are at risk of reduced functionality or changing state within the next few decades, must be protected. This is a fundamentally new perspective. We all depend on a stable and resilient Earth system for our wellbeing, from individual households, communities and cities to nations and regions. This resilience can no longer be taken for granted' (Nakicenovic et al. 2016: 27).

Now, starting from the definition by Capra and Mattei (2015: 149) given above – that actually comprises almost all the essential elements – we can move on to illustrating the main features that characterise the theory of the commons. But first it is necessary to make a preliminary remark. We are aware that today the commons movements around the world are quantitatively numerous and highly multifaceted. However, as we just hinted above, there are certain features that are somehow always present, i.e. a "common core of the commons" (forgive the wordplay!). And it is exactly the features of this core that we are going to outline now.

First off, the commons postulate a holistic approach to ecology.[XLI] We partly already know what this means from the previous discussion of the five jurisprudential features. Holism applied to ecology entails that the natural environment and the living beings living within it – including humans – are not seen as separate entities, but conceives instead human and natural elements as interconnected in a web of equal relations.[XLII] In this way,

holistic ecology deeply opposes a *mechanistic* view of the man-nature interface[XLIII] which, following the Cartesian and Baconian legacy, conceives nature as an entity which, as a machine, can be understood, composed and fragmented in all of its parts and is seen as a hierarchically inferior entity which must be "dominated" by men.[XLIV]

According to a holistic view, instead, the natural world is not conceived as a machine, as a *res extensa* ontologically divided from the *res cogitans* (i.e., the human being) but, instead, it is understood as a network of interconnected relations with no hierarchical relationships with each other. Every single component contributes to the whole. The paradigmatic examples are the natural ecosystems (e.g., a forest, a coral reef, etc.) and, at a global level, the so-called biomes (e.g., tundra, tropical rainforest, desert, ocean, etc.; see Figure 2 for a map of the "critical" biomes).[XLV] The correct functioning of ecosystems is dependent not just on the health of other ecosystems. Their flourishing is also dependent on the aggregate contribution of living and non-living entities residing in it so much that, in case even just one of them is removed or altered, the equilibrium could often be irremediably broken. And, as we already said, the Anthropocene is putting the functioning of these fragile equilibria under great strain.[XLVI]

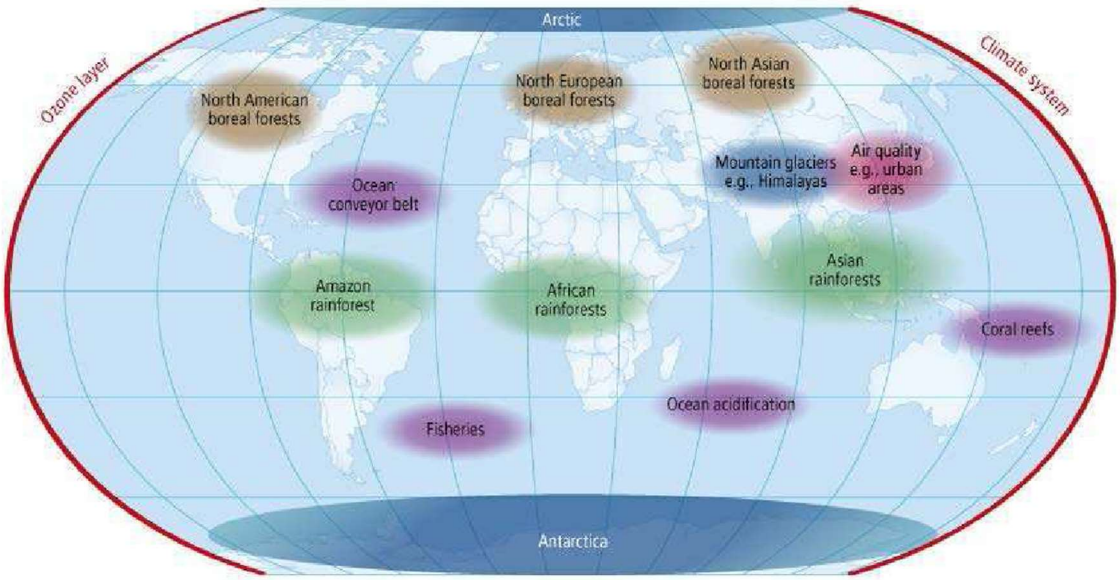
An even more patent example of this interconnectedness is given by the so-called "critical biomes", that 'play a decisive role in regulating the overall status of the life-support system on Earth, that is, how well Earth can support world development' (Nakicenovic et al. 2016: 31 - *figure description*). Indeed, they

'[r]egulate regional energy flows, hydrological flows, and carbon, nitrogen and phosphorus cycles and provide stable habitats for living species are under threat. These biomes are *interconnected with each other* – moisture feedback from the Amazon rainforest affects the temperature and function of the tropical monsoon system, which in turn may interact with the global climate system' (Nakicenovic et al. 2016: 30, emphasis added).

In the era of the Anthropocene,

'[a]ll Earth's biomes are influenced by human pressures indeed, more than three quarters of the terrestrial biosphere has been transformed into what might be called anthromes – or anthropogenic biomes. In particular, the world's grasslands and savannas have been transformed by human pressures, particularly agriculture, with severe impacts on

biodiversity and other Earth system functioning' (Nakicenovic et al. 2016: 30, emphasis added).[XLVII]



(*Figure 2*) A map of the critical biomes. Rainforests (green), boreal forests (brown), atmosphere (red), cryosphere (blue), hydrosphere (purple). (Nakicenovic et al. 2016: 31)

In light of these dramatic considerations, the commons theory instead implies adopting a holistic/systemic approach that does not situate human beings "outside" nature but, instead, locates them in an inter-connected relationship with it. We humans *are* nature and do not *own* it: the fact that we are ontologically made of the same texture of the ecosystems surrounding us and giving us life comes inevitably before any social construction on the belonging of these ecosystems to any given person.[XLVIII] Besides, we must not forget the "boomerang effect" we mentioned at the beginning of this paper, i.e. that the Anthropocene shift is eliciting not only disastrous effects on the natural environment (or, in general, on everything in the planet that is "not human") but, as a matter of fact, even the human race is experiencing difficult problems due to its own activities (e.g., diseases from excessive pollution of air, migration for climate change, related issues of food security, and others).

Then, there is the element of the community, which also shares the same etymology with the word "common". The role played by the community in the governance of the commons (seen as goods that are necessary for life of present and future generations) is essential. Indeed, the community can be seen as the main "agent" that acts in defence of the commons.[XLIX] However, the term "community" needs to be better specified. Are we only considering the indigenous communities, living in symbiosis with the common resource? Or are we identifying the meaning of community with a broader spectrum, thus comprising not only small-scale communities but also larger communities which can possess a trans-national (i.e., that is irrespective of national borders) nature? We believe that the term "community" when dealing with the actors with the duty and responsibility for the protection of the commons should be interpreted in an elastic manner. In what sense? Conceiving the term community as only a relatively small aggregate of individuals living in a relatively small portion of our planet, in our opinion, does not make much sense in our contemporary globalised and hyper-connected world. We believe, instead, that in our contemporary days and for issues such as the environment the term community should be better intended as every aggregate of individuals that cohesively acts through social networks in defence of goods that are essential for life (i.e., the commons), irrespective of their geographical distribution (after all, such an extended interpretation of the term "community" is already present in the definition of commons we gave above quoting Capra and Mattei 2015: 149).[L] Consider the classical example of the pollution of our atmosphere: isn't this an issue that concerns the entire population of our planet? And isn't the ensemble of all the individuals throughout the world that have an interest in preserving the common "air" a *community*? We believe so, especially, as we just said, in our increasingly globalised world.[LI] Thus, conceiving the term community in such a way allows us to encompass not only those indigenous groups that are localised in specific geographical areas, but also every individual on the planet that has a stake in protecting our natural environment, as in an "all-affected" legitimacy.[LII]

Moving on to analysing the next characterising features of the commons (the feature of transnational environmental law has already been discussed earlier, in the comments to the judicial decisions), there is the essential component of intergenerational justice. Without

entering into the immense philosophical debate on the issue,[LIII] for our purpose it is necessary to highlight how the concern for the environmental rights of future generations is inherent in the definition of the commons. Indeed, the concern for the conditions of natural resources is not solely directed to our contemporary situation (intra-generational justice). The tragedy of the commons predicted by Hardin is certainly happening today exactly because the previous generations had such little care for the preservation of the Earth's natural resources. Thus, one of the first priorities of commons movements around the world is exactly the concern for future generations. Indeed, it is true that the Earth regenerates itself. However, the rate of the depletion and exploitation of natural resources operated by the Anthropocene is so intense that, in many cases, we have reached a point of no return, as the dramatic example of our ecological footprint clearly demonstrates.[LIV]

5. On the futility of dichotomies: two theoretical challenges.

At this point, it is worth considering two important points in support of our thesis. Firstly, we believe that the endorsement of the commons theoretical framework – thanks to its holistic/systemic perspective on environmental justice – can help to overcome a rather fruitless and obsolete dualism: ecocentrism vs. anthropocentrism. Secondly and finally, we will consider a legitimate objection that usually arises when dealing with the commons and which regards their being a *tertium genus* compared to the traditional public-private dichotomy. We will demonstrate how this objection could be overcome. These two points can be summed up by the following inquiries:

1) What about the ecocentrism vs. anthropocentrism debate? Does the commons' theoretical framework fall under one of these two approaches? Or does it overcome this dichotomy?

2) What about the assertion that the commons are considered neither private nor public? Does this feature constitute an insurmountable barrier to the endorsement of the commons as a foundational basis for the new tendencies in environmental justice set out above?

Let us consider these two points in turn.

1) What about the ecocentrism vs. anthropocentrism debate? Does the commons' theoretical framework fall under one of these two approaches? Or does it overcome this dichotomy?

We saw how one of the most innovative points in the judicial decisions considered in this paper is the adoption for the first time of a holistic/systemic approach when dealing with environmental justice. Indeed, while the first formulations of environmental rights have been developed by assuming nature as a mere ancillary entity for human well-being – reflecting an essentially anthropocentric approach[LV] – the new holistic perspectives considered here assumed a more central role of nature in relation to humans. As in a "copernican revolution", thus, the focus shifted from an essentially anthropocentric treatment of environmental justice to an evaluation of nature for its *intrinsic* value.[LVI] The patent demonstration of this new approach lies in the fact that, as we saw, the judges actually *endowed nature with legal subjectivity*.

What we would like to stress here is that the judges are using the same holistic/systemic approach to ecology embraced by the commons doctrine. And this approach, we believe, helps to find an optimal compromise between anthropocentrism and ecocentrism.

But why should this compromise be found? We think that this dualism is fruitless and lacks significance. To be more precise, the distinction between anthropocentrism and ecocentrism cannot be conceived in absolute terms, in the sense that it is *impossible* to have either a "pure" ecocentric approach and/or a "pure" anthropocentric approach when dealing with environmental justice[LVII].

How? Why not a "pure" ecocentric approach, i.e. an approach that posits the primacy of non-human nature over humans? We believe that this aim is practically impossible to pursue. Indeed, we cannot overlook that, despite everything, we humans *are part* of the Earth in the same way as animals, trees, rocks and rivers are. Even if, probably, the extinction of the whole human race would avoid the "tragedy of the commons" and would not have brought the Anthropocene, nevertheless it is morally, physically and practically inconceivable to eradicate our presence on Earth. Also, a pure ecocentric stance is not even

possible in philosophical terms: whether we want it or not, it will be always up to *humans* (and humans only) to decide whether to adopt an ecocentric approach or not. Unfortunately, nature cannot "decide for itself" and have a say in judicial courts, if it was not for the human medium (the endowment with legal personality of the Atrato river and of the Colombian Amazon rainforest came from a human decision!).[LVIII]

On the other hand, especially today, we could not endorse a purely anthropocentric ecological stance anymore. As we said earlier, our current living in the Anthropocene entails that we, as morally responsible agents, could not conceive nature as a mere *means* to achieve human well-being anymore.[LIX] On the contrary, as scholars from various disciplines argue, we should start adopting solutions that contribute to human welfare without compromising the welfare of the natural world. With a very effective expression, saying that man is the principal cause of the Anthropocene 'does not mean that humans are the central concern for Anthropocene normativity, for responses to its crises, or primary beneficiaries of any regulatory and/or normative interventions' (Kotzé 2014: 262).

Conceiving nature as a common, instead, rejects the assumptions lying at the basis of the anthropocentrism vs. ecocentrism debate *in toto*. Indeed, this debate assumes an *oppositional*, *mutually exclusive* and *hierarchical* dualistic way of thinking, that conceives humans and nature as if they were on two distinct ontological levels. In other words, having in mind only anthropocentrism or ecocentrism as the only two possible ways of dealing with environmental justice is not only reductive of the variegate human-nature relationships, but it also does not constitute a reasonable solution for our age. The commons, instead, by postulating a holistic/systemic approach to ecology in the above-considered terms, help to not see environmental justice in such manichean terms (i.e., black or white, no "grey areas" in the middle). As it can be inferred from our explanation of the features of the commons, a holistic/systemic approach allows us (and, more importantly, the judges who will decide on these matters) to take into account *both* humans *and* nature when deliberating about environmental justice.

2) What about the assertion that the commons are considered neither private nor public? Does this feature constitute an insurmountable barrier to the endorsement of the commons as a foundational basis for the new tendencies in environmental justice set out above?

Ecocentrism vs. anthropocentrism is not the only dichotomy that is challenged by the commons. There is another dualism under discussion, far more pervasive, one of the founding pillars of the modern liberal state: the public-private dichotomy.

As we hinted above, although there is no universal consensus on all the types of goods that constitute the category of the commons, there is a widespread agreement on the fact that they cannot be considered neither private nor public (see definition above). With a very effective expression, the Italian legal scholar Ugo Mattei define the commons as a *tertium genus* compared to the traditional public and private categories.[LX] However, this means that the commons actually challenge the roots of the modern liberal state, because questioning the traditional public-private dichotomy (always considered as exhaustive) means questioning one of the founding pillars of all the contemporary legal systems worldwide, without considering the international legal system.

Thus, at this point, an objection (especially, we suppose, among legal scholars) would legitimately arise: if we have to introduce a new "third category" in addition to the public and private ones, wouldn't it constitute too big a shift for our legal systems? Wouldn't abandoning our traditional public-private dichotomy be too big an upset for basically the entirety of our current national and international institutions?

How should this objection be responded to? Actually, the answer is not as hard as many would believe. Indeed, the point is that, accepting the commons as a *tertium genus* and introducing them in our legal systems would not necessarily imply the neglect of the traditional public-private dichotomy.[LXI] How is it possible? The answer lies in the way we conceive and legally define the commons.

We believe that probably the most effective and innovative formulation of the commons in this sense comes from Italy, and in particular from the work of a reforming Commission chaired by the legal scholar Stefano Rodotà. Rodotà, together with other important co-national legal scholars, was called in 2007 to redact a reform scheme for the Italian civil code (1942), in order to reform its obsolete classification of the goods.

The Commission's final formulation was highly innovative because, if the scheme of reform would have had been approved,[LXII] Italy would have had one of the most complete legal definitions of the commons at the international level.

The Commission defined the commons as goods that

'suffer a highly critical situation due to their scarcity, depletion and for absolute lack of legal guarantees [and it defines them as] *things that express utilities that are functional to the exercise of fundamental rights and functional to the free personal development, and they are characterised by the principle of intergenerational safeguard of their utilities*' (Rodotà Commission 2008: 6, emphasis added, my translation).

But perhaps even more interesting for our current purposes, the Commission defined the commons as those goods that 'cannot be included *stricto sensu* in the category of public property, because they are under a regime of *diffuse ownership*, since they can belong not only to public legal persons, but also to privates (...)'(Rodotà Commission 2007: 6, emphasis added, my translation).

As we can see, the main innovation lies in the concept of "diffuse ownership". Indeed, this formulation directly addresses our objection no. 2) How, as we can read from the text of the Reform Scheme, the commons can be *either in public or private hands*. What is important is that, since these goods are 'things that express utilities that are functional to the exercise of fundamental rights and functional to the free personal development' (Rodotà Commission 2007: 6, my translation), their enjoyment must be granted for everyone, *irrespective of their proprietarian regime*. Thus, this way of conceiving the commons can overcome our objection no. 2) set out above. Indeed, this innovative way of legally framing the commons is able to succeed in creating a new category *without* actually eliciting a radical transformation of our current legal systems, i.e. without abandoning the classical public-private dichotomy.

Thus, in light of all these considerations, we see how the theory of the commons is not as "anthropocentric" as many would *prima facie* argue. On the contrary, as we said before, we believe that this theory (equipped with the features described above) could actually constitute the flywheel to overcome a dichotomy ("anthropocentrism-vs.-ecocentrism"[LXIII])

that, in the era of the Anthropocene, has probably become rather obsolete and inadequate, if taken in its absolute terms.[LXIV] Indeed, if we – and either the considered judicial decisions and the contemporary environmental justice seem to be following this path – are starting to consider the human being as *essentially intertwined and integrated with the natural environment* (in a holistic fashion), a rigid separation between anthropocentrism on one hand and ecocentrism on the other ceases to have so much significance.[LXV]

Actually, this seems to be the approach of the Universal Covenant affirming a human right to commons and rights-based governance of the Earth's natural wealth and resources. This international agreement endorses the idea of the implementation of a

'system for using and protecting all the creations of nature and related societal institutions that we inherit jointly and freely, hold in trust for future generations, and manage democratically in keeping with human rights principles grounded in respect for nature as well as human beings, including the right of all people to participate in the governance of wealth and resources important to their basic needs and culture' (Weston & Bollier 2013: 219).

6. Final Remarks

According to a wide array of scholars coming from various disciplines, we are currently living in a new 'man-made' geological era called Anthropocene. However, the choice of the name we would like to label this era it is not the real issue here. The real issue is that, for the first time in history, the human footprint on planet Earth has reached such a great magnitude that its effects can be compared to those of a proper geological era. And these effects are, needless to say, most of the time detrimental. The rates of deforestation, desertification, pollution of air and seas - just to mention a few - have reached levels that are unsustainable for our planet. All these problems, though, are not only affecting "the environment", conceived as an abstract entity to be taken by itself only. These problems, instead, have actually started to deeply touch even humans, the 'authors' of Anthropocene. As it too many times happened in the last century, those who always pay the highest price are the most vulnerable groups of society.

In this article, we focused on the case of Latin America. We believe it is a paradigmatic case to study. Indeed, on the one hand it is one of the richest regions in our planet in terms of biodiversity and of natural resources; on the other, all these incommensurably valuable goods for humanity have been undergoing an enormous process of destruction. And many indigenous communities, which have always been living in a deep symbiosis with its environment, are now under great risk because of the intolerable levels of depletion of those goods that are essential for life: water, food, a healthy environment.

It is exactly because of its immense richness in natural resources that, perhaps, the judicial decisions by Latin American courts have also been a flywheel for the protection of environmental rights of these communities, marking important milestones for future case law on this issue. Notably, we chose to focus on two recent decisions (the STC 4360-2018 by the Colombian Supreme Court and the Advisory Opinion OC-23/17 by the Inter-American Court of Human Rights) which - we believe - incarnate a very remarkable shift towards a new conception of environmental justice. Indeed, for the first time these decisions - together with the one on the Atrato river, T-622 of 2016 - *endowed the natural environment with legal personality*. This means to grant a river, a forest, etc. the *capacity to act* in its own defence before a court of law - of course, with a *fictio juris*: those individuals and communities who see their environmental rights violated can pursue a legal action against the perpetrators. But that was not all. Indeed, these judicial decisions have the great merit of having embraced a new ecological attitude, more in tune with the detrimental environmental conditions of Anthropocene. We tried to identify five core elements characterising this new approach: *1) Holistic/Systemic approach to the man-nature relationship; 2) Community; 3) Inter-generational justice; 4) Environmental rights; and 5) Transnational environmental law*.

At this point, we noticed that all these elements are actually mirrored by a theory that is acquiring more and more relevance in the last decades when dealing with the environment: the theory of the commons. Thus, we argued that the commons could help strengthening the new environmental justice approach embraced by our considered case law by constituting a valid theoretical basis for future pronouncements. The theory of the commons also gives a helping hand, we argued, in overcoming two rather inadequate and obsolete dichotomies for our age.

The first one is the 'anthropocentrism vs ecocentrism' debate. These two stances taken in their *absolute* terms cannot fit an environmental justice discourse for our contemporary days.

The second dualism the commons help to overcome is the public vs private debate when considering. Indeed, the theory of the commons stresses that this traditional dichotomy cannot give an adequate esteem of those goods that are essential for life and that we all share equally also caring for future generations. For this reason, commoners postulate a different way to conceive these goods that *does not fall* in neither public nor private property. However, we argued that considering the natural environment as a common *does not* necessarily imply neglecting the traditional proprietarian regimes of public/private. Instead, embracing the theory of the commons as a basis for environmental protection would only imply to endorse a 'special' regime for certain kinds of goods that are essential for life and that are currently in great danger of being depleted forever due to anthropic activity. Specifically, to ground this claim we looked at what we believe is probably the most innovative legal formulation of the commons: the one given by the Rodotà Commission in 2008.

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[*] Domenico Giannino (Institute of Latin American Studies, School of Advanced Studies University of London) and Antonio Manzoni (Sant'Anna School of Advanced Studies).

[I] Cf. Hardin (1968).

[II] 'All commons are shared resources in which each stakeholder has an equal interest. Common-pool resources [also called CPR] are resources where one person's use subtracts from another's use and where it is often necessary, but difficult and costly, to exclude other users outside the group from using the resource'. (Nakicenovic et al. 2016: 27). See also Ostrom (1990).

[III] For example, see United Nations, 'Global Issues', available at <http://www.un.org/en/sections/issues-depth/global-issues-overview/>, accessed 27 January 2019.

[IV] See Polanyi (1944); Castree (2003) identifies six main features/consequences that usually characterise commodification of nature: *privatisation*, *alienability*, *individuation*, *abstraction*, *evaluation, displacement*. Also, an example of commodification of nature from the most recent decades can be found in those practices labelled as 'market environmentalism', such as carbon/biodiversity offsets and cap-and-trade pollution schemes. Cf. Center for Climate and Energy Solutions (2011); Bachram (2004); Ives and Bekessy (2015); for a general philosophical criticism of these commodifying practices, cf. Sandel (2013).

[V] In the same article, the authors offer an interesting discussion on how the concept of "stability" of the Earth conditions, which has always been taken for granted by international law, is now highly questioned by the effects of Anthropocene.

[VI] '*Stable and resilient Earth system*: The Earth system is dynamic and ever changing but internal regulating processes, such as negative feedback loops, ensure that fluctuations of key processes remain within boundaries so that the system is stable and resilient. However, external pressures, and internal feedback loops driven by, for example, evolution can overwhelm the internal regulating capacity of the system thereby upsetting this dynamic equilibrium' (Nakicenovic et al. 2016: v). 'According to the International Commission on Stratigraphy, the geological epoch that began at the end of the last ice age 11,700 years ago and that has

continued until now is named the Holocene. The Holocene has been characterized by a remarkably stable climate' (Nakicenovic et al. 2016: iv).

[VII] Interestingly, Kotzé (2014: 253) highlights how human rights, especially in the environmental context (i.e., the so-called environmental rights), are currently undergoing an increasing popularity, even though they are legitimately criticized 'for being vague (or 'troublingly indeterminate operationally'), absolute, redundant and undemocratic; for being non-justiciable, which means they are incapable of being settled by law or by the action of a court; for being too anthropocentric due to their promotion of economic and social freedoms, too culturally imperialist, too focused on individuals as a result of their grounding in liberal individualism and for being disingenuous by creating false hope.' In-text references by Kotzé to Weston and Bollier (2013: 117-118); Boyd (2012: 33-34).

[VIII] As various authors increasingly underline, measures to tackle the contemporary environmental issues are by now to be treated as proper emergencies. Cf. for example the recent contribution by Stacey (2018). Cf. also Capra and Mattei (2015); Barnes (2006). The alarming situation of today's environmental situation has been sent out by many scholars from various disciplines. An extremely dramatic issue in this sense is the situation of our *ecological footprint*. This concept has been introduced to measure the impact that human activities have on the ecosystems of our planet. More specifically, it assesses the amount of natural resources that we consume in relation to the capacity of our planet to regenerate them. In the last few years we reached the impressive record of an ecological footprint of 1.5, which means that 'every year we consume an amount of resources that exceeds half of the Earth's regenerative capacity' (Mattei and Quarta 2018: 19, our translation). In other words, every year there is a proportion of 0.5 of our natural resources that will never regenerate anymore, establishing a dramatic trend of consumption that, if maintained, will inevitably lead to the complete depletion of our planet.

[IX] On the legal rights of natural objects see for example Stone (1972).

[X] On the impact of neoliberal policies in Latin America see Grugel (1998); Huber and Solt (2004); Michael Walton (2004).

[XI] *Medio Ambiente y Derechos Humanos*, Advisory Opinion OC-23/17 Inter-American Court of Human Rights, serie A23 (15 November 2017).

[XII] STC 4360-2018 Corte Suprema de Justicia Colombia; STC 622-2016 Corte Constitucional de Colombia; Sentencia No. 218-2015 Corte Constitucional del Ecuador.

[XIII] Ecuadorian Constitution (2008) and Bolivian Constitution (2009).

[XIV] Colombia is one of seventeen megadiverse countries in the world according to the UN Environment World Conservation Monitoring Centre. More information are available at <http://www.biodiversitya-z.org/content/megadiverse-countries>, accessed 16 December 2018.

[XV] The following decisions of the Colombia Constitutional Court are especially important: T-411/1992, C-431/2000, T-622/2016.

[XVI] The Colombian *constitutional ecological order* – identified by the Colombian Supreme Court of Justice in its decision of April, 5th 2018 - consists of article 1 (prevalence of national interest); article 8 (state duty to protect Colombian environmental assets); article 49 (state responsibility for environmental protection); article 58 (ecological function of the private property); article 63 (national parks and communal lands of ethnic groups are inalienable, imprescriptible, and not subject to seizure); article 67 (the education system of the State has the duty to train the citizens to the respect of the environment); article 79 (healthy environment is a fundamental right); article 80 (the State will manage the environmental results with the aim of guaranteeing sustainable development, conservation, restoration, or replacement); article 88 (the creation of popular actions as a specific judicial mechanism for the protection of the environment); article 95 (the protection of the environment is a duty of every citizen); article 226 (the duty of the state to promote the internationalization of ecological relations). The entire text of the Colombian constitution is available at < https://www.constituteproject.org/constitution/Colombia_2005.pdf>, accessed 16 December 2018.

[XVII] Ruling by the Colombian Constitutional Court T622/16 available at <http://www.corteconstitucional.gov.co/relatoria/2016/T-622-16.htm>, accessed 16 December 2018.

[XVIII] On the idea of holism in ecology see Smuts (1999).

[XIX] This idea is a simplification of a more philosophically complex concept expressed by Aristotle in the eighth book of *Metaphysics*. "To return to the difficulty which has been stated with respect both to definitions and to number, what is the cause of their unity? In the case of all things which have several parts and in which the totality is not, as it were, a mere heap, but the whole is something besides the parts, there is a cause".

[xx] The four main components of the Earth system are: hydrosphere, geosphere, atmosphere and biosphere.
[xxi] This systemic approach is borne out by the most recent scientific development. Indeed, "Quantum theory forces us to see the universe not as a collection of physical objects, but rather as a complicated web of relations between the various parts of a unified whole". (Capra 1983: 55).
[xxii] STC4360-2018 available at <https://www.elaw.org/system/files/attachments/publicresource/Colombia%202018%20Sentencia%20Amazonas%20cambio%20climatico.pdf>, accessed 16 December 2018.
[xxiii] STC4360-2018, para 14
[xxiv] STC4360-2018, para 2.2.
[xxv] STC4360-2018, para 2.4.
[xxvi] STC4360-2018, para 2.5. The Court refers back to the well-known article by Peces-Barba (1997).
[xxvii] STC4360-2018, para 2.5.3.
[xxviii] Acosta Alvarado and Rivas-Ramírez (2018) highlight the similarities between the idea of *global ecological public order* and the environmental public order, contained in Amaya Navas (2016).
[xxix] The International Covenant on Economic, Social and Cultural Rights (1966); the Declaration of the United Nations Conference on the Human Environment (1972); the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (1977); the Rio Declaration on Environment and Development (1992); the Paris Agreement on climate change (2015).
[xxx] STC4360-2018, para 2.2
[xxxi] Article 19.6 of the Protocol of San Salvador.
[xxxii] Article 26 of the American Convention states that: 'The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires'.
[xxxiii] The Declaration of the United Nations Conference on the Human Environment (Stockholm,1972), the Rio Declaration on Environment and Development (1992) and the Johannesburg Declaration on Sustainable Development (2002). We must hold in mind that, from the moment it was born, environmental law has always been deeply anthropocentric. As an illustrative example, see the Principle 1 of the Rio Declaration on Environment and Development (1992): 'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature': available at <http://www.unesco.org/education/pdf/RIO_E.PDF)>, accessed 30 January 2019.
[xxxiv] The right to a healthy environment is recognised in the constitutions of Bolivia, Argentina, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Venezuela.
[xxxv] *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 Inter-American Court of Human Rights, Serie A18 (17 September 2003).
Medio Ambiente y Derechos Humanos, Advisory Opinion OC-23/17 Inter-American Court of Human Rights, Serie A23 (15 November 2017).
[xxxvi] Ecocentrism in environmental ethics is opposed to anthropocentrism. According to the former, the natural environment is considered for its intrinsic value, i.e. it is valuable for its own sake. According to the latter, instead, nature is valuable for its instrumental value, i.e. for its utility for something else, in our case for human utility. For a more in-depth discussion of these terms, cf. for example Boylan (ed.) (2014); Humphrey (2002); Rolston III (1988).
[xxxvii] Cf. the reports by the Inter-American Commission on Human Rights <http://cidh.org/countryrep/Indigenous-Lands09/Ancestral-Lands.ENG.pdf> and <http://www.oas.org/en/iachr/reports/pdfs/ExtractiveIndustries2016.pdf>
[xxxviii] There are different analytical approaches to the study of human rights in the environmental context. Three terms have been used: "environmental rights", "environmental human rights", "human rights and the environment". Kotzé (2014: 255) argues that '[w]hile there is little agreement on the conceptual difference between these terms, it is generally accepted that environmental rights' relate to the (mostly substantive) right to a clean and healthy environment that is not harmful to health and wellbeing. 'Environmental human rights' is a somewhat broader category of reference that could include all human rights that have a bearing on the environment, including procedural and substantive rights (e.g. the rights to human dignity, life, administrative justice, access to information and access to justice). 'Human rights and the environment' is the broadest

category of the three because it situates human rights and the environment as two separate yet distinctly interrelated issues'.

[XXXIX] 'The traditional forms of national sovereignty are increasingly challenged by the realities of ecological and economic interdependence. Nowhere is this more true than in shared ecosystems and in 'the global commons' - those parts of the planet that fall outside national jurisdictions' (Brundtland 1987, available at <http://www.un-documents.net/our-common-future.pdf>). In international law, the traditional distinction it is usually made between "global" and "local" commons. 'Local commons are, for example fishing grounds, grazing areas, irrigation systems, agriculture and forests. Global commons, for example include the atmosphere and high seas, areas that are recognized as falling beyond national jurisdiction.' (Nakicenovic et al. 2016: 27).

[XL] However, for the sake of completeness, we must say that some scholars consider commons even goods such as the cultural heritage, immaterial goods such as Internet and even 'everything that is obtained by social production, which is necessary for the social interaction and for the continuation of this production, in the form of knowledge, the languages, the regulations, information, affections, and so on' (Hardt and Negri 2010: 8, our translation).

[XLI] Cf. Capra and Mattei 2015.

[XLII] Cf. *Idem.*

[XLIII] The so-called "reductionism", to find a term for summarizing these aspects. With this term it is meant an approach that attempts to explain things by reducing them to their individual simpler components. Cf. *Idem.*

[XLIV] On this historical shift, marked by the Scientific Revolution, from a holistic to a mechanistic view of the man-nature interface, see Merchant (1990); Capra and Mattei (2015); Kheel (1985). Similarly, and relating to human rights, according to some 'the liberal notion of human rights that is grounded in Modernity, itself pits humans as masters of nature and entitled recipients against a defenseless environment' Kotzé (2014: 263); in-text reference by Kotzé to Bosselmann (2004).

[XLV] See Shaw (2018).

[XLVI] See Nakicenovic et al. (2016).

[XLVII] In-text references to Barnosky et al. (2012); Williams et al. (2015); Lenton et al., (2007); Lenton and Williams (2013); Ellis (2013).

[XLVIII] Cf. Mattei (2011); Capra and Mattei (2015).

[XLIX] Cf. what is probably the main contribution on the community governance of common pool resources, i.e. the work by Elinor Ostrom, *Governing the Commons. The Evolution of Institutions for Collective Action* (1990). In her famous work, Ostrom tried to empirically confute Hardin's pessimistic prophecy - the unavoidable tragedy of the commons - by presenting a wide array of experiences collected from communities all over the world. In particular, she observed how these communities naturally and efficiently organise and auto-govern themselves for the use of collective resources (e.g. water to irrigate, soil to cultivate), performing a regulation of egoistical individualism without the intervention of the private property/market mechanisms and/or the State. In a few words, through a catalogue of examples, Ostrom tried to empirically demonstrate that the "tragedy of the commons" described by Hardin was an illegitimate generalisation, since an efficient and yet generative use of common resources (i.e. the so-called *commoning*) is actually possible.

[L] Along these lines, see diffusely Capra and Mattei (2015: 28-29; 131-136; 144-145).

[LI] Cf. Kotzè and Soyapi (2016: 84) on the relation between globalisation and transnational environmental law.

[LII] Another interesting aspect characterising the commons movement is their peculiar way of conceiving power relations in their governance. For example, they refute the logic of concentration of power that is present both in public property and private property, while favoring instead a *diffusion* of power over the good among the consociates. Also, the commons postulate cooperation and *participatory inclusion* in the enjoyment of the good and not, as mainly private property instruments do, competition over the resource and exclusion from its enjoyment for whoever is not the owner (see Mattei 2011). On the transnational nature of politics and social movements related to the environmental issues see Doherty and Doyle (2006).

[LIII] The debate has had a huge philosophical resonance throughout history. Without in any way claiming to be exhaustive - since the authors who wrote about this topic span from Aristotle to Rawls and Parfit -, cf. Gosseries (2008); Gosseries and Meyer (eds.) (2009); Gardiner et al (eds.) (2010).

[LIV] See footnote 8.

[LV] According to Gearty (2010: 7-8), '(...) the [anthropocentric] discussion is invariably about the self-fulfilment of the individual, his or her ability to set goals for leading a full life and then being free to go on to achieve those targets. The debate is about what are the necessary building blocks of such a successful life; it is

not about what that life can or ought to do to make the world around it a better place, even for others to live in, much less simply for the planet's sake. Such a formulation thus sees *the environment as a life-sustaining good or entitlement to be added to all other material conditions of human welfare including housing, food and healthcare.* Anthropocentric-oriented rights are *utilitarian* and they focus on the socio-economic context thus seeking to ground, improve access to and expand human claims to resources with a view to ensuring economic development in its widest sense'. In-text reference to Bosselmann (2005). Also, remember the Principle 1 of the Rio Declaration on Environment and Development (1992): '*Human beings are at the centre* of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.' (available at http://www.unesco.org/education/pdf/RIO_E.PDF) (emphasis added).

[LVI] See above, par. 4.1.

[LVII] See De Lucia (2015); Grear (2013); Philippopoulos-Mihalopoulos (2013).

[LVIII] We believe we can identify, on the one hand, a "softer" ecocentric approach and, on the other, a "stronger" one in the formulation of environmental human rights. The former 'sees the environment as a condition to life, thus placing limitations on individual freedoms [and] more inclined towards limitations of human entitlements to resources.' [Conceived this way, environmental rights would] 'recognize the intrinsic and not the functional value of the environment, while simultaneously seeking to preserve ecological integrity'. Kotzé (2014: 258), in-text reference to Bosselmann (2005). The "stronger" ecocentric approach, instead, is well represented by the above-discussed decision by the Colombian Supreme Court (STC 4360-2018). This approach does not simply posit limitations on human freedoms for the sake of environmental integrity. It goes further than this, by *endowing nature with proper rights*. Such an approach is also followed by 'Ecuador and Bolivia's constitutional experiments incorporating a more ecocentric objective into human rights *by granting the environment a 'right to exist, persist, maintain and regenerate its vital cycles*, structure, functions and its processes in evolution' (article 71 of the Constitution of Ecuador)'. Kotzé (2014: 258-259, emphasis added). For a general overview of the ideas of *buen vivir* (Bolivia's constitution 2009) and derechos de la naturaleza (Ecuador's constitution 2008), see Bariè (2014). A similar "strong" ecocentric approach can be found in the Universal Declaration of Rights of Mother Earth, presented in 2011 to the United Nations by the Bolivian Government. 'The Declaration recognizes that the Earth is a living entity and as a result 'Mother Earth' *could lay claim to the full range of fundamental rights normally attributed to humans* including, among others: the right to life and to exist; the right to be respected; the right to regenerate its bio-capacity and to continue its vital cycles and processes free from human disruptions; the right to maintain its identity and integrity as a distinct, self-regulating and interrelated being; the right to water as a source of life; the right to clean air; the right to integral health; the right to be free from contamination, pollution and toxic or radioactive waste; the right to not have its genetic structure modified or disrupted in a manner that threatens it integrity or vital and healthy functioning; and the right to full and prompt restoration.' Kotzé (2014: 265, emphasis added), referring to the art. 2 of the Proposed Universal Declaration of the Rights of Mother Earth (2011) <http://pwccc.wordpress.com/programa/>.

[LIX] Cf., among others, Brundtland (1987); Kotzé (2014).

[LX] See Mattei (2011).

[LXI] This dichotomy is one of the pillars of the Western political-legal tradition so much that Norberto Bobbio supported the idea of its undeniability. Indeed, he wrote in its *Stato, Governo, Società. Per una teoria generale della Politica* (1985) that the denial of this distinction would have meant the dissolution of the law itself.
However, the contemporary social and legal complexity wriggles out of any tight divide and, therefore, it is necessary to become aware of the hybridization of institutions, models and legal systems. The dichotomy public versus private is *de facto* becoming the object of a dialectical overcoming in the double sense of destruction and conservation (Catania, (2008). Cf. Casini (2014); Ford (2011); Kotzè and Soyapi (2016: 87). Cf. also Piketty (2014: 569, 573): '(...) it is important, I think, to insist that one of the most important issues in coming years will be the development of *new forms of property* and democratic control of capital. The *dividing line between public capital and private capital* is by no means as clear as some have believed since the fall of the Berlin Wall. As noted, there are already many areas, such as education, health, culture, and the media, in which the dominant forms of organization and ownership *have little to do with the polar paradigms of purely private capital* (modeled on the joint- stock company entirely owned by its shareholders) *and purely public capital* (based on a similar top- down logic in which the sovereign government decides on all investments). *There are obviously many intermediate forms of organization* capable of mobilizing the talent of different individuals and the information at their disposal. When it comes to organizing collective decisions, the market and the ballot box are merely two polar extremes. *New forms of participation and governance remain to be invented.* (...) The nation-state is still the right

level at which to modernize any number of social and fiscal policies and to develop *new forms of governance and shared ownership intermediate between public and private ownership*, which is one of the major challenges for the century ahead. But only regional political integration can lead to effective regulation of the globalized patrimonial capitalism of the twenty-first century'(emphasis added). Cf. also Capra and Mattei (2015: 144 ss); Barnes (2006).

[LXII] Now, after ten years, the project has been re-launched. While we are writing, (Jan. 2019), a campaign for the collection of signatures is going on in order to present a popular initiative law to the Italian parliament for the recognition of the commons in the Italian Civil Code in accordance to the 2007 Commission's formulation.

[LXIII] Also, we saw how the commons challenge the allegedly exhaustivity of another very important dichotomy: the public-private one.

[LXIV] Lövbrand et al. (2009: 12) actually propose a formulation of ecocentrism that deeply resemble the salient features of the commons as we described above: 'descriptions of the world as an intrinsically dynamic, interconnected web of relations in which there are no dividing lines between the living and nonliving, or the human and non-human ... resonate well with the Anthropocene imagery'.

[LXV] To use an effective expression, the Anthropocene needs a shift from the *homo oeconomicus* to an 'an *enlightened homo ecologicus universalis*. This is a being that is much more connected with the environment, who seeks out solidarity instead of competition, and whose freedom is conditional on the foregoing. Individuals thus become planetary citizens (...)'. Kotzé (2014: 267).

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