



The State, the Market, and some Preliminary Question about the Commons

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Introduction. Dominant wisdom.

Social justice is pursued in Western democracies by the (currently declining) institutions of the Welfare State. Access to social justice programs are usually understood as provided by “rights of second generation.” These social rights are not merely negative (shields against infringement), like property rights, but are considered positive i.e. requiring a specific obligation of the State.

This vision, which places the specific burden of satisfaction of social rights on the State, is coherent within the evolution of Western jurisprudence. Since the Scientific Revolution and the Reformation, social justice has been expelled from the core domain of private law¹. The Scholastic notion of law, still rooted in the Jesuit jurists of Salamanca (XVI century) according to which there were two concepts of justice---distributive justice and commutative justice--- was abandoned at the outset of modern Western jurisprudence. Starting from Grotius (XVII century), concerns over justice were equated to issues over fairness in contractual exchanges entered into by individuals. According to this vision, distribution, which was intended to pertain to the *whole* society and not just to its *parts*, was assumed as a social fact: distributive justice was expelled from legal science. Economics, developed as an autonomous branch of knowledge in the eighteenth century, shared such a vision². According to this dominant wisdom, issues of distribution cannot

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See James Gordley, *The Philosophical Origins of Modern Contract Doctrine*, 1991

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See Mark Blaug, *Economic Theory in Retrospect*, 1st ed. 1962

be part of a scientific discourse based on positivism. Distribution is considered entirely in the domain of political values rather than empirically measurable facts. Distributive justice became a matter of politics to be dealt with (if at all) by State institutions of public law. The birth of the Welfare State in the early twentieth century was thus considered as an exceptional intervention by regulation (by means of fiscal policy) into the market order, with the specific aim to guarantee some social justice to the weaker members of society. In the West, since then, social justice was never able to capture again the core of rights discourse, and consequently has remained constantly at the mercy of fiscal crisis: no money, no social rights!³

The concept of the commons can provide today exactly the necessary tools, both legally and politically, to addressing the incremental marginalization of social justice. Being outside of the State/Market duopoly, the Commons, as an institutional framework, presents an alternative legal paradigm, providing for more equitable distribution of resources and as a direct consequence, social justice.

Seeing the Commons

The current vision presents the opposition between “the public” (the domain of the State) and “the private” (the domain of the market and of private property) as exhausting all the range of possibilities (in a sort of zero sum game). This gridlocked opposition is a product of the modernist tradition still dominant today in law and in economics. It hydes the commons from the public vision. The commons, however,⁴ are resources which belong to the people as a matter of necessity, claim free access, and radically oppose both the state and private property as shaped by market forces. They are not concessions. If

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See Ugo Mattei & Fernanda Nicola, *A Social Dimension in European Private Law? . The Call for Setting a Progressive Agenda*, 45 New England L. R. 1-66 (2006)

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See Beniamino Lapadula & Laura Pennacchi, *Privato, Pubblico, Comune. Lezioni dalla crisi globale*, Roma, 2010.

properly theorized and politically perceived, the Commons can serve the crucial function of reintroducing social justice into the core of the legal and economic discourse by empowering the people to direct action.

The commons provide services which are often taken for granted by their users: those who benefit from the commons do not take into account their intrinsic value, only acknowledging it once the commons are destroyed and substitutes need to be found. To some extent, the universal services provided by the commons are similar to household work, never noticed when the work is being done. Only when no one is there to do the dishes, you notice its value. In other words you don't miss something until it is gone. Two striking examples of this feature are represented by mangroves and by coral barriers: people living on the coasts are not able to estimate the value of the services they provide simply because they don't even know that these goods have a specific function, that they are doing something for them. Only when a Tsunami hits, destroying villages, the value of such vegetation becomes apparent.⁵ However, prior to their destruction, mangroves played a major role in protecting coastal villages from tsunami waves. It would be highly expensive to build a similar barrier artificially.

Unearthing the Source of the Current “Dominant Wisdom” in the Western Legal tradition

It could be said that the commons disappear as a result of a structural incompatibility inherent in the deepest aspects of the Western “legality,” a legality that is founded on the universalizing and exhaustive combination of individualism with the State\ private property dichotomy.

Centuries before, in ancient Rome the early clans routinely extended their landholdings by usurping the commons and the privatization of the commons was already described by Engels as the most fundamental economic pattern of European development. Thus Western law has served a very important role in destroying the commons, certainly

5

LESTER R. BROWN, *Plan B 4.0. Mobilizing to Save Civilization*, Norton & Company, New York – London, 2009.

not in protecting them⁶. This still seems to be the pattern of development in cognitive capitalism⁷: think about prosecution of peer to peer internet exchanges.

Furthermore, it has always been problematic for the commons to find someone that would represent them in court, by suing those who tried to seize them. Both historically and today, those who benefit most from the commons are not “owners” in the technical sense, but usually poor farmers (or today young internet surfers) with no means of getting into the court system. Let’s remember how easily such farmers fell victim to the *enclosures* in England, the crucial phase in the development of early capitalism which provided the necessary proletarian workforce for the rising manufactures. Such enclosures and such violent production of workforce from dispossessed peasants would simply have been impossible outside of the fundamental alliance between private ownership and the State.⁸

Piercing the Veil of the supposed Dichotomy between the State and private property.

The state v. private debate presents a false dichotomy, a distinction without a difference. The state is no longer the democratic representation of the aggregate of individuals, but instead a market actor among many. The collusion or merger of state and private interests, with the same actors (corporations) on both sides of the equation, leaves little room for a “commons” framework, no matter how convincing the evidence about the benefits may be.

Private property and the State are the two major legal and political institutions that carry on the dominant view of the world. The common wisdom, presents them as radically conflicting. It assumes, in a cryptic way, that state and the market have a zero-

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Friedrich Engels *The Mark*. in *Socialism. Utopian and Scientific* , 2006.

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James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, in 66 “Law and Contemporary Problems”, 2003. 33-75.

8

Michael Tigar, *Law and the Rise of Capitalism*, 1977.

sum relationship: more state is equal to less market and less market is equal to more state. In this reductive scheme the state and private property become quintessential of public and private poles of opposition. Of course this picture is totally false on both historical and modern levels because the two entities, as social and living institutions, can only be structurally linked in a relationship of mutual symbiosis. The fabricated clear-cut opposition between the two is a precise ideological choice of the individualistic tradition⁹. This reduction hides a common structure of property (market) and sovereignty (state) based on the concentration of power. Private structures (corporation) concentrate their decision making and power of exclusion in the hands of one subject (the owner) or within a hierarchy (the CEO). Similarly, public structures (bureaucracy) concentrate power at the top of a sovereign hierarchy.

Both archetypes are inserted into a fundamental structure: the rule of a subject (an individual, a company, the government) over an object (a private good, an organization, a territory). Such pretended opposition between two domains that share the same structure is the result of modern Cartesian reductionist, quantitative, and individualistic thought. The individual subject left alone, narcissistic and wanting, finds in products, commodities, and external objects the satisfaction of his desires. This impoverished relational horizon, that has produced our alienation from nature (we own it therefore we are not part of it) is scientifically constructed as "objective" and measured by a system of prices to be paid for the satisfaction of various increasingly complex "needs."

The typical individualistic 'fiction' of the liberal tradition (the myth of Robinson Crusoe) induces market needs by erasing the communitarian experience. The more the lonely individual has needs the more money can be collected to fulfill their satisfaction: Thus the qualitative paradigm, based on meaningful relationship submits to a quantitative one. Unfortunately, ecology and 'systemic' thinking - the paradigms capable of revealing that these dynamics of individualistic accumulation are devastating for community life - are notably absent in contemporary politics, which has elected the "social sciences"

9

This conflict is at the very origins of liberal individualism. Locke and Hobbes would be the two champions respectively of private property and of State sovereignty. See C.B. Macpherson, cit. supra.

(particularly microeconomics, political science and marketing) as its only repository of ideas. Contrary to Garrett Hardin's famed phrase in the "Tragedy of the Commons," "a commons is a place of no law and therefore ruin," it seems that state and market mechanisms, which rely on the "individual" as its object, are in fact the culprits of this ruin today.¹⁰

Tragedy of the Commons: Two World Views in Conflict Competition v. Cooperation

Individual selfishness is the central assumption underpinning Hardin's analysis. the central assumption underpinning Hardin's analysis. Only the crude application of the model of *homo oeconomicus*¹¹, an individual maximizer of short-time utility, explains the results (and academic success) of the so-called "tragedy of the commons."¹² In fact, the well known parable of the microbiologist Garret Hardin, presented to the public in a famous essay in 1968, has perverted the ordinary wisdom to see the commons as a place of no law¹³. According to Hardin, a common resource, as freely appropriable stimulates the opportunistic behavior of accumulation and ultimately destructive and "inefficient" consumption. This reasoning conjures up the image of a person invited to a buffet where food is freely accessible, and rather than sharing the bounty with

10

David Feeney, Fikret Berkes, Bonnie J.McCay, and James M Acheson, "The Tragedy of the Commons: Twenty-two years Later," *Human Ecology*, Vol. 18, No. 1, 1990. These authors are part of Ostrom's research team and apply an institutional analysis based on case studies performed over several decades.

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The concept originating in the work of John Stuart Mill, and in the 18th century brought into mainstream political economy by Adam Smith and David Ricardo.

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Garrett Hardin, *The Tragedy of the Commons*, "Science", 13 December 1968, pp. 1243-1248,

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See Elinor Ostrom, *Governing the Commons. The Evolution of Institutions for Collective Action*, 1990

others, rushes to try to maximize the amount of calories that can be stored at the expense of others, efficiently consuming the largest possible amount of food in the least possible time.

The “Tragedy of the Commons” highlights two worldviews in conflict. The dominant worldview being substantially based on the social Darwinian idea, which makes “competition,” “struggle,” and “emulation” between physical and legal persons the essence of reality. There are a number of possible narratives capable of explaining the abandonment of the community based model in the West, the most relevant for our purposes views its demise as the product of “progressive” modernizing market forces relying on state-wide political institutions. It is a fact that the alliance between state institutions and private property interests has been the force behind the race for colonial plunder, the enclosure of the commons in eighteenth century England, and the increased concentration of capital (the original accumulation of Marxian memory).¹⁴ The recessive world view is instead based on an ecological and holistic approach to the world and displays relationship, cooperation and community as its typical pattern. This model, still present in the organization of communities in the “periphery” continues to suffer a merciless assault by the structural adjustment and comprehensive development plans of the World Bank and International Monetary Fund which push for modernization. Such modernizing efforts have encouraged and resulted in the “commodification” of land, and of local knowledge, supported by a process of cultural adjustment (human rights, rule of law, gender equality etc.) that serves as justifying rhetoric for continuity in plunder¹⁵.

Going Beyond the Tragedy

Elinor Ostrom and her team of social scientists successfully demonstrated through an overwhelming amount of empirical evidence that cooperative property arrangements

14

See Sandro Mezzadra, *La «cosiddetta» accumulazione originaria*, in AA.VV., *Lessico marxiano*, Manifestolibri, Roma, 2008, pp. 23-52.

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See Ugo Mattei & Laura Nader, *Plunder. When The Rule of Law is Illegal*, 2008

are in fact successful and individuals do not destroy their common pool resources. Ostrom's work undeniably marks a critical turning point in economic theory. It refuted Hardin's tragedy but actually failed to notice that corporations and States, if not individuals, actually do behave in such a way to produce tragedy. Without consideration of the historical, political, and legal context of the fierce struggle between commoners on the one hand and the unholy alliance between the State and private property on the other, Ostrom's findings remains limited in their applicability. Property law from its early development in the West acted to justify the power of dominant sovereigns over weaker subjects in a process of brutal exploitation. Property law continued to persist in this direction by "terra nullus" doctrines during the period of Colonialism. In more recent times, such domination has taken on a more subtle and hegemonic form but it is clearly the case that in fact corporations tend to operate as relentless and merciless maximizers of short term self interest. Whether the outcome of the commons is considered tragic (Hardin) or not (Ostrom), this approach to the commons does not overcome commodification. Thus they contribute to a long lineage of modernist thought that has secured a place for radical individualism and eventual dismantlement of the public domain in favor of private interests.

The pervasiveness of the false opposition between state and market as discussed above precludes the literature on the commons to radically break with their commodification. Current taxonomies trying to make order out of many types of commons (natural commons – environment, water, etc.. - vs. social commons – culture, knowledge, historical remembrances) do not fully embrace the needed shift to a more phenomenological understanding of our issues. Reducing the commons to commodities actually limit their scope and as a consequence their revolutionary potential based on a legitimate claim for radical equalitarian redistribution of resources. Much of the Nobel prized liberal literature on the commons should be thoroughly examined critically so as to avoid reproducing again the traditional mechanistic view, the separation between object and subject and resulting commodification.¹⁶ Alongside the empirical data now available,

16

Gian Carlo Rota, *The End of Objectivity. The Legacy of Phenomenology*, Lectures at MIT 1974-1991 Second Preliminary Edition, in collaboration with Sean Murphy and Jeff Thompson, 1991.

we must critically assess our current institutions and reclaim our common sense about the issue of resource distribution, perverted too long by the liberal agenda of modernity. The commons project must be as much about a new framework for participatory government as alternative property arrangements.

The Holistic Revolution: Rehabilitating the Common Sense

Interestingly enough the counter-hegemonic narrative to the cornerstone of individualism, originated in the sciences. Holistic attitudes, based on the qualitative mapping of relationships, rather than on quantitative measurements and the positivistic reductionism of Galileo, Descartes, and Newton, also eventually emerged in the natural sciences through physics and systems biology.¹⁷ Quantum mechanics in particular, and Einstein's relativity, have caused an epistemological revolution which such newer disciplines as cognitive science and consciousness studies are attempting to address. This holistic revolution, on the philosophical level has ancient roots, from Aristotle's ontological investigations to later philosophers like Husserl and Heidegger, who employed concepts of phenomenology such as "fundierung"¹⁸ and 'relevance' to signal the end of an "objective" world where subjects are separate from their objects of observation (or individuals from their very environment). Regardless of the richness of the imprint that this holistic revolution has made in these disciplines, this revolution has yet to be embraced in the social sciences. Here, the Anglo-American empiricist tradition (with roots in Baconian scientism) still dominates the academic landscape especially in economics, political science and sociology and also in the Anglo-American analytical philosophical traditions as well as in the law.

The commons can be described only from a phenomenological and holistic perspective and their understanding is therefore incompatible with the above mentioned

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Fritjof Capra, *The Web of Life. A New Scientific Understanding of Living Systems*, 2004

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Fundierung: a term coined by Heidegger to describe the layers of contextuality which constitute our perception of reality. Martin Heidegger, *Being and Time*, trans. by John Macquarrie & Edward Robinson, 1962.

reductionism. The commons are radically incompatible with the idea of individual autonomy as developed in the rights-based capitalistic tradition. In this respect, commons are an ecological-qualitative category based on inclusion and access, whereas property and State sovereignty are rather economical-quantitative categories based on exclusion (produced scarcity) and violent concentration of power into a few hands.

All this, evidently requires the jurist's attention to the difficult and urgent task of constructing the new foundation of a legal order capable of transcending the property-state dualisms inherent in the current order. Given the dominance of private property, individualism, and competition as the basis of the current legal order, the new order must correct this imbalance by focusing on the collective and the commons as the center, creating an institutional setting reflecting long term sustainability and full inclusion of all the global commoners including the poorest and most vulnerable (human and non humans). To do so we need first an epistemic (and political) emancipation from the predatory appetites of both the State and private property, the two fundamental components of the dominant imperialistic Western wisdom. Commons lie beyond the reductionist opposition of "subject-object", which produces the commodification of both. Commons, unlike private goods and public goods, are not commodities and cannot be reduced to the language of ownership. They express a qualitative relation. It would be reductive to say that we *have* a common good: we should rather see to what extent we *are* the commons, in as much as we are part of an environment, an urban or rural ecosystem. Here, the subject is part of the object. For this reason commons are inseparably related and link individuals, communities, and the ecosystem itself.

Political Shift

Today we can see from examples all around us, from global warming to the economic collapse, that the politically recessive but philosophically more sophisticated holistic paradigm offers us a fundamental and necessary shift in the perception of reality. In this context the commons can offer an institutional setting reflexive of the need to reject the false illusion of modern liberalism and rationalism. This is why we cannot settle to see the "commons" as a mere third way between private property and the state as most of the current debate seems to suggest. To be sure, in the current academic

resurgence of interest the commons are reduced to an institutional setting proposed to manage the leftovers of the Western historical banquet which occupies with States and private property (the mythological market) almost the totality of the political scene. To the contrary we believe that the commons must be promoted to an institutional structure that genuinely questions the domains of private property (and its ideological apparatuses such as self-determination and “the market”) and that of the State: not a third way but an ecologically legitimized foe of the alliance between private property and the state. The shift that we need now to accomplish politically, not only theoretically, is to change the dominant wisdom from the absolute domination of the subject (as owner or State) over the object (territory or more generally the environment) to a focus on the relationship of the two (subject-nature). We need a new common sense recognizing, outside of the Western liberal hubris, that each individual's survival depends on its relationship with others, with the community, with the environment. The first necessary shift that becomes apparent is the move from a focus on quantity (the fundamental idea of the scientific revolution and of capitalist accumulation) to quality a key notion of the alternative holistic vision.

A legal system based on the commons must use the "ecosystem" as a model, where a community of individuals or social groups are linked by a horizontal mutual connection to a network where power is dispersed; generally rejecting the idea of hierarchy (and competition, produced by the same logic) in favor of a participatory and collaborative model, which prevents the concentration of power in one party or entity, and puts community interests at the center. Only in such a framework social rights can actually be satisfied. In this logic a common (water, culture, the internet, land, education) is not a “commodity” but rather a shared conception of the reality which radically challenges with the arms of critique and sometimes with the critique of the arms the seemingly unstoppable trend of privatization\corporatization.

Conclusion

Even today, despite the dramatic crisis of 2008, when the free market ideology has shown its catastrophic nature, State intervention dubbed Keynesian policy, has been

utilized to transfer massive amounts of public money to the private sector. The logic of plunder shared by both the private and the state sector could not be more open. It should be clear that what we need is rather a very large extension of the commons framework to subvert the domination of private property (with its rhetoric of autonomy and of the rule of law) currently sustained by both the State and the market. Commons expansion favors the opposite logic of authentic participatory democracy in both the State and market domains. The agenda of “less government, less market, more commons” is, I believe, the only way to resurrect an alternative narrative of social inclusion (and direct satisfaction of social rights) capable of re-gaining hegemony.