

First Thoughts for a Phenomenology of the Commons

By Ugo Mattei

The commons are not concessions. They are resources that belong to the people as a matter of life necessity. Everybody has a right of an equal share of the commons and must be empowered by law to claim equal and direct access to it. Everybody has equal responsibility to the commons and shares a direct responsibility to transfer its wealth to future generations. The commons radically oppose both the State and private property as shaped by market forces, and are powerful sources of emancipation and social justice. However, they have been buried by the dominant academic discourse grounded in scientific positivism. They need to be emancipated by an authentic shift in phenomenological perception in order to produce emancipation.

Social justice is pursued in Western democracies by the (currently declining) institutions of the Welfare State. Access to social justice programs is usually understood as provided by “rights of second generation,” which require a specific obligation of the State to respect and guarantee them.

This vision, which places the specific burden of satisfying social rights on the government, has been central to the evolution of Western jurisprudence. Since the Scientific Revolution and the Reformation, social justice has been expelled from the core domain of private law. The Scholastic notion of law in the 16th century – which was based on two concepts of justice, distributive justice and commutative justice – was abandoned at the outset of modern Western jurisprudence. Starting with Grotius in the 17th century, concerns over justice were equated to issues of fairness in contractual exchanges between individuals. Distribution was seen as applying to the whole society and not just to its parts, and was assumed as a social fact. Thus the concerns of distributive justice were expelled from legal science.

Another significant change occurred in the seventeenth century with the so-called scientific revolution, which gave rise to the paradigm of positivism and the dominant wisdom of modernity (Capra 2009). According to this vision, facts must be separated from values, the world of the “is” being clearly different from that of the “ought to be.” Economics, developed as an autonomous branch of knowledge in the 18th century, shares such a vision (Blaug 1962). Distribution is considered entirely in the domain of political values (ought to be) rather than measurable facts (is). Consequently, issues related to how resources should be distributed in a just

society have been expelled not only from the law but also from the self-proclaimed scientific discourse of economics.

Distributive justice thus became a matter of politics to be dealt with (if at all) by State institutions of public law and by regulation. The birth of the Welfare State in the early 20th Century was considered as an exceptional intervention into the market order by regulation mainly through taxes, 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 at the mercy of fiscal crisis: no money, no social rights! (Mattei & Nicola 2006).

The concept of the commons can provide exactly the necessary tools, both legally and politically, to address 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. If 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.

Seeing the commons

The current vision presents the opposition between “the public” (the domain of the government) 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 hides the commons from the public vision.

The commons provide services that are often taken for granted by their users: many of 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 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. An example is the role served by mangroves in coastal regions. When making development decisions, people take their existence for granted and simply do not consider their important role in protecting coastal villages from tsunami waves. Only when a tsunami hits, destroying villages, does the value of such vegetation becomes apparent (Brown 2009). It would be highly expensive to build a similar, artificial barrier.

Seeing the commons and fully appreciating their role in the ecology of life on earth is politically crucial and an absolute necessity for any serious scholarly endeavor. The commons cannot be circumscribed for purposes of analysis; they claim a fully holistic approach. This is why dominant social sciences, having internalized the zero-sum vision of market and government, are ill-equipped to grapple with the issue.

It could be said that the commons disappear as a result of their structural incompatibility with the deepest aspects of the Western “legality,” a legality that is

founded on the universalizing combination of individualism with the State/private property dichotomy. Centuries before the birth of the modern State, in ancient Rome, the early clans routinely extended their landholdings by usurping the commons. Engels describes the privatization of the commons as the most fundamental economic pattern of European development. Thus Western law has served a very important role in destroying the commons, certainly not in protecting them. This still seems to be the pattern of development in cognitive capitalism (Boyle 2003): think about prosecution of peer-to-peer exchange on the Internet.

But it has always been problematic for commoners to find someone that would represent them in court, to sue those who try to seize the commons. 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 accessing the court system. Let’s remember how easily farmers in England fell victim to enclosures in the first, crucial phase of early capitalism, which provided the necessary proletarian workforce for the rising manufacturers. Enclosures and violent recruitment of dispossessed peasants to become a capitalist workforce would simply have been impossible without the fundamental alliance between private ownership and the State (Tigar 1977).

The dominant vision of the commons as a poorly theorized exception to *either* market *or* government is rooted at the very origins and in the very structure of the dominating Western vision of the law. That is how a social fact becomes real.

Piercing the veil of the market-state dichotomy

Private property and the State are the two major legal and political institutions that carry on the dominant view of the world. But the state versus 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.

Conventional wisdom presents the market and the state as radically conflicting. It assumes, in a cryptic way, that they have a zero-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 reflects the ideological choice of the individualistic tradition. This conflict emerged at the very origins of liberal individualism, as seen in Locke and Hobbes, the two champions, respectively, of private property and of State sovereignty.

This reduction hides a shared structure of property (market) and sovereignty (state) based on the concentration of power. Private structures (corporations)

concentrate their decisionmaking and power of exclusion in the hands of one subject (the owner) or within a hierarchy (the CEO). Similarly, public structures (bureaucracies) 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, which 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, e.g., the myth of Robinson Crusoe, induces market needs by erasing consciousness of the communitarian experience. The more needs the lonely individual has, the more money can be collected to satisfy them. Thus the qualitative paradigm based on meaningful relationships submits to a quantitative one.

Unfortunately, ecology and “systemic” thinking – the paradigms that could reveal the devastating impact of individualistic accumulation on community life – are notably absent in contemporary politics, in part because it looks to the “social sciences” (particularly microeconomics, political science and marketing) as its only repository of ideas. Contrary to microbiologist Garrett Hardin’s famed phrase, the “tragedy of the commons” (Hardin 1968) – “a commons is a place of no law and therefore ruin” – state and market mechanisms that rely on the “individual” as its object are in fact the culprits of this ruin today (Feeny et al. 1990).

Two world views in conflict competition versus cooperation

Individual selfishness is the central assumption underpinning Hardin’s analysis. Only the crude application of the model of *Homo economicus* explains the results (and academic success) of the so-called “tragedy of the commons.” *Homo economicus* originated in the work of John Stuart Mill and was brought into mainstream political economy in the 18th century by Adam Smith and David Ricardo, both of whom focused on individuals as maximizers of short-term utility. Hardin’s “tragedy” parable continued this tradition when it cast the commons as a place of no law. According to Hardin, a common resource, as freely appropriable, stimulates the opportunistic individual 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 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 is substantially social Darwinism, which makes “competi-

tion," "struggle," and "emulation" between physical and legal persons the essence of reality. The recessive worldview, an ecological and holistic understanding of the world, is based on relationships, cooperation and community. This model, still present in the organization of communities in the "periphery," continues to suffer a merciless assault by the structural adjustment and comprehensive "modernization" and "development" plans of the World Bank and International Monetary Fund. As many of the articles in this volume testify, such efforts encourage the "commodification" of land, and of local knowledge, as well as cultural adjustments (imposition of human rights, rule of law, gender equality, etc.) that serve as a justifying rhetoric for continuity in plunder (Mattei & Nader 2008).

Elinor Ostrom and her team of social scientists successfully amassed an overwhelming amount of empirical evidence to show that cooperative property arrangements are in fact successful and that individuals do not necessarily destroy their common-pool resources. Ostrom's work undeniably marks a critical turning point in economic theory. It refuted Hardin's tragedy, but it failed to notice that corporations and States, if not individuals, behave in ways that nonetheless produce tragedy. Without consideration of the fierce historical, political, and legal struggle between commoners on the one hand and the unholy alliance between the State and private property (capital) on the other, Ostrom's findings remain limited in their applicability.

The so-called "original accumulation" described by Marx has been an institutional phenomenon carried on by an alliance between centralized State structures and a concentration of capital by private property and corporate structures. This process has victimized the ordinary ("non-institutional") human being, and has produced and ideologically justified a process of brutal institutional exploitation of the multitudes by the few. Such a phenomenon was by no means limited to the "enclosure" laws of England. The *terra nullius* doctrines endorsed by John Locke and other scholars during the period of colonial expansion overseas confirm the institutional nature of "tragedy-producing" behavior (Mattei and Nader 2008). Natives were all but denied human condition (were "reduced" to a natural state) because they did not adopt the civilizing institution of private property. In more recent times, the patterns of domination, institutional settings, and narratives of enclosure have taken on more subtle forms, but continue to enclose the commons.

Hardin's parable maintains tremendous predictive power despite Ostrom's critique and all its own intellectual shortcomings, e.g., that the common is a place of no law, precisely because as a rule "mere humans," acting outside of the institutional context of modernity, do respect the commons. Meanwhile, "institutional humans" operating via States and corporations continue to produce tragic outcomes. Thus the panoply of Ostrom's examples of flesh-and-blood individuals who cooperate rather than compete, seems impotent to undermine Hardin's argument. The examples do not take adequate account of the institutional realities and the actual power structures in which decision-making occurs. Indeed, Ostrom's critique of the tragedy of the commons risks shifting attention away from

the problem and shielding powerful economic and political actors from responsibility for “tragedies.”

Often, scholars accept the specious dichotomy between state and market, as discussed above, and so decline to develop a deeper phenomenological understanding of the commons that could make a radical break from the discourse of commodification. Understanding commons as commodities actually limits our understanding of the many types of commons (natural, social, cultural, knowledge-based, historical) and blunts their revolutionary potential and legitimate claims for a radical, egalitarian redistribution of resources. Much of the literature on the commons should be thoroughly and critically examined so as to avoid reproducing the traditional mechanistic view, the separation between object and subject, and resulting commodification (Rota 1991).

Rehabilitating the common sense

A phenomenological understanding of the commons forces us to move beyond the reductionist opposition of “subject-object,” which produces the commodification of both. It helps us understand that, unlike private and public goods, commons 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.

This holistic revolution has ancient roots, from Aristotle’s ontological investigations to later philosophers like Husserl and Heidegger, who employed concepts such as “fundierung” (Heidegger 1962) and “relevance” to signal the end of an “objective” world where subjects are separate from their objects of observation and individuals are separate from their very environment. New holistic attitudes have emerged, also, in the natural sciences through physics and systems biology, which are based on the qualitative mapping of relationships, rather than on quantitative measurements and the positivistic reductionism of Galileo, Descartes, and Newton (Capra 2004). Quantum mechanics in particular, and Einstein’s relativity, have caused an epistemological revolution that disciplines such as cognitive science and consciousness studies are attempting to address. Despite the richness of the holistic revolution in these disciplines, this revolution has yet to be embraced in the social sciences.

The commons can be described only from a phenomenological and holistic perspective, which is incompatible with the above-mentioned reductionism and 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, access and community duties, whereas property and State sovereignty are *economical-quantitative* categories based on exclusion (produced scarcity): a rhetoric of individual-centered rights and the violent concentration of power into a few hands.

These insights require the jurists to address the difficult and urgent task of constructing the foundations of a new legal order capable of transcending the dualisms (property/State, subject/object, public/private) inherent in the current order. The new order must overcome the dominance of private property, individualism, and competition, and focus on the collective and the commons. The challenge is to create an institutional setting that can enable long-term sustainability and full inclusion of all global commoners, including the poorest and most vulnerable. 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 Western wisdom.

A political shift

Today we can see from examples all around us – from global warming to the economic collapse – that the commons offers us a fundamental and necessary shift in the perception of reality. In this context the commons help us reject the illusions of modern liberalism and rationalism. This is why we cannot settle for seeing the “commons” as a mere third way between private property and the state, as most of the current debate seems to suggest. The commons cannot be reduced to managing the leftovers of the Western historical banquet, which is the preoccupation of the contemporary political scene. To the contrary, we believe that the commons must be elevated as an institutional structure that genuinely questions the domains of private property, its ideological apparatuses and the State – not a third way but a challenge to the alliance between private property and the state.

The shift that we need to accomplish not only theoretically but also politically, is to change the dominant wisdom – from the absolute domination of the subject (as owner or State) over the object (territory or environment) – to a focus on the relationship of the two (subject-nature). We need a new common sense that recognizes that each individual’s survival depends on his/her relationship with others, with the community, and with the environment. The first necessary shift to a holistic vision requires a reorientation away from quantity (a fundamental idea of the scientific revolution and of capitalist accumulation) to quality.

A legal system based on the commons must use the “ecosystem” as a model, where a community of individuals or social groups is horizontally linked and power is dispersed. It must generally reject the idea of hierarchy in favor of a participatory and collaborative model, one that prevents the concentration of power and puts community interests at the center. Only in such a framework can social rights actually be satisfied. In this logic, a commons is not a mere resource (water, culture, the internet, land, education), but rather a shared conception of reality that radically challenges the seemingly unstoppable trend of enclosure and corporatization.

Even today, despite the dramatic crisis of 2008, State intervention, dubbed Keynesian policy, has served 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. What we need is rather a very large extension of the commons framework: “less government, less market, more commons.” This is, I believe, the only way to resurrect an alternative narrative of social inclusion.

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