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The Commons as a Legal Concept

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Abstract Scientific debates about the political, economic and even legal aspects of commons have circulated wherever commons are perceived to pose a challenge to the increasing commodification of people's lives. Indeed, a wide range of commons has emerged worldwide. Emerging commons pose a challenge to the law which is now requested to provide legal tools to resist the dispossession of the common wealth. Nevertheless, commons do not embody a reality which is external or unfamiliar to the law. This paper is an attempt to reframe the commons as a legal concept. In this article I argue that commons are not just a marginal element of contemporary legal systems. Rather, they embody the premises for important transformative practices and discourses and represent a subversive site in the legal order. I maintain, first, that the law of the commons is consistent with the law in force and the current legal regimes of private property and, second, that the current stage of globalization is most favourable to the establishment of a law of the commons both in the peripheries and at the core of the capitalist system. However, given the persistent dominance of the individual-based property paradigm, the legitimacy of the commons on legal grounds remains problematic. Certainly the recognition and protection of the commons challenge the legal regime of property in force and query about the possible limits that the law may impose upon property rights. It is evident that the true core of the commons discourse as a legal discourse rests upon its relation with property and depends on the notion of property that we assume as normative. The Hohfeldian idea of property as a bundle of rights offers a good starting point for articulating a legal theory of the commons under positive law.

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Introduction

From a historical point of view, there is nothing new about commons but over the last decade there has been a renewed interest in them, especially as they have become increasingly identified with strategies of resistance to neoliberal politics both at a global and local level. Scientific debates about the political, economic and legal aspects of commons have circulated wherever commons are perceived to pose a challenge to the increasing commodification of people's lives. Indeed, a diverse range of commons has emerged worldwide (Holder 2008, pp. 299–310). They concern both tangible goods—land-based or otherwise—and intangible goods (so-called cultural commons) as articulations of the wealth produced in common, i.e. the product of social cooperation, and many of them arise from or are re-created through the struggles of social movements and the mobilization of communities.

These 'new commons' have been accompanied by a counter-narrative that speaks of a (possible) political and social transformation in this current stage of capitalism, and makes a difference in legal discourse too, insofar as it disrupts the dominance of the private property paradigm in the relations between human beings and resources.

In the face of emerging commons, the law is called upon to provide tools to resist the dispossession of common wealth. Certainly, the protection of the commons requires a creative and imaginative effort on the part of jurists. Nevertheless, commons do not embody a reality that is external or unfamiliar to the law.

Evidence of commons can be found in most legal systems. Collective rights on communal lands have always been enforced in continental Europe, Asia and Africa. Collective properties in Italy, indigenous rights on land in North and South America, as well as collective rights of servitudes or use (such as *usi civici* in Italy) are currently granted by many national laws. In some cases they are recognized as formal entitlements, in others they are governed through informal practices.

While collective rights of access and use are usually presented as a nostalgic throwback to old communal lands, such a narrative is now increasingly undermined by a variety of 'emerging commons', such as Common Interest Communities, Limited Equity Housing Cooperatives and Community Land Trusts in North America or Guerrilla Gardens in urban areas worldwide, not to mention intangible commons such as the very many experiences of commoning on the Internet (Wikipedia being just one notable example). The complexity of this situation contradicts any suggestion that commons are either exceptional or a mere legacy of the past.

Recently, a wide variety of legal instruments have been deployed to protect (or re-appropriate) the commons, ranging from property-like or 'counterposed property claims',[1] to the denial of private property (such as informality in urban

[1] Blomley tackles the issue of 'the property of the poor', in other words the ways in which poor people in a neighbourhood claim rights on land that has been in the community for decades in reaction to redevelopment projects and gentrification (Blomley 2008, p. 311).

development), by way of creating a legal person out of the common resource to be protected (below 'Use Across the Subject/Object Distinction' section). Thus multiple legal tools are available in all legal systems and serve as functional equivalents.

In this article I argue that commons are not just a marginal component of contemporary legal systems. On the contrary, they embody the premises for important transformative practices and discourses and represent a subversive site in the legal order: commons both challenge the dominance of private property in legal discourse and confront the abuse of intellectual property that has occurred worldwide in the last decades. Even more radically, they disrupt both the subject/object and the public/private dichotomies. Regarding the former, if we understand the commons as social systems consisting of communities and resources managed in common, it becomes clear that resources and communities are mutually constitutive, to the extent that the distinction between the legal subject/titleholder and the object of the entitlement starts to disappear. Indeed, among the variety of legal arrangements adopted to protect the commons there are some that blur (or flip) the subject/object opposition (below 'Use Across the Subject/Object Distinction' section). Regarding the latter, the commons as a social entity goes beyond both the individualistic approach to private law and the dogma of state sovereignty in public law. In fact, in modern legal systems, the commons represent the epitome of the crisis of the public/private dichotomy in property law. This is particularly true for civil law systems where the public/private distinction in the allocation of resources radically marked the abolition of feudalism and located itself at the core of the legal system. Conversely emergent commons are now claimed to be located beyond the market/state opposition.

This point was clearly corroborated in 2011 in two important decisions made by the Supreme Court of India and the Italian Supreme Court. The first decision[2] refers to an emblematic example of political corruption involving the transfer from the local government to a private developer of an area located in a village in the State of Punjab, which included a pond that was crucial for local inhabitants as a source of water for drinking, washing and watering cattle. The Court condemned this widespread practice of the public administration and declared the need to protect common rights in order to defend the lives of communities.

The Italian decision[3] is particularly relevant because it offered a first formal recognition of the category of common goods. Examining the claim of a private fishery to an area of the Venice Lagoon, the Court maintained that state properties had to be considered common goods when they were devoted to the fulfillment of people's fundamental rights (in this case, the right to enjoy the environment).

Despite the dominant account, these judgments show that one does not need to return to a mythical golden age to find the social and political premises for fitting the commons into the legal order, nor is it necessary to wait for a better time (i.e. the end of capitalism) for the commons to acquire legal status. In other words, I argue that legal tools needed to establish the law of the commons are available right now,

[2] Supreme Court of India, Civil Appeal No. 1132/2011@SLP(C) NO. 3109/2011, 28 January 2011.

[3] Cass. Civ. Sez. Unite. Sent., 14 February 2011, n. 3665.

in the era of neoliberalism. More specifically, I contend, first, that the legal recognition and regulation of the commons is consistent with the law in force and the current legal regimes of private property, and second, that this present stage of globalization, both in the peripheries and at the core of the capitalist system, is more favourable to the establishment of the 'law of the commons' as a possible new area of private law.

However, given the persistent dominance of the individual-based property paradigm, the legitimacy of the commons on legal grounds remains problematic. Certainly the recognition and protection of the commons challenge the legal regime of property in force and question the potential limits that the law may impose upon property rights. It is evident at this point that the true core of the commons discourse as a *legal* discourse rests on its relation with property and depends on the notion of property that we assume as normative. The Hohfeldian idea of property as constituted by a bundle of separable rights offers a good starting point for articulating a legal theory of the commons under positive law. Moreover, given the public/private dichotomy that rules the access to resources in Western—and especially civil law—legal systems, the possibility of conceiving common goods as a category that exceeds both private and public property relies on a legal realist approach to the very structure of property.

This paper is an attempt to reframe the commons as a legal concept.[4] It moves from the acknowledgement that the many collective initiatives of social struggle and resistance that have occurred across the globe have firmly placed the question of the legal recognition of the commons on the radical agenda. From this perspective, the commons provide a good example of how it is possible to challenge the public/private and state sovereignty/market divisions as major ideological frameworks that enable the dispossession of what is produced in common.

It suggests that the legal basis for the commons can be mainly traced to within private law and particularly the field of property law. However, the aim here is not to advocate a third type of property in addition to the public and the private. Instead, Hohfeld's theory of property as a bundle of rights can be usefully applied to unbundle property to provide a theoretical foundation to the commons. The main argument here is that property forms a continuum from individual to collective property and that alongside this continuum different bundles of rights exist in varying degrees. These rights can be rearticulated in the context of the commons and offer a broad spectrum of legal arrangements that ground collective rights of use in the law in force.

[4] The locution 'commons as a legal concept', which is also the title of this article, takes its inspiration from the famous essay by Frug (1980). However, I have no ambition to play the same seminal role that Frug's article played in its field, nor do I presume to offer a pivotal or pathbreaking work by analyzing the legal basis of the commons. On the contrary, I am well aware of the huge legal literature existing worldwide on the topic, of which it is literally impossible to provide here an exhaustive review. Setting aside the vast scholarship produced both in North and South America, I limit myself to a few references to the debate on commons and the law in Europe, where there is also quite an extensive scholarship. For the United Kingdom see Linebaugh (2008), Davies (2012, pp. 1–21, 2015), Chatterton (2010, pp. 625–628) and Finchett-Maddock (2010). For France see Parance and de Saint Victor (2014), Dardot and Laval (2014) and Coriat (2015).

The paper is structured in four sections. The first two sections offer, respectively, a definition and a taxonomy of what can be reasonably conceived as commons at this present time. In doing so, the first section draws mainly on the Italian experience, which offers some interesting elements both at the political and doctrinal level and is characterized by what I define as a non-naturalistic approach to the commons. The second section on Taxonomy adopts this particular approach in order to design a taxonomy of resources capable of defining commons in legal terms. Section three on the Legal Basis of the Commons offers a genealogical account of the commons as an exception to property law and, at the same time, as something internal to it. In section four on Use versus Ownership I map various legal arrangements that have concretely assigned legitimacy or, more precisely, a legal form to collective rights of use as property rights distinct from property ownership. In the Conclusion I return to the relation between the discourse of commons and the idea of property as a bundle of rights and consider the issue of urban squatting within the Italian common goods movement as a case study for cross-examining and re-proposing the 'unbundling' hypothesis.

Commons 'Italian Style'

Commons are today perceived globally as a broad framework that challenges the role of individual property as the dominant means of organizing relationships between people and things and, more generally, of structuring social relationships. This framework represents an undoubtedly successful model in legal discourse, one that—to put it in geopolitical terms—has followed the centre-periphery trajectory. As economic and legal literature demonstrates—from Hardin (1968, pp. 1243–1248) and Ostrom (1990) to Demsetz (1967, pp. 347–359), Boyle (2003a, p. 1, b, p. 33), Lessig (2004, p. 1, 2006, p. 56) and others—the commons discourse has circulated between the Anglo-American centres of the globalized world and its various peripheries; providing, in the process, a keyword that conceptualizes the manifold struggles of resistance to 'accumulation by dispossession' (Harvey 2003, 2012). However, it is also possible to discern 'local' versions of the commons framework, and Italy is an interesting example in this respect.[5]

In this part I focus on the Italian experience where the commons discourse originating from the centre has been revisited mainly on the legal terrain to offer possible alternatives to the crisis and transformation of the public/private dichotomy. Italy can be considered a semi-peripheral territory with regard to the processes of legal globalization. By 'semi-periphery' I mean a legal system where legal concepts, techniques or arguments from the centre are elaborated, reframed and spread onward to the peripheries, thus functioning as a sort of sorting centre of jural artifacts. As such, the Italian system undergoes legal developments that may indirectly affect or be of interest to a broader region in the world. In the current

[5] For a short introduction see Marella (2014). The Italian literature on the topic is quite vast now. See among many other works Mattei et al. (2007), Mattei (2011), Marella (2012), Ciervo (2012), Rodotà (2013), Lucarelli (2013), Breccia et al. (2015), Sacconi and Ottone (2015) and Quarta and Spanò (2016).

stage of capitalism, characterized by widespread privatization and the commodification of society, a legal field that has undoubtedly found itself under scrutiny is property law, and it is within this field that the legal status of the commons has become a major issue.

Commons, according to a prevalent opinion, give rise to social systems consisting of three elements (Bollier 2011; Ostrom 1990):[6]

1. common pool *resources* (such as water, land, forests, parks, etc.);
2. a *community* that has access to and takes care of this resource. The community and the common good exist in circular relation to each other whereby the community is identified by the resource managed in common, while the resource is in turn identified through the community that manages it;
3. the collective action of creating, restoring, maintaining and governing in common, which is also defined in the literature as *commoning* (Linebaugh 2008; De Angelis 2010, pp. 954–977).

The resources considered under point (1) are usually identified as (a) natural resources such as lakes, forests, the air, etc.; and (b) intangible things such as traditional knowledge, genetic resources, information and knowledge freely accessible on the Internet (at least in theory), etc.

In Italy the commons (common goods) have mostly represented a battleground for economic and social change: the common goods movements, not unlike analogous social movements in other parts of the world, have been struggling against the new enclosures of common spaces and resources ranging from tap water[7] to cultural spaces, such as theatres or cinemas, to which public access has been removed by public or private owners for the benefit of private profit (Bailey and Mattei 2013, p. 965). Therefore, the resulting notion of common goods that emerges out of the Italian debate does not have a predefined identity: it is not just a country's environmental resources or cultural heritage that are *biens communs*. Common goods can be anything. A private cinema or a public farm can *be*(*come*) common goods.

A significant example of this idea of the commons is the case of Cinema Palazzo, a private theatre located in the gentrifying neighbourhood of San Lorenzo just outside the historic centre of Rome. Following the closure of the cinema, the building underwent years of decline and was eventually rented to a company that planned to transform it into a casino. A wide group of artists, students and local residents blocked these plans by occupying the cinema. They soon set about managing the space as a common good. Of particular significance to our discussion is the Court's response to the lessee's claim to possession. This individual merely asserted that some of the occupants were morally responsible for the violent dispossession he had suffered. The Court rejected the claim and described the

[6] Elinor Ostrom encapsulates this structure in referring to communities of individuals relying on institutions that resemble neither the state nor the market to govern in common some resource systems with reasonable degrees of success over long periods of time (Ostrom 1990, p. 1).

[7] The reference here is to the Italian National Referendum of 12–13 June 2011 over the repeal of a Decree concerning the privatization of public utilities, including tap water.

occupy movement as a '*moltitudine pacifica*' (pacific multitude). Moreover it stated that defendants were not moral perpetrators of the dispossession because they had not acted out of economic interest, but were motivated by a genuine political objective: that of saving the original (cultural) use of the building.[8] Implicitly, the Court defined Cinema Palazzo's occupation as virtuous.[9]

Here the notion of common goods—one that characterizes the Italian experience as a whole—embraces a *non-naturalistic* (or non-essentialist) perspective. On the one hand, a non-naturalistic notion of common goods emerges from the social movements' practices, which have shown that the *biens communs* arise out of social struggles and are created through the practice of *commoning*, as the many occupations of cultural spaces have highlighted. On the other hand, the social movements' approach to the common goods resonates with and is enhanced by the theoretical elaboration of a group of Italian legal scholars known as the Rodotà Commission.[10]

The Rodotà Commission (hereafter RC), named after its chairperson and internationally renowned legal scholar professor Stefano Rodotà, was appointed in 2007 by the national Minister of Justice to reform the third chapter of the Italian civil code devoted to the taxonomy and regulation of assets that are owned by the State and other public bodies. The RC produced a draft, which, although ultimately ignored by the Parliament,[11] introduced Italian law to the innovative category of *beni comuni* (common goods) as a third category of goods that sit beyond the public/private divide. Following the RC's proposal, common goods can be defined in legal terms as those goods, publicly or privately owned, that are functional to the fulfillment of fundamental rights and individual flourishing and need to be protected by the law, also for the sake of future generations.

The concept of common goods proposed by the RC deserves some preliminary remarks. First of all both its definition and the one that emerges out of Italian social movements come with a similar caveat: the phrase 'Commons' or 'Common Goods' is *not* a new, fancy way of describing resources owned by the State or a local tier of government. In fact common goods can be—and often are—owned by private actors. The public and private ownership of common goods both undergo legal restrictions in order to make collective access and use possible. Second, and as a consequence, the RC's definition does not design a third type of property, different from private and public property. On the contrary, it requires the recognition of specific property rights of access and enjoyment to be disentangled from the bundle of rights and allocated to those whose fundamental rights are at stake. Third, similar

[8] Tribunale di Roma, VII Sez. Civ., Sent. 8 February 2012 (Agabitini 2012, pp. 850–858).

[9] In this case as well as in others (*Ex-Asilo Filangeri, Teatro Valle, Ex-Colorificio Toscano,* etc.) it is possible to talk of a 'virtuous occupation', because this kind of occupation activates a virtuous circle of utilities production by 'freeing' real estates and areas from owners' misuse whilst, at the same time, using them 'properly', for instance, by organizing Italian language courses for migrants, free sport activities, cultural happenings, afterschool activities, free-access libraries, etc.

[10] For further developments in the relation between social movements and the Rodotà Commission see Marella (2014).

[11] It is actually in the agenda of the Commissione Giustizia in the Italian Senate, which is awaiting examination.

to the notion that arises from the social movements' practices, the legal notion developed by the RC implies a non-naturalistic vision of the commons. The qualification of a resource as a common good arises from its capacity to satisfy the fundamental rights of individuals. The notion of fundamental rights to which we refer here is drawn from the Italian democratic Constitution but it also takes into account the supranational level, namely the European Charter of Fundamental Rights and Liberties, The European Convention of Human Rights, the common constitutional traditions of EU Member States, the Universal Declaration of Human Rights and other international conventions. Therefore the spectrum of the fundamental rights relevant to qualifying common goods is very broad, and ranges from the right to life and health (Art. 2 ECHR and Art. 32 Italian Constitution), to the right to a free and dignified life (Arts. 2, 3 and 36 Italian Constitution) and is framed in the perspective of human flourishing and thus also includes access to knowledge, culture and education, and participation in the political, social and economic organization of the country (Art. 3 Italian Constitution).

Although the reform draft produced by the RC has not (at least not yet)[12] come into force, the legal notion proposed has been deployed by the Italian Judicature at its highest level, i.e. by the Plenary Session of the Supreme Court in 2011,[13] as already mentioned in the 'Introduction'. In asserting the public nature of the contested area of the Venice Lagoon, the Supreme Court affirmed its legal status as a common good by drawing on the right to the environment as a fundamental right recognized to everyone by Article 9 of the Italian Constitution.

A Taxonomy

Moving from the convergence between the non-naturalistic legal notion of common goods illustrated above and the sociological notion of the commons as social systems consisting of three elements (resource, community and *commoning*), it is possible to taxonomize four different groups of common goods:

(a) Natural resources, such as water, oceans, lakes, rivers and forests.
(b) Cultural resources that are either tangible or intangible, such as knowledge, cultural artifacts and works of art (that should remain) in the public domain, indigenous traditions, human genes (which are both tangible and intangible at the same time), and the landscape, all of which are in competition with intellectual property regimes.
(c) Urban space.
(d) Public services and infrastructures.

The last two points of this taxonomy require further discussion.

[12] The draft and the introductory memorandum are available at the web site http://www.giustizia.it/giustizia/it/mg_1_12_1.wp?contentId=SPS47617.

[13] Corte di Cassazione, Sezioni Unite Civili, 14 February 2011, n. 3665.

Urban Space

'Classic' urban commons include squares, streets, parks and public gardens and their status as such is generally uncontested. The square, for instance, is commonly depicted as the original site of public opinion and political participation in modern democracies. There is a huge legal literature concerning *these* urban commons. However, I want to argue that it is not only the 'public' space that is functional to human flourishing that has to be considered a common good, but urban space in general. Cities are quintessentially human collective products after all! Therefore the urban space as a whole should be qualified as a commons.

Different philosophical and sociological images of the city (or what I prefer to call the metropolis)—as the major site of production of value (Negri 2008; Hardt and Negri 2009) or the biopolitical apparatus *par excellence* (Agamben 2007)—support and enrich our understanding of urban space as a commons. If we assume urban space as the site of social conflicts over the appropriation of social value, i.e. value produced collectively by social cooperation, the notion of common goods becomes a keyword in a strategy aimed at opposing the process of accumulation by dispossession (Harvey 2003, 2012) that affects the production/reproduction pattern within the metropolis (Negri 2008).

The conceptualization of urban space as a commons is obviously not neutral from a legal point of view. It raises the question as to whether the private property of urban land is compatible with the understanding of urban space and its various constitutive parts—neighbourhoods for instance—as commons. At the very least, such a conceptualization entails a new understanding of urban property as a major factor in the construction of social relations; one that draws on the theory of property as a bundle of rights (Hohfeld 1913, p. 16) and ultimately on the idea of a disintegrated property (Grey 1980). This new premise produces a snowball effect and raises important questions.

To what extent, for instance, does the understanding of urban space as a commons and the possible unbundling of the bundle of rights have an impact on urban property? Consider, for example, the 'illegal' occupation of land or buildings abandoned by their owners or subtracted from their cultural or collective function for speculative purposes or, conversely, the dispossession of the cultural value (or 'ambiance') of a neighbourhood and its pricing in the real estate market at the expense of the original inhabitants for the benefit of the new, wealthier residents (otherwise commonly known as gentrification). Is the notion of urban space as commons so functional as to limit or exclude the power of the owner to assign her property for a certain use, non-use or purpose when that use or purpose frustrates the fulfillment of others' fundamental rights? And, even more radically, can it affect the right of the owner—commonly assumed as a stick in the bundle—to transform the 'spillovers' of social cooperation into rent, in revenues for her own exclusive benefit? Here the role of urban property as a major factor in the construction of social relations is at stake.

If considered from a property law rationale, the opposing property claims that arise from the social struggles of *occupy* movements or local communities that challenge the legal prerogatives of ownership, find in every legal system a series of

functional equivalents—such as the protection of reliance interest in property (Singer 1988, p. 611), the adverse possession rule and other legal tools—that offer viable support to a community's 'investment' in a place in terms of stewardship, transcending the initial putative character of illegality, and turning them into 'regular' property rights.

A partially different set of problems concerns the redistributive effects that collective action in the urban environment is able to produce. It arises from the simple fact that not all urban commons have the same (if any) transformative impact on power relations in the metropolis. Two major factors are critical in this case: the public–private partnership in the governance of urban space and the rhetoric of the community as an agent that alleviates social decay.

Presently many urban commons, i.e. urban assets such as local streets, parks and other shared neighbourhood amenities, are the product of a significant decline in the public management of local resources and the transfer of public functions to the private realm, in other words a shift in control from local governments, which are affected by fiscal strain and budget cuts, to private groups (with or without transfer of ownership) and/or to neighbourhood groups (which involves no transfer of ownership) (Foster 2011, p. 57). Such dynamics are in turn intersected by a tension between, on the one hand, the 'enclosure' of public space for the benefit of private interests (as in the case of shopping malls and gated communities) and, on the other, a new tendency to *urban commoning*, namely the shared management of urban land (parks, abandoned buildings, etc.) that is publicly or privately owned but collectively managed by groups of users, on the other. In short, the generation of new (urban) commons can represent the outcome of the new private–public partnership but also a backlash against such a partnership, to the extent that it is possible to differentiate between *conservative* new commons and *transformative* new commons.

According to the dominant narrative, proactive communities are supposed to have a redeeming effect on social decay in run-down urban areas. In particular, claims about urban degradation and social disorder often lie at the basis of regeneration programmes that seek to restore the 'quality' of urban space by also drawing on the activism of neighbourhood communities. In particular, regeneration may incorporate instances of collective action aimed at reviving neighbourhood amenities. Community activism, however, can ultimately contribute to increase social segregation. As a matter of fact, some neighbourhood experiences tend to create or reinforce closed, exclusive communities (Foster 2011). More precisely, new commons in the United States that function as park conservancies or business improvement districts (BIDs) depend very much on the wealth and prestige of the urban area in which they are located, and thus also on their capacity for fundraising at the local level. In such cases there are no distributive effects across different urban areas: on the contrary differences in wealth distribution are reinforced. Of course, communities are, socially speaking, not all the same and the rhetoric of community is not sufficient per se to produce social transformation or to enable one single commoning experience to have a redistributive impact upon the wider urban community. The particular fiscal system that exists in an urban area can lead to a contradictory tension between, on the one hand, the convergence between

community activists and tax payers in wealthy neighbourhoods, and, on the other, the unwillingness to invest in or donate to poor city neighbourhoods. Thus, it is not surprising that under certain circumstances communities can become an instrument of enclosure of urban space and a source of social and racial segregation.

Redistribution across different urban areas not only requires an active community, but a dynamic, fluid, and inclusive collective dimension. Subsequent issues at stake include: the extent of participation, namely how to bring in all possible constituencies; how to foster through collective action the production and redistribution of welfare, also at a legal level; how to save the informal nature of the occupation and management of those new transformative commons such as 'cultural spaces', theatres, etc. where processes of bottom-up production and redistribution of welfare arise and, conversely, how to translate all this into legal terms and arrangements. Creativity in legal expertise has promoted successful experiments of commoning, by granting a legal status to the collective use and stewardship of shared resources (*infra* "Use Versus Ownership" section). Certainly, the access to and the use of local resources grounded on fundamental rights as well as the social function of property both assume here crucial significance.

Public Services and Infrastructures

In the last of the four taxonomy categories, I group institutions providing public services such as public healthcare service, national or local systems of education, schools, universities and the like; as well as infrastructure such as roads, railways, the Internet, etc. The reason why I group these two types of resources in the same category is due to their role in the welfare state and to the transformation they have undergone as a consequence of its crisis.

(a) Regarding the first group, the common goods framework offers theoretical tools to tackle the crisis of public services, by progressing beyond the usual neoliberal pattern of privatization as a consequence of public withdrawal. As the welfare state model declines it appears necessary to dismiss the *rights claim versus state's duty as service provider* schema, namely the vertical relationship between the state and the citizen and instead to start thinking of public services as the products of social cooperation, and hence as commons. Accordingly, public service recipients are requested to participate in service management on the basis of horizontal relationships nurtured and expanded through new social bonds of cooperation and solidarity, so as to resist the neoliberal dynamics of privatization, outsourcing and commodification. In the words of the World Health Organization,[14] just to take a telling example, health care is not a market commodity but should rather be considered as a commons. There exist studies on the organization and management of health care as a commons (Romagnoli 2013). They show that recipients' participation in public healthcare management actually improves service quality. In other words, commoning succeeds where privatization fails.

[14] See the report of the World Health Organization published in 2008, in http://www.who.int/whr/2008/en/.

Other important studies regard education and particularly universities (Madison et al. 2009, p. 365), which can also be revisited as (cultural) commons. Universities present the commons' characteristic structure:

1. common pool *resources* (tangible goods like buildings and facilities, but also intangible goods such as the knowledge that is produced inside the institution);
2. a *community* that has access to and takes care of these resources (students, faculty and staff);
3. the collective action of governing in common (universities are self-governing communities and possible distortions from the democratic model of self-government are better understood and identified if we think of universities as commons[15]).

(b) The second group—infrastructures—partially overlaps with public services. Infrastructures are those resources that are functional to the production of other goods and utilities. Therefore they are not subjected to direct consumption but are a means of producing and consuming other resources. Scholars distinguish between traditional infrastructures such as transportation and communication, and non-traditional infrastructures such as environmental (e.g. lakes) and intellectual (e.g. ideas, languages, etc.) resources.

The functioning of infrastructures commonly facilitates a wide range of downstream productive activities and the creation of social goods. The dominant view in the evaluation of infrastructure performance and efficiency embraces a supply-side perspective that disregards the production of social goods insofar as they are not identified as economic returns for the infrastructure owner/provider. On this basis some users and uses are prioritized at the expense of others, and this generally affects the structuring of the infrastructure.

If we instead think of infrastructures from a demand-side perspective, as suggested in a recent study (Frischmann 2012), we can take into account all the (public and social) goods and utilities that are not returns for the infrastructure provider but produce positive externalities that benefit society as a whole. The non-discriminatory access to and use of infrastructures enable (and enhance) the production of those public and social goods that improve people's wellbeing. Open access and non-discrimination become the keywords of an ideal regime of infrastructure governance, which relies on neither the market nor direct state intervention (be this through state management or subsidization), but on managing infrastructures as commons. What gives substance to a project of open access and non-discrimination between users' identities and the various uses they pursue is a mechanism of cross-subsidies between different uses, different users and the

[15] A good practice of commoning within law faculties are legal clinics, a bottom-up teaching methodology in which students learn by problem-solving and engaging with real clients (usually socially marginalized people excluded from access to justice). By doing so, a non-hierarchical process of legal knowledge production is implemented and more importantly this legal knowledge is shared with a broader community outside the law faculty (Marella and Rigo 2015, pp. 181–194).

production of different goods.[16] In other words, open access and non-discrimination as core principles of a management regime based on commoning are able to produce redistributive effects between various possible users and uses and, as such, trigger a virtuous circle between the spillovers from certain uses and the social demand for access and social goods (Frischmann 2012, p. 112).

The Legal Basis for the Commons: A Genealogical Account

The vast literature on the various types of commons indicates that these are indisputably understood as legal issues. Nevertheless, a problem of legitimacy in terms of the matter's 'scientific' status persists and is based on a presumed clash with the private property paradigm. However, there is a sense that the problem with the commons does not rest on their opposition, extrinsic nature or *distance* from individual private property, rather on the *naturalization* of private property as the exclusive scheme of relations that the dominant narrative in law establishes between persons and things.

The ideological process of naturalization of private property as the exclusive form of relations that liberal law establishes between persons and things has its founding fathers in theorists such as John Locke, or more recently, Hardin (1968) and Demsetz (1967); a process that was consolidated with the codifications of the nineteenth century—especially the Napoleonic Code which almost completely deleted other legal forms of ownership[17]—and through its legitimization in scholarship that draws on a very partial interpretation of property rights in Roman law.[18]

Reflecting on the evidence of emergent commons, I propose to flip this narrative and to imagine property rights in current positive law as a continuum between two poles: individual private property, on the one hand, and collective property, on the other. The line running between these two poles indicates many different gradations in the relations between things and people (considered both in terms of individuals and communities), and different degrees of intensity with respect to the right to exclude and the right to not be excluded.[19] The continuum in property rights that I

[16] A good example of an idea of infrastructures as commons is offered by basic research. Like a road system or communication networks or oceans, basic research facilitates downstream creation of further knowledge and research. It is a non-rival resource: it creates downstream benefits and is characterized by a wide variety of downstream uses. But it is doomed to impoverishment through patenting and enclosures of various kinds—such as objectives selection in accordance to market demand.

[17] But see Art. 542 (regulating 'les biens communaux') and Art. 714 (on 'les choses communes').

[18] Of fundamental importance, from a genealogical point of view, is Yan Thomas' well-known essay *La valeur des chose* (2002), in which he argues that the very existence of individual property in Roman law, which the dominant view has traditionally represented as the noble ancestry of modern private property, derives 'by subtraction' from the legal regimes of common and public goods, so that individual property itself was even unconceivable without taking into account the regulation of non-private goods.

[19] According to Nicholas Blomley the right to exclude is the basis of private property, whereas 'common property can be understood as the right to *not* be excluded from the use of a thing' (Blomley 2008, pp. 311, 319 f). In the text I assume that commons do not correspond to a third species of the genus property, other than private property and state property, for its core 'sticks' are rather access and use,

theorize here includes collective rights of use, irrespective of ownership titles. It 'hosts' entitlements of use as well as ownership, and situations of informality as well as formal titles conceptualized not as opposite polarities, but as different degrees of 'thickness' in property rights, with some solutions in between such as reliance interests in property that derive from the stewardship of a place (building or land) for an extended period of time, even on an informal basis.[20] In other words, we can imagine individual property and collective property/ies as two opposite ends of a continuum along which we find different degrees of 'density' in the owner's right to exclude and in the right of use and access of non-owners. In the structure of legal entitlements associated with the commons, the right to exclude is strongly reduced and the right to access obviously expands. More precisely, the thinning of the owner's prerogatives is at its maximum at the centre of the continuum (where commons are located) but not at the collective property end, where sticks in the bundle, like the right to exclude, are as sturdy and strong as they are at the opposite end.

This continuum corresponds to a variety of sources of law: legislation, customary law, private ordering, and a various combination of different sources, such as legislation + customary law + private ordering, as in the case of collective properties [e.g. *Partecipanze agrarie* in the Italian experience (Grossi 1990, pp. 505–555)] and collective rights of use (the so-called *usi civici* in Italian law); or private ordering + legislation, as in the case of common interest communities. But we can easily imagine a new customary law in the making, for instance in the regulation of collective access and use of urban gardens.

This continuum has its own genealogy that differs from the genealogy of the superiority of individual private property noted above. In the stage of legal globalization that Duncan Kennedy calls *Classical Legal Thought* (Kennedy 2006), Savigny and Hegel, for different reasons, support a particularly complex view of the relation among things, individuals and communities, one that is open to a discourse on the commons in positive law. What I am trying to demonstrate is that there is no contradiction between private law and the commons, neither in the liberal tradition of private law nor in the private law currently in force.

In fact, it is clearly evident that the idea of the bundle of rights is at work in the individual/collective property continuum. Hence one of the most successful theories in property law not only shows the compatibility of the commons with current property law regimes but also legitimizes and fosters their legal regulation. In addition, in the case of positive law a *socially oriented* version of the bundle of rights theory can be identified in the principle of the social function of property, which is sanctioned by several constitutions in Europe and Latin America, and in Italian law by the democratic Constitution at Article 42, 2. Accordingly, property

Footnote 19 continued
independently from ownership. For this reason I prefer not to use the definition of common property as it may entail the kind of ambiguity that I want to avoid. This leads me to specify the structure of my continuum scheme to clarify the distance between the way in which commons are conceptualized in this paper and collective property notwithstanding the fact that in current *non genealogical* analyses the latter is commonly assumed as 'the origin' of the former.

[20] Blomley, drawing from Singer (1988).

rights have to conform to the general interest; that is, to the interest of the whole of society. Therefore—just as the idea of the bundle of rights suggests—there is no predefined core of private property upon which the law cannot place limits or conditions according to the social function norm. On the contrary, collective rights of access to those publicly or privately owned resources that are functional to the fulfillment of an individuals' fundamental rights can be grounded on the social function norm. After all, the contemplation of collective interests in the substantive regulation of individual property is nothing new in modern legal systems. Thus, it is by constructing a genealogical account of the legal foundation of the commons that another story can be told.

Here it is worth briefly recalling an important Italian scholarly tradition that has significantly contributed to deconstruct the dominant view of property as an absolute right (Pugliatti 1954, p. 159). A particular interesting historical case is that of Villa Borghese, a lavish park in the centre of Rome. Although privately owned by the Borghese family, this park was customarily accessed and used by the people of Rome. At a certain point the owner decided to enclose the Villa and thus preclude public access. The mayor of Rome as representative of the citizens sued Marcantonio Borghese, the owner, arguing that Villa Borghese was a *res in usu publico*, that is a private property burdened by the public right of entry. Therefore the park could not be enclosed so as to exclude Roman citizens. The Court upheld the mayor's argument and the park was reopened for people's access and use.[21] The doctrine enforced here was to some extent similar to the *public trust doctrine* commonly enforced in some common law jurisdictions (Alexander 2009, pp. 745, 801 ff.). The idea is that a privately owned estate can under certain circumstances have the same function as a publicly owned property, namely as a state property in the public domain (*bene demaniale* in Italian law), such as a public road. Consequently the law has to grant public access to those privately owned lands or assets—parks but also libraries or galleries—that are functional to the fulfillment of the material, educational, artistic or cultural interests of the collectivity. In Italian law this outcome was achieved by establishing a kind of collective entitlement similar to the law of servitudes. As a result of this old case law, the new Italian civil code enacted in 1942 included a provision devoted to disciplining the rights of public use (Art. 825 c.c.). Moreover its enforcement by the courts provides here a 'widespread' access to justice, i.e. a kind of collective or 'popular' action on the basis of which every citizen is entitled to sue the owner when she precludes public entry.[22] One may conclude that the right of public use is a means to allocate some sticks of the bundle to the collectivity; preserving the tenure of the original owner while turning the real estate (the park in the Villa Borghese case) into a commons.

[21] Cass. Roma, 9 March 1887. The Municipality's success was also due to the legal arguments of the plaintiff's attorney, Pasquale Stanislao Mancini, a distinguished legal scholar whose appeal brief was later published with the title *Del diritto di uso pubblico del Comune e del Popolo di Roma sulla Villa Borghese*, 1886 (Di Porto 2013, pp. 45–73).

[22] See Cass., sez. II, 23.05.2012, n. 8165. In reference to the nature of the collective right of use on a privately-owned land as an entitlement granted by Art. 825 of the Civil Code to single individuals—not *uti singuli* but—*uti cives*, see Cass., sez. II, 22 October 2013, n. 23960; Cass., sez. II, 22 March 2012, n. 4597.

Late-nineteenth-century agrarian reform programmes sought to rid the old collective properties existing in Italy of traditional elements of closure and conservatism, such as membership limited to the male descendants of original members, in order to grant access to land to the rural poor and so to alleviate social inequality (Di Robilant 2012, pp. 263, 288). Affordable housing was another field where the bundle of property rights was separated and reassembled. The Luzzati Law of 1903 (Di Robilant 2013, pp. 869, 916) created two different types of units, *case economiche* and *case popolari*, both developed by public law institutions (regional 'Institutes for Affordable Housing') but largely funded by private banks and mutual aid cooperatives (Di Robilant 2013, p. 917). The *case popolari* were to be publicly owned and leased at a fixed rate, while *case economiche* were to be sold at a fixed price to lower-middle-class buyers where owners' use and alienation rights were subject to restraints under the Institute's control. The resulting affordable housing scheme was an interesting experiment in the disaggregation and redistribution of property rights between public and private actors.

Nonetheless it cannot be denied that there has been a crusade against collective property rights in modern legal systems (Gambaro 1990, p. 15).[23] Indeed, the denial (and, to some extent, the annihilation) of collective properties indicates the strength of the public/private distinction in property, particularly in civil law systems. To my knowledge, however, the fracture in the coexistence of individual and collective property rights becomes more pronounced when the State enters the scene, i.e. when commons, such as communal lands, become the property of the State, city or some other public body, which then proceeds to manage them in the public interest. It is in this moment that the State 'swallows up' the community and deprives it of its political role and legal status, which sees it transformed it into a *persona ficta* called *universitas*, and, in turn, converted into an articulation of the State, municipality or the like (Venezian 1920). This is particularly evident during the stage of capitalism corresponding to the second globalization of law and legal thought known as 'The Social' (Kennedy 2006). The same idea of the social function of private property (*funzione sociale della proprietà* in Italian legal discourse), which before Italy's postwar Constitution had been posed in even more radical terms by jurists supporting the Fascist regime, can be framed in this schema insofar as it ascribes all the potential redistributive powers of individual owners to the State, foreclosing any role for communities. In fact, the rise of state *dirigisme* as the guiding force in politics in the first half of the twentieth century coincided with the downfall of collective property rights.

Today, on the contrary, the ideal site for a new expansion of the commons (think for example of Wikipedia, file sharing, etc.) is the Internet: an intangible place subtracted from state sovereignty, although not totally immune from state legislation. More generally, commons seem today to find unexpected openings. The present stage of globalization, the third phase in Duncan Kennedy's model, is particularly favourable for a new growth of commons for a simple reason: the sovereignty of nation states has been weakened and to some extent almost

[23] With reference to the Italian experience Justice Paolo Grossi has talked of a 'holocaust' (Grossi 1977, pp. 10–11).

dismantled, while the institutions of globalization are today the major factors of commons dispossession. Nation states are now involved in a massive wave of privatizations that have replaced previous forms of state control over common goods, both in relation to material resources (think of the role of the World Bank in the privatization of the water system in Bolivia and the subsequent 'water war' in Cochabamba, but also the worldwide practice of land grabbing) and immaterial resources (the imposition of the Agreement of Trade-Related Aspects of Intellectual Property Rights or TRIPs on WTO member states and the subsequent spread of the so-called *Second Enclosure Movement* across the world). At the local level we find the public/private relation completely reshaped: in many economic fields these are no longer in opposition but rather work in partnership. A clear example of this is the so-called 'New Urbanism', a new approach to the planning and governance of urban space. Here a distinction no longer exists between the interests of private owners and the State, rather the public and private act together in partnership. On the one hand, we have the public that sells or transfers entire urban areas in need of regeneration or already regenerated with public funds to private entrepreneurs. As a result some urban areas, especially shopping areas, are privatized. On the other hand, private owners, such as those who run shopping malls, act like public actors in handling public order: they have their own security agents who wear the same uniform and carry the same weapons as the city's police force (Bottomley 2007, p. 65). They work together to control human bodies in the metropolis, and they work together to dispossess people from the urban commons.

For these reasons I argue that the present stage of capitalism is most favourable to commons both at the global and local level. Moreover, I argue that the legal relations between people and things at this stage of legal globalization are not only characterized by an increasing success of the individual private property paradigm, but also by new achievements on behalf of commons.

The task of jurists, and particularly experts in private law theory, is now to trace a legal path for commons through the twists and turns of positive law.

Use Versus Ownership

The continuum sketched above seeks to ground the legal status of the commons within the field of property, but outside the constraints of ownership. It is my belief that common goods aim to transcend ownership. Their proper dimension is (collective) use and access. I have argued that the disarticulation of property into the many entitlements that constitute the bundle is a mandatory step in the construction of a possible legal regime of common goods.

In this part, however, my goal is not to offer a *theory* of the use of and access to common goods as an example of the bundle of rights model. Rather, I want to map the legal arrangements that have been operationally employed to construct the legitimacy of *use* as a collective entitlement disconnected and opposed to ownership. The legal instruments that have been recently deployed to protect (or re-appropriate) the commons are of a rich variety and largely uneven: sometimes

they mimic ownership entitlements, sometimes they explicitly reject property and draw on atypical forms of use.

In reference to intangible resources and cultural commons, we also find both a counter-hegemonic use of intellectual property rights (such as the copyleft strategies),[24] and the denial of intellectual property rights.[25] In both sets of cases my preference gravitates to the latter position and the move towards the disintegration of property as an absolute and exclusive right.

From a comparative law perspective we can observe that multiple legal tools are available as functional equivalents. We can taxonomize them according to the following criteria: the legal or informal nature of the arrangement; the preference for private law or public law settings and the reference to either side of the subject/object dichotomy.

Use Through or Beyond the Law

(a) *Titling* The creation of formal property rights is the strategy commonly devised to counter land-grabbing policies in Sub-Saharan countries, where indigenous people and other communities often have just informal collective rights of use. The titling campaigns pursue the formal recognition of collective rights on land, as a means to deter foreign investors from buying or leasing of land.
(b) *Non-titling* In contrast, urban residential commons resulting from untitled occupations, such as squats, can be better protected against dispossession through a strategy of informality. Practices of informality in urban development are diffuse worldwide, especially in the Global South. Drawing on the work of the economist Hernando de Soto, the World Bank recently launched a titling campaign based on the assumption that the allocation of property rights to squatters would make them

[24] Emblematic are also patents registered by indigenous people, such as Maori on aspects of their traditional culture (Vezzani 2012, 2007, pp. 305–342).

[25] An important case concerning patents on human genes is *Association for Molecular Pathology v. United States Patent and Trademark Office*. In May 2009 the Association for Molecular Pathology and other medical associations, doctors and patients sued the United States Patent and Trademark Office (USPTO) and Myriad Genetics, over patents related to two breast cancer genes and certain diagnostic screening methods. According to the plaintiff the patents in question violated §101 of the Patent Act, 35 USC. The US District Court for the Southern District of New York declared that isolating DNA was not patentable because it was not 'markedly different' from native DNA as it existed in nature, and that the claims for 'analyzing' and 'comparing' DNA sequences were invalid because they simply regarded abstract mental processes. In the appeal judgment (29 July 2011), the Federal Circuit held that isolated DNA sequences could not be considered the product of nature because they were chemically distinct from their native state; moreover the screening method for cancer therapeutics included transformative steps and presented 'functional and palpable applications in the field of biotechnology'. Instead the Court confirmed the claim that comparing and analyzing DNA sequences were patent-ineligible. In March 2012 the US Supreme Court issued a first writ of certiorari. It vacated the Federal Circuit judgment and remanded the case back to the Federal Circuit to reconsider it in light of the recent decision in *Mayo Collective Services v. Prometheus Laboratories*. The Federal Circuit confirmed its previous position about the patentability of isolated human genes. The Association for Molecular Pathology petitioned for another writ of certiorari, which was granted, but limited to the patentability of human genes. On 13 June 2013 the US Supreme Court stated that a DNA segment was a product of nature and so was not patent eligible, even if it had been isolated, while Complementary DNA might be patent eligible because it was not naturally occurring.

better off (Esquirol 2014). The resistance to the World Bank's policy rests on the conflicting idea that titling would push occupied land and buildings back onto the real estate market and the credit/mortgage circuit with the result of depriving new owners of their houses over the long term.

Use Between Public Law and Private Law

(a) *Full Private Law Arrangements* The need for affordable housing in the Western metropolis has led to interesting solutions in private law arrangements that combine individual and collective entitlements. The US experience of Limited Equity Cooperatives (hereinafter LEC) is one such solution and, in my view, comes closest to the idea of urban space as commons. LECs are conceived for low-income housing and function as a multilateral legal mechanism that unbundles the bundle of rights: a land trust or other non-profit entity owns the land, a cooperative owns the building, the residents own shares in the cooperative, equity appreciation on the cooperative shares goes to the land trust and the cooperative rather than the shareholders, and so housing units remain affordable even when the first residents sell their shares.

From the perspective of urban commoning, the LEC experience is significant for at least two reasons: first, it creates collective actors that are not only in a position to stop gentrification but also to contribute to the social transformation of the neighbourhood; second, housing is not provided according to tenure but on the basis of the cooperative shares and so no real property is attributed to the residents, which strategically represents an optimal move for the purposes of a transformative project. In fact, property allocation is barely functional to social transformation.

In Italy an analogous experiment aims to provide access to affordable housing beyond both state housing programmes and the housing market. It draws on the law of obligations in order to disaggregate access to housing from ownership and to create a collective management of units, which is neither public nor based on individual property rights. I am referring here to the so-called EVA project, located in Pescomaggiore, a small village near L'Aquila, the beautiful historic city in the Central Apennine Mountains that was heavily damaged by an earthquake in 2009 and largely unreconstructed. EVA represents an original legal arrangement designed to resist the CASE project, a post-earthquake scheme developed by the Berlusconi government to provide homes for people in L'Aquila. As a result of this project, citizens who had their homes damaged by the earthquake were dispossessed of both their private homes and their public space. Following the earthquake many were confined in emergency camps and were later rehoused in new-build complexes in areas far from the city centre that lacked basic urban infrastructure and social relations. The EVA project seeks to avoid such problems. The practice of commoning here aims to provide temporary houses to people in difficulty due to the earthquake by superseding home-ownership and the market at the same time. Landowners voluntarily provide land on the basis of a gratuitous loan for use (*contratto di comodato* in Italian law). Simultaneously a committee collects funds for the construction of environmentally sustainable homes, on the promise that regardless of the contribution made by the public, it entitles the donor to be part of a collective body, called the Tavola Pescolana, which oversees the management of the

eco-village. Financial donations do not provide access to ownership but to the mere use of the units. The same units cannot be sold on the market. Once residents have been able to move back into their former houses, they will continue to manage the eco-village in common as a new, tourist resort.

(b) *Across Public and Private Law* In March 2012 a multitude of artists and knowledge-workers in Naples occupied a sixteenth-century building located in the city's historic centre (Ex Asilo Filangieri) to protest against its abandonment by the local government following renovation. After a few months of *virtuous occupation*, a deliberation by the municipality in May 2012 assigned access and use of the building not only to the individual natural persons occupying the building at that moment in time, but to an undifferentiated crowd of knowledge-workers, i.e. to an open community. The use that is enabled by the municipality's resolution is legally grounded on two elements: the practice of commoning as a management regime to be established in the building and shared by an open community for the perpetual benefit of all, and a regulatory draft of the building's terms of use that the community would define and upon which the local authority would then agree. The legal form that both the community of artists and knowledge workers and the local government evoke in the definition of the legal regime of the use of and access to the Asilo Filangieri building is a customary law of use known as *usi civici* and widespread in the Italian countryside and occasionally in Italian cities (*usi civici urbani*). A regime of *uso civico* grants access to and use of land to local communities usually for, but not exclusively, grazing and timber. The recall of the old experience of *usi civici* is double-sided: on the one hand it recalls old collective property rights which epitomize an alternative to the individual private property model of modern law; on the other the *usi civici* model is assumed to be a possible legal scheme that can formalize the stable experience of self-government, democratic participation and commoning.

Recently a new resolution of the local government has absorbed and institutionalized the use and management regulation drafted by the Asilo's community with the name 'Dichiarazione di uso civico e collettivo urbano' (Micciarelli 2014, p. 58).[26] In legal terms this latest move marks a shift in the enforceability of the regulations regarding access and use, which is now binding on whoever takes over the management of the building.

In sum, the sources of the legal arrangement employed for the management of the Asilo Filangieri building are the local authority resolutions, the private autonomy that finds its expression in the drafting of the regulations and a prospective customary law.

(c) *Full Public Law Solutions* Recently several Italian municipalities have implemented specific protocols dedicated to the regulation of citizens' good practices of participation and care of the urban commons.

The first city that adopted such an instrument is the city of Bologna with the *Bologna Regulation on Collaboration for the Care and Regeneration of the Urban Commons* enacted in 2014. Many other commons-based experiments in cities around Italy have followed. Their legal basis can be traced in the principle of

[26] It is possible to read the 'Declaration' at http://www.euronomade.info/?p=6456.

horizontal subsidiarity provided by Article 118 of the Italian Constitution, according to which the State and local governments should foster citizens' autonomous initiatives aimed at promoting the general interest of the collectivity. The other pillar in this case is the *active citizenship* philosophy, according to which citizens as such not only have rights recognized by the State but also responsibilities towards society. Therefore citizens are expected to share with the State or local government the stewardship of commons. Within this framework urban commons—usually publicly owned land—are identified and managed on the basis of distinct protocols negotiated between citizens (both as individuals and as associations) and the municipality that owns the related resources or is in charge of their custody.

A French approach to a public law regulation of the commons can be recognized in a recent interpretation of Article 714 of the Civil Code, which states that common things are those things that do not belong to anyone and therefore can be used in common. This provision, traditionally restricted to the air and seawater and largely neglected because opposed to the dominant model of individual private property as absolute and inviolable (and still interpreted to lie at the core of the Civil Code system) is now re-read as the legal foundation of the *public domain*. Accordingly, access to and use of resources, like information on the Internet, are reconstructed in terms of *liberté publique* in French law, for instance, along the lines of freedom of speech (Gaudemet 1998, p. 134; Chardeaux 2006, p. 179).

This is a valuable solution in the perspective of opening up the access of (mainly intangible) common resources to all, although likely to interest only non-rival goods and non-community based commons.[27]

Use Across the Subject/Object Distinction

In the epistemological framework of the subject/object dichotomy the common goods are usually located within the latter end as objects. An alternative solution for commons may be to turn 'the object' into a legal person, i.e. into 'the legal subject'. This is the legal status that has been recently recognized to a river, the Whanganui River in New Zealand by virtue of an agreement between the national government and a Maori population. Drawing on an indigenous tradition that identifies the river with the population itself, the *Whanganui Iwi* (*I am the River and the River is me*), the agreement recognizes the river as *Te Awa Tupua*, an autonomous legal entity. In legal terms the stewardship responsibilities are grounded on the powers of the river's legal representative(s).[28]

Not far removed from this 'exotic' arrangement is the project of making a private foundation out of the Teatro Valle Occupato. The Teatro Valle is a historic and nationally renowned theatre located in central Rome. It was occupied in June 2011 by a group of artists to resist its possible privatization and was subsequently

[27] Problems arise when we consider occupations that are protected by means of possession claims: a potential conflict between free access granted to all and the legal protection of possession is clearly evident here.

[28] As to the Treaty between the Maori community and the New Zealand Government see Ruruku Whakatupua Te Mana o te Awa Tupua, available online at: http://nz01.terabyte.co.nz/ots/DocumentLibrary/RurukuWhakatupua-TeManaoTeAwaTupua.pdf.

'transformed' into a cultural commons. The Teatro Valle Occupato soon became a symbol of the common goods movement in Italy and a site of commoning experimentation in the production of art and culture. The project of the Teatro Valle Occupato Foundation (*Fondazione Teatro Valle Bene Comune*) has been supported with monetary contributions from a large number of people (including activists, artists and theatre goers) and has been involved in the continuous production of intangible goods, from artistic productions to lectures, seminars and training courses. This patrimony will continue to foster the Foundation's project even though the occupants vacated the theatre in August 2014 (Giardini et al. 2012).

In fact this circularity between the two polarities of the subject/object distinction has been a distinct feature of older experiences of commoning, such as the collective ownership of lands located in a number of regions in Italy, such as the so-called *Partecipanze Agrarie* in Emilia, which were formerly regulated by customary law and which the national legislation later turned into legal persons.

Conclusion

Most of the legal arrangements that I have mapped above resonate with narratives of social conflicts and resistance to, what David Harvey has brilliantly defined, accumulation by dispossession. By creating and/or protecting commons, the cases explored here also aim to stop gentrification, enhance equality, and protect the well being of future generations.

In the Italian case the social struggles against dispossession that have pursued new forms of commonwealth mostly take advantage of the legal tools offered by private law, namely the freedom of contract and property law that is conceived as a bundle of rights.

A critical reading of property law *vis-à-vis* the idea of the bundle of rights allows us to disarticulate property into the many entitlements that constitute the bundle in a way that, in my opinion, is functional to the construction of a legal regime for common goods. To this end, two further features that have materialized in the experience of common goods in Italy may prove to be strategic: a non-naturalistic approach to qualifying common goods and a renewed reading of the social function principle, according to which the ownership of resources qualified as common goods should conform to a social function, hence grant free access, use and common management of the given assets. In other words, in the name of the social function, the owner is not only obliged to allow access and use of the resource to individuals or groups whose fundamental rights benefit from the utilities that her property produces: she also has the duty to share with these people her power of control over the thing, i.e. the decision-making *stick* in the bundle that regards the use and management of her asset (Rodotà 2012).

To conclude, this hypothesis should be considered in relation to the social conflicts that have arisen over the question of access to given resources, in particular to urban land.

The issue of the 'new' or 'virtuous' occupations deserves some additional attention. I am not referring here to traditional squats, but to places of '*commoning*'

where occupants reinvent social welfare by opening publicly or privately owned buildings—especially theatres, cinemas, but also factories and farms vacated by their owners—to a larger community, be it neighbourhood-based or city-wide. In doing so, they transform these assets into facilities and services that are shared and managed in common.[29] The attempt to save these occupations from eviction is strictly connected to (and affected by) the legal construction of common goods and commoning. This allows for a re-connection between what is legal and what is illegal but perceived to be legitimate and fair.

The case of the occupation of the Colorificio Toscano in Pisa epitomizes the difference that alternative visions of property can have on tackling conflicts over alternative uses (and misuses) of urban assets. The Colorificio represents a notable experience of commoning that the commons legal discourse has unfortunately not been able to preserve from the opposing view of property as an absolute right. The case regards the occupation of a dye factory abandoned by the owner, who had first purchased the factory (although was more interested in the accompanying intellectual property package), and then delocalized the material production of dyes, stopped industrial activity in Pisa and fired the local workforce. In fact, the goal of the owner was at that point to lobby the local government to revise the urban zoning plan and accommodate a residential development (located very close to the famous Leaning Tower) that would have generated major profits. As a result of the activists' occupation, this huge area was revived and returned to local citizens. It soon became the site of bottom-up forms of welfare production, including popular training courses, handicraft workshops, after-school activities for children and even a climbing wall. However the owner sued the occupants and succeeded in reacquiring his property.

This unfortunate denouement laid some questions on the table, one above all: was the dye factory owner entitled to sue the occupants after having exploited and abandoned his property? Or was this an abuse of right?

In this paper it has been argued that by unbundling the bundle of rights, rights of use and access can be disarticulated from ownership as sticks that can be allocated to other people, social groups and communities. According to a particular interpretation of the same provision (Rodotà 1960, p. 1252), the exercise of property rights by the owner has to conform to the general interest, so as to realize their social function. Thus, in the light of the social function principle, we may rephrase the question in the following way: was the dye factory owner's behaviour *lawful* according to the social function principle? Did he deserve—in the light of the Italian Constitution—the legal protection he received from the trial court? In other words, can the social function be deployed in order to save 'virtuous occupations' from eviction and protect common goods? The most advanced interpretation of the social function provision goes in this direction and locates the principle at the core of the legal regime of common goods. As such, the owner is not allowed to choose a

[29] By guaranteeing free access to urban sites, occupants not only practice a bottom-up production of welfare, but also try to reinvent labour beyond labour/capital relations. This allows for alternative means of income through '*commoning*'.

different use for land if this goes against the qualified interests (i.e. fundamental rights) of the community.

This outcome can be framed within a strongly redistributive interpretation of the social function principle, as far as the latter is based on the premise that there is no core of property that the law has to preserve. Therefore, property ownership should be reread in the light of common goods protection and owners' prerogatives unbundled so as to safeguard non-owners' fundamental rights. In this sense the social function norm operates both as a behavioural standard on the basis of which it is possible to assess the legitimacy of owner's activities, and as a parameter of the variable contours and contents of property. Either way, it is indisputable that common goods emerge from dynamic patterns and are not qualified to exist as such always.

This is just a partial and tentative conclusion: the commons issue shakes up dominant legal theory and requires jurists to be more imaginative than ever. A great effort still needs to be made. The contribution of comparative law is crucial in this respect. Indeed the relevance of the Italian story I have been recounting in this paper is not confined to this particular national case. Functional equivalents for the legal arrangements described here can be found in every legal system. More importantly, in every legal system the concrete regulation of property rights is the outcome of a varying compromise between private interests and public constraints, personal liberty and redistributive motives, the individual and the community.

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References

Agabitini, Chiara. 2012. Tutela possessoria e beni comuni: Il caso del cinema 'Palazzo'. *Nuova Giurisprudenza Civile Commentata* 10: 850–858.

Agamben, Giorgio. 2007. La città e la metropoli. *Posse* 13. http://www.sinistrainrete.info/teoria/133-la-citta-e-la-metropoli.html.

Alexander, Gregory S. 2009. The social-obligation norm in American property law. *Cornell Law Review* 94: 745.

Bailey, Saki, and Ugo Mattei. 2013. Social movements as constituent power. *Indiana Journal of Global Legal Studies* 20: 965.

Blomley, Nicholas. 2008. Enclosure, common right and the property of the poor. *Social Legal Studies* 17: 311–331.

Bollier, David. 2011. *The commons, short and sweet.* http://bollier.org/commons-short-and-sweet. Accessed 18 December 2015.

Bottomley, Anne. 2007. A trip to the mall. Revisiting the public/private divide. In *Feminist perspectives on land law*, ed. Hilary Lim, and Anne Bottomley, 65. London: Routledge Cavendish.

Boyle, James. 2003a. Foreword: The opposite of property? *Law & Contemporary Problems* 66: 1.

Boyle, James. 2003b. The second enclosure movement and the construction of public domain. *Law & Contemporary Problems* 66: 33.

Breccia, Umberto, Giovanna Colombini, Emanuela Navarretta, and Roberto Romboli (eds.). 2015. *I beni comuni*. Pisa: Pisa University Press.

Chardeaux, Marie-Alice. 2006. *Les choses communes*. Paris: LGDJ.

Chatterton, Paul. 2010. Seeking the urban common: Furthering the debate on spatial justice. *City* 14(6): 625–628.
Ciervo, Antonello. 2012. *I beni comuni*. Rome: Ediesse.
Coriat, Benjamin (ed.). 2015. *Le retour des communs. La crise de l'idéologie propriétaire*. Paris: Editions Les Liens qui Libèrent.
Dardot, Pierre, and Christian Laval. 2014. *Commun. Essai sur la révolution au XXIe siècle*. Paris: La Découverte.
Davies, Margaret. 2012. Persons, property, and community. *feminists@law* 2(2): 1–21.
Davies, Margaret (ed.). 2015. *Property Volume IV: Public–private spaces, the commons and the public domain*. Abingdon: Routledge.
De Angelis, Massimo. 2010. The production of commons and the 'explosion' of the middle class. *Antipode* 42: 954–977.
Demsetz, Harold. 1967. Toward a theory of property rights. *The American Economic Review*. 57(2): 347–359.
Di Porto, Andrea. 2013. *Res in usu publico e beni comuni. Il nodo della tutela*. Torino: Giappichelli Editore.
Di Robilant, Anna. 2012. Common ownership and equality of autonomy. *McGill Law Journal* 58: 263–320.
Di Robilant, Anna. 2013. Property: A bundle of sticks or a tree? *Vanderbilt Law Review* 66: 869–932.
Esquirol, Jorge. 2014. Titling and untitled housing in Panama City. *Tennessee Journal of Law & Policy* 4: 243–302.
Finchett-Maddock, Lucy. 2010. Finding spaces for resistance through legal pluralism: The hidden legality of the UK social centre movement. *Journal of Legal Pluralism & Unofficial Law* 61: 31.
Foster, Sheila. 2011. Collective action and the urban commons. *Notre Dame Law Review* 87: 57.
Frischmann, Brett. 2012. *Infrastructure: The social value of shared resources*. Oxford: Oxford University Press.
Frug, Gerald E. 1980. The city as a legal concept. *Harvard Law Review* 93: 1057–1154. Reprinted 1984 (in part) as Chapter 13 in *Cities of the mind: Images and themes of the city in the social sciences*, eds. Lloyd Rodwin & Robert Hollister, 233–290. Springer.
Gambaro, Antonio. 1990. La proprietà. In *Trattato di diritto privato*, ed. Giovanni Iudica, and Paolo Zatti. Milano: Giuffrè.
Gaudemet, Yves. 1998. Libertés publiques et domain public. In *Mélanges Jacques Robert: libertés*, ed. Xavier Robert, 125–134. Paris: Montchrestien.
Giardini, Federica, Ugo Mattei, and Rafael Spregelburd. 2012. *Teatro Valle occupato. La rivolta culturale dei beni comuni*. Rome: Derive Approdi.
Grey, Thomas C. 1980. The disintegration of property. In *Property Nomos n. XXII*, ed. J. Roland Pennock, and John W. Chapman, 69–85. New York: New York University Press.
Grossi, Paolo. 1977. *Un altro modo di possedere. L'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria*. Milano: Giuffrè Editore.
Grossi, Paolo. 1990. Assolutismo giuridico e proprietà collettive. *Quaderni fiorentini per la storia del pensiero giuridico moderno* 19: 505–555.
Hardin, Garrett. 1968. The tragedy of the commons. *Science, New Series* 162(3859): 1243–1248.
Hardt, Michael, and Antonio Negri. 2009. *Commonwealth*. Cambridge, MA: Harvard University Press.
Harvey, David. 2003. *The new imperialism*. Oxford: Oxford University Press.
Harvey, David. 2012. *Rebel cities. From the right to the cities to the urban revolution*. London: Verso.
Hohfeld, Wesley N. 1913. Some fundamental legal conceptions as applied in judicial reasoning. *Yale Law Journal* 23: 16.
Holder, Jane B. 2008. Emerging commons. *Social & Legal Studies* 17(3): 299–310.
Kennedy, Duncan. 2006. Three globalizations of law and legal thought: 1850–2000. In *The new law and economic development. A critical appraisal*, ed. David Trubek, and Alvaro Santos. Cambridge: Cambridge University Press.
Lessig, Lawrence. 2004. The creative commons. *Montana Law Review* 65: 1.
Lessig, Lawrence. 2006. Re-crafting a public domain. *Yale Journal of Law & Humanities* 18: 56.
Linebaugh, Peter. 2008. *The Magna Carta Manifesto: Liberties and commons for all*. Berkeley: University of California Press.
Lucarelli, Alberto. 2013. *La democrazia dei beni comuni*. Rome-Bari: Laterza.
Madison, Michael J., Brett M. Frischmann, and Katherine J. Strandburg. 2009. The university as constructed cultural commons. *Washington University Journal of Law and Policy* 30: 365.

Mancini, Pasquale Stanislao. 1886. Del diritto di uso pubblico del Comune e del Popolo di Roma sulla Villa Borghese. *Il Filangieri* XI, 1–19, 49–78 and 119–151.
Marella, Maria Rosaria (ed.). 2012. *Oltre il pubblico e il privato. Per un diritto dei beni comuni*. Verona: Ombre corte.
Marella, Maria Rosaria. 2014. *The constituent assembly of the commons (CAC)*. OpenDemocracy. https://www.opendemocracy.net/can-europe-make-it/maria-rosaria-marella/constituent-assembly-of-commons-cac. Accessed 10 December 2015.
Marella, Maria Rosaria and Enrica Rigo. 2015. Cliniche legali, commons e giustizia sociale. *Parolechiave* 53: 181–194.
Mattei, Ugo. 2011. *Beni comuni. Un manifesto*. Rome: Laterza.
Mattei, Ugo, Edoardo Reviglio, and Stefano Rodotà (eds.). 2007. *Invertire la rotta. Idee per una riforma della proprietà pubblica*. Bologna: Il Mulino.
Micciarelli, Giuseppe. 2014. I beni comuni e la partecipazione democratica. Da un 'altro modo di possedere' ad un 'altro modo di governare'. *Jura Gentium* XI: 58.
Negri, Antonio. 2008. *Dalla fabbrica alla metropoli. Saggi politici*. Rome: Datanews.
Ostrom, Elinor. 1990. *Governing the commons. The evolution of institutions for collective action*. Cambridge: Cambridge University Press.
Parance, Béatrice, and Jacques De Saint Victor (eds.). 2014. *Repenser les biens communs*. Paris: CNRS Editions.
Pugliatti, Salvatore. 1954. La proprietà e le proprietà. In *La proprietà nel nuovo diritto*, 159. Milano: Giuffrè.
Quarta, Alessandra, and Michele Spanò (eds.). 2016. *Beni comuni 2.0. Contro-egemonia e nuove istituzioni*. Udine: Mimesis.
Rodotà, Stefano. 1960. Note critiche in tema di proprietà. *Rivista trimestrale di diritto e procedura civile* 14: 1252.
Rodotà, Stefano. 2012. Postfazione. Beni comuni: Una strategia globale contro lo 'human divide'. In *Oltre il pubblico e il privato. Per un diritto dei beni comuni*, ed. Maria Rosaria Marella, 311–331. Verona: Ombre corte.
Rodotà, Stefano. 2013. *Il terribile diritto. Studi sulla proprietà privata e i beni comuni*. Bologna: Il Mulino.
Romagnoli, Carlo. 2013. La prevenzione ambientale e gli esposti. Indagine sul punto di vista di comitati territoriali per la salute e la qualità dell'ambiente sulle attività di prevenzione. *ISDE Umbria*. http://www.comunemente.unipg.it/index.php/materiali.html#.
Sacconi, Lorenzo, and Stefania Ottone (eds.). 2015. *Beni comuni e cooperazione*. Bologna: Il Mulino.
Singer, Joseph. 1988. The reliance interest in property. *Stanford Law Review* 40: 611.
Thomas, Yan. 2002. La valeur des choses. Le droit romain hors la religion. *Annales. Histoire, Sciences Sociales* 57(6): 1431–1462, on-line http://www.persee.fr/doc/ahess_0395-2649_2002_num_57_6_280119.
Venezian, Giacomo. 1920. Reliquie della proprietà collettiva in Italia. In *Opere giuridiche di Giacomo Venezian, II, Studi sui diritti reali*. Rome.
Vezzani, Simone. 2007. Il Primo Protocollo alla Convenzione europea dei diritti umani e la tutela della proprietà intellettuale di popoli indigeni e comunità locali. *Diritti umani e diritto internazionale* 2: 305–342.
Vezzani, Simone. 2012. I saperi tradizionali e le culture popolari nel prisma dei beni comuni. In *Oltre il pubblico e il privato. Per un diritto dei beni comuni*, ed. Maria Rosaria Marella, 149–159. Verona: Ombre corte.