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Abstract 9

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Enclosed Solutions for Common Problems? Uncertainty, Precaution and Collective Learning in Environmental Law

Until recently, for people firmly believing in progress, Karl Polanyi could perhaps have been regarded as some romantic Knight of the Sorrowful Countenance. He bemoans the loss of the medieval commons or even the primitive economy of the "noble savage", while fighting in vain - but with the fervour of the religious socialist - against the "satanic mill" of the free market. Even if Polanyi's "Great Transformation" offers a convincing historical analysis of the Industrialisation and the emergence of a market society; against the backdrop of the political triumph of market fundamentalism in the 1980s and the early 1990s, his theory seemed to offer few realistic remedies.

However, since the turn of the millennium the idea of a commons, already laid to rest by mainstream economists and most social scientists, has had an unexpected resurrection. But, as opposed to the traditional concept of commons, which was applied to natural resources, like pastures, forests or marine environments, the new commons concern shared knowledge. This also allows for a new perspective on the problem of environmental degradation. Just as the focus of the commons-problem shifted from traditional to new commons, the focus of protection has shifted from the prevention of known dangers to the precaution of uncertain risk. To enable a rational environmental policy under conditions of uncertainty, common knowledge of environmental problems has to be further developed.

But just as the traditional commons, the intellectual commons are endangered by an enclosure-movement, "the enclosure of the intangible commons of the mind" (James Boyle). The worldwide propagation of intellectual property rights, privacy regulation, and legal protection of business secrets often proves to be an obstacle rather than an incentive to learning. Furthermore, modern style environmental regulations often make use of economic incentives, which tend to establish individual responsibility for risk-management. In the case of uncertain causes and complex multi-agent constellations this can lead to a fragmentation of risk-management and to a disruption of necessary inter-organisational learning processes. In most cases, such 'enclosed solutions' are insufficient to solve common problems.

However, even if intellectual property rights and environmental regulation contribute to this "second enclosure", it would be counterproductive to put the whole blame on legalisation. Rather, in terms of the private/public-distinction, law is a double-edged sword: not only does it protect private property, but also delimits property against the public sphere.

This is rather obvious, when private intellectual property has to be balanced with public interests in legal decision making, e.g. when environmental information duties in chemicals law prevail over business secrets. But new approaches to environmental regulation even go further as they also establish comprehensive responsibilities and "basic duties"

(Grundpflichten) of proprietors, which are accompanied by rules of public (or at least inter-firm) accountability. These new approaches might open up possibilities of public deliberation about shared values and - especially in environmental law - adequate levels of risk.