

Public-Commons Partnership and the Commonification of that which is Public

Tomaso Fattori: Excerpts from his contributions to the book *Living in dignity in the XXIst century. Poverty and inequalities from the Human Rights, Democracy and Commons perspective*, Council of Europe- Social Cohesion Research and Early Warning Division, 2012

"The field of Commons can be for the most part identified with a public but not-state arena, in which the actions of the individuals who collectively take care of, produce and share the Commons are decisive and fundamental. In this sense, Commons and commoning can become a means for transforming public sector and public services (often bureaucracy-bound and used to pursue the private interests of lobby groups): a means for their commonification (or commonalization). Indeed, there are many possible virtuous crossovers between the traditional public realm and the realm of Commons.

Commonification goes beyond the simple de-privatization of the public realm: Commonification basically consists of its democratization, bringing back elements of direct self-government and self-managing, by the residents themselves, of goods and services of general interest (or participatory management within revitalized public bodies). Commonification is a process in which the inhabitants of a territory regain capability and power to make decisions, to orientate choices, rules and priorities, reappropriating themselves of the very possibility of governing and managing goods and services in a participatory manner (1): it is this first-person activity which changes citizens into commoners. Generally, there are a series of circumstances (including living space and time schedules, job precariousness and other difficult work conditions, the urbanization of land and the complexity of infrastructures) which do not physically allow the inhabitants of a large metropolis to completely self-manage fundamental services such as water utilities or public transport, bypassing the Municipalities and the public bodies (or managing without public funds to finance major infrastructure works): it is on the other hand possible to include elements of self-government and commoning in the distinct stages of general orientation, planning, scheduling, management and monitoring of the services. At the same time it is necessary to also give back public service workers an active role in co-management. Which means going the other way down the road as compared to the privatization of that which is "public".

But there are also other overlaps possible between the idea of public and that of Commons, apart from the necessary creation of legislative tools which can protect and encourage Commons and commoning. Several forms of Public-Commons partnership can be developed, where the role of state is realigned, from its current support and subsidising of private for-profit companies, towards supporting commoning and the creation of common value. This can be achieved through tax exemptions, subsidies and empowerment of sharing and commoning activities, but also, for example, by allocating public and state-owned goods to common and shared usage thanks to projects which see public institutions and commoners working together. (2) This is a road which could be the beginning of a general transformation of the role of the state and of local authorities into partner state, "namely public authorities which create the right environment and support infrastructure so that citizens can peer produce value from which the whole of society benefits", according to the definition of it given by Michel Bauwens (3)."

Notes:

1) Naturally, the commonification of a service presupposes first of all that the collective goods required to satisfy their needs and fundamental rights are managed according to a model which is not based on market logic and profits.

2) At the present time there are examples of degraded or unused public buildings

which local administrations have targeted for projects of self-recovery and co-housing, which involve social groups who are not “poor enough” to be entitled to public housing programmes but nor are they in a position to buy themselves a house (normally young people in medium-low income brackets). The future residents receive a lease to use the publicly-owned buildings for a pre-defined number of years (in order to allow an actual shared use of the areas recovered) in exchange for a certain number of hours' work on the building site (and a modest monetary contribution): the residents' community is built, centred around a project, even before they live together. Another possible example is that of the repopulating of some abandoned areas in the mountains of Tuscany, where the Regional administration has held to the non-saleability of the common land and has activated a project to reconstitute communities of commoners who, grouped into cooperatives and other forms of association, have been able to buy and restore the abandoned buildings, return the common land to cultivation and take care of the woodland.

3) Bauwens points out that, to avoid the risk that the concept of partner state be confused with plans to dismantle the welfare state, along the “big society” model: “the peer production of common value requires civic wealth and strong civic institutions. In other words, the partner state concept transcends and includes the best of the welfare state, such as the social solidarity mechanisms, strong educational systems and a vibrant and publicly supported cultural life. What the British Tories did was to use the Big Society rhetoric to attempt to further weaken the remnants of social solidarity, and throw people to fend for themselves. This was not enabling and empowering; it was its opposite.” Bauwens M., *The Partner State & Ethical Economy*, July 2012. See: <http://www.shareable.net>

Tommaso Fattori: [Towards a Legal Framework for the Commons](#)

It is commonly acknowledged that there is a legislative gap concerning the protection and recognition of the sphere of Commons (1). The consequence of these inadequate legal guarantees is the extreme vulnerability of Commons, which remain without protection from processes of “enclosure”, due both to the market and to public policies in favour of privatization, in their various forms. (2) A first preliminary step is the drafting of a catalogue of Commons (3), both at the national and European level, albeit in the knowledge that it must remain a potentially open and updatable catalogue: it is necessary to make it possible to obtain recognition and to catalogue everything which communities identify and claim as Commons. A catalogue which forms the basis for a Charter, or several charters, for the effective protection of Commons and commoning, also through the guarantee that each individual can have recourse to courts of law to protect the Commons by means of injunctive relief.

Commons perform functions conducive to the satisfaction of the fundamental rights of individuals and of the collectivity, they are connected to the survival, the free development of the person and of their individual dignity, to social cohesion and the life of the community, frequently to the very life of this planet. Therefore Commons must be defended by the legal system and safeguarded through particularly stringent protective norms which can ensure the collective enjoyment and use of them, also for the future. Commons also need a specific form of self-governing by the commoners themselves, which must also be strenuously defended, apart from the possibility of allowing co-government with public institutions, as is applicable in the case of Commons relating to services and public infrastructures, Commons which are not tied to specific communities, Commons which do not have defined borders.

But the sphere of Commons is broader still, sometimes even tied to specific projects, as normally occurs in the case of digital or non-material Commons. It is therefore necessary but not sufficient to define and protect an area of Commons seen as a sort of public but non-state area (or common public area), made up of the Commons as a

whole, in the sense of shared non-alienable goods. (4)

We also need a more general recognition and a flexible system of legal protection for commoning activities and for the products of collective creativity: the state and institutions must take an active role in supporting commoning and to support the creation of new Commons. This active role must translate into forms of **public-common partnership**, where the institutions enable and empower the collective/social peer-creation of common value.(5) Governments could also provide seed funding, incentives and grants for Commons and commoning, just as it currently provides research and development support and assistance to businesses and corporations (6).

The drafting of one of more **Charters of Commons** (7) must offer a broad range of forms of protection, which would go for example from the definition of special statutes for the safeguarding of biodiversity or of traditional knowledge to laws defending the collective interests of digital communities. At the same time a series of legal tools aiming to keep the results of collective creation under the control of the collectivity which produced them have been built and invented by the commoners themselves, for example by altering the legal tools which were originally designed to protect private property, redirecting them towards the protection of Commons, as has been the case with GPL and CC licenses, the product of a transformation and a turning onto their head of the logic of laws governing copyright.(8)

The legal recognition of the sphere of Commons must lead to a delegation of authority and power by the state to commons-based institutions. That is to say, the constitution of self-regulating commons-based institutions must be authorized, protected and legally recognised (starting with the recognition of those which already exist(9).), through which commoners can protect, produce and reproduce Commons and common value.

Current debates (and experiments) focus on Trusts, Foundations, for-benefit institutions etc. Commons trusts are normally considered legal entities responsible for protecting shared assets, and which have a fiduciary duty to preserve natural and material commons - such as natural systems, water, air, land, and biodiversity - and to protect, regenerate or create social, cultural, digital and intellectual Commons, such as Wikipedia and the Internet itself. Such trusts can be located either inside the boundaries of one state or be trans-border, according to the size and range of the resource and/or of its relative community of interest. Finally, it is probably not sufficient to stop at meta-institutions designed to preserve and protect the common destiny of a Commons over time and prevent its alienation. Just as it is true that commoning normally produces use value which cannot be accounted for in monetary terms (values which are part of the range of positive social or environmental externalities) one should construct a special legal form which could recognise and protect a similar type of enterprise or "project" (a common social enterprise) and protect a similar form of production of use value of collective use, which will help build another type of economy.

Notes:

1) Apart from some residual elements present in Common Law, such as the Public Trust Doctrine: the principle that certain resources are preserved for common use and that the government is required to maintain them for the public's reasonable use. Otherwise, western law has been built on the public/private dichotomy and, starting from the recognition of individual rights, reducing and weakening the sphere of common rights until they are annihilated.

2) Peter Barnes comments: "governments in Europe as well as the United States have a double standard. If the property is privately owned, it can't be taken without fair compensation. (...). By contrast, if the valuable asset is commonly owned, no such prohibition exists. A government

can take from the Commons and give to private owners without the latter paying a dime". Barnes P., A Double Standard on "Takings", October, 2006. See: <http://www.onthecommons.org>

3) Following the model of the so called "Rodotà commission", set up in 2007 and charged with revising the Italian Civil Code, the first act of which was to draw up an initial catalogue of Commons.

4) The legal theoretician Luigi Ferrajoli has for some time been suggesting the route of actually constitutionalizing the Commons, thus taking them away both from the market and from the threats of exclusive private appropriation and from the decisions of temporary political majorities (as has happened at least in part in some Latin American constitutions, notably Ecuador). Constitutionalization would indeed ensure Commons non-reversible legal protection.

5) In relation to the concept of Partner State, Michel Bauwens writes: "first theorized by Italian political scientist Cosma Orsi, (it) is a state form that enables and empowers the social creation of value by its citizens. It protects the infrastructure of cooperation that is the whole of society". Bauwens M., The Partner State & Ethical Economy, July 2012. See: <http://www.shareable.net>

6) David Bollier writes: "Government should actively support the commons, just as it supports the market. Government does all sorts of things to help markets function well. It builds infrastructure, pays for courts, provides legal protections, promotes trade, and gives out subsidies, among other benefits. Why shouldn't government provide similar support to help the commons work well? I say it's time to explore how government can play a more active role in nurturing the commons sector and the type of value that it creates". Bollier D., The Digital Republic, November 2009. See: <http://onthecommons.org> . Similarly, in a document entitled "Measures to Finance the Shift to a Commons-Based Economy " prepared in 2012 by Commons Action for the United Nations, a network of CSOs, we can read: "Governments would shift their primary emphasis away from issuing corporate charters and licensing the private sector and, instead, move toward approving social charters and open licenses for resource preservation and social and cultural production processes through commons trusts managed by those who would cultivate and protect commonly held resources".

7) In the same document, Commons Action for the United Nations encourages initiatives such as "the creation of Social Charters to affirm the sovereignty of human beings over their means of sustenance and well-being arising through a customary or emerging identification with an ecology, a cultural resource area, a social need, or a form of collective labour. These charters are covenants and institutions negotiated by commons communities for the protection and sustenance of their resources. They use a commoning approach to ensure that community access to — and sovereignty over — their own commons is maintained and that the interests of all stakeholders are represented".

8) David Bollier also illustrate the value and importance of the so-called "vernacular law", "which is the (group of) informal, socially based rules and norms that communities develop, independent of formal, written law. (...) It validates "the street" as a source of law over and against formal law, which is often corrupt, unresponsive, inaccessible to ordinary people, etc." David Bollier, private letter.

9) "Whether these commons are traditional (rivers, forests, indigenous cultures) or emerging (energy, intellectual property, internet), communities are successfully managing them through collaboration and collective action. This growing movement has also begun to create social charters and commons trusts — formal instruments which define the incentives, rights and responsibilities of stakeholders for the supervision and protection of common resources". Quilligan J., Beyond State Capitalism. The Commons Economy in our Lifetimes, July, 2010. See: <http://onthecommons.org>