

Market, State, and Commons

*** Essay: Providing Direct Access To Social Justice By Renewing Common Sense: The State, the Market, and some Preliminary Question about the Commons. By UGO MATTEI. Uninomade, 2014**

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"In the wake of urgent challenges to both the European Union and the global system, the inadequacy of both state and market mechanisms has become increasingly evident. Such a crisis presents a ripe setting for rethinking the unnatural zero sum relationship between fiscal crisis and social justice, in order to restructure institutional arrangements on both domestic and global levels. The concept of the commons can provide today exactly the necessary tools, both legally and politically, to addressing the increasing marginalization of social justice under crisis capitalism. Being outside of the State/Market duopoly, the Commons, as an institutional framework, presents an alternative legal paradigm, providing for more equitable distribution of resources and as a direct consequence, social justice.

The current vision presents the opposition between "the public" (the domain of the State) and "the private" (the domain of the market and of private property) as exhausting all the domain of possibilities (in a sort of zero sum game). This gridlocked opposition is a product of the individualist tradition still dominant today in law and in economics. The discourse around the Commons attempts to overcome this assumed traditional equivalence between public sector and the State, as well as rejects the role of the Market, in so far as it reduces individuals from citizens (an entity of rights) to consumers (entities functional to the ends of capitalism). The Commons bypasses these mediating forces of market and State, thus presenting a worldview that reunites individuals to collective action in a direct relationship. The Commons (water, knowledge, health, energy and cultural heritage also known as common pool resources within the "institutional analysis" of Ostrom)[5], are resources which belong to the people as a matter of necessity, depend upon free access, and do not depend upon the special intervention of state and market forces. Consequently, they do not depend on the fiscal availability of resources. They are not concessions. If properly theorized, the Commons can serve the crucial function of reintroducing social justice into the core of the private law discourse.

However such a shift, requires a significant break with the dominant wisdom which assumes that management of resources must be mediated through either the state or private property. How can the Commons overcome this "dominant wisdom," to carve power away from private property/market and the State, and transfer it directly into the hands of the people? Overcoming the dominant wisdom includes several steps: 1) a need to see and recognize the Commons that are already providing us with a resource 2) an unearthing of the source of the dominant wisdom in the Western Legal tradition that assumes the management of resources must be mediated through the state and/or market and 3) to encourage a more holistic paradigm which uses the ecosystem as a model in forming an alternative legal institution of the Commons.

Seeing the Commons

The first step in overcoming the dominant wisdom is to “recognize” the commons that are already present. The commons provide services which are often taken for granted by their users: those who benefit from the commons do not take into account their intrinsic value, only acknowledging it once the commons are destroyed and substitutes need to be found. To some extent, the universal services provided by common goods are similar to household work, never noticed when the work is being done. Only when no one is there to do the dishes, you notice its value. In other words you don’t miss something until it is gone. Two striking examples of this feature are represented by mangroves and by coral barriers: people living on the coasts are not able to estimate the value of the services they provide simply because they don’t even know that these goods have a specific function, that they are doing something for them. Only when a Tsunami hits, destroying villages, the value of such vegetation becomes apparent. Similarly, when Italians destroyed the coral barrier so as to let great cargo-boats dock in Mogadishu and load them with their colonial plunder, they in fact had opened a way for sharks who flocked in, attracted by the nearby slaughter-house blood that was shed into the sea. Mogadishu’s beach thus became one of the most dangerous places in the world to swim. Recreating a barrier to keep sharks away from the coasts would require now huge investments technologically and financially. This example demonstrates how the value of a common good is only acknowledged once it runs out and need to be substituted. In the same manner, mangroves have been destroyed to breed shrimp.[6] However, prior to their destruction, mangroves played a major role in protecting coastal villages from tsunami waves. Again, it would be highly expensive to build a similar barrier artificially.

Public awareness of the fundamental role/value of a Commons may only be pursued by investing on the side of demand, acting in such a way to make people acknowledge the importance of their services. As mentioned above, if Commons do not seem to produce any return, this is simply because their users are not aware of the huge benefits that can be derived from them. They are indeed essential in satisfying basic human needs. Only their recognition can mobilize society to save them and expand their domain.

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

It could be said that the commons are disappearing as a result of a structural incompatibility inherent in the deepest aspects of the Western “legality,” a legality that is founded on the universalizing and exhaustive combination of individualism and the State and private property/market dichotomy. Centuries before, in ancient Rome the early clans routinely extended their landholdings by usurping the commons and the privatization of the commons was already described by Engels as the most fundamental economic pattern of European development. Thus Western law has served a very important role in destroying the commons, certainly not in protecting them[7]. This still seems to be the pattern of development in cognitive capitalism[8]: think about prosecution of peer to peer internet exchanges.

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

The commons as diffused-power (or absence of hierarchical power) is also structurally incompatible with the adversary idea of the Western trial. The structure of the adversarial trial as a zero sum game requires an interest to act that must be specifically referable to a specific individual. The commons, characterized by its diffused access, “belonging” to all, prevents it from appointing anyone that could be considered a holder of such a special interest and thereby legitimizing his/her presence in court. In other words, in a trial conceived of as a zero sum game, between a winner and a loser there is no space in the court for the commons framework (except from special technical-trial mechanisms as the class actions, developed as an exception and very recently). It is the issue known in the American legal debate as the “standing to sue” : who among the enormous number of beneficiaries of drinking water (or fresh air) could differentiate enough of his interest from others, in order to become its savior, exercising his/her right to a hearing? Such a problem has a big practical impact because Courts are reluctant to admit anything that departs from the archetype of the zero-sum game, a problem that different legal systems solve (when they do) as an exception rather than as a formalized rule.

Piercing the Veil of the State v. private property (market) Dichotomy

In 2010, we can see that the state v. private debate presents a false dichotomy, a distinction without a difference. The state is no longer the democratic representation of the aggregate of individuals, but instead a market actor among many (Coase). The collusion or merger of state and private interests, with the same actors (corporations) on both sides of the equation, and the technocracy developed to veil the political nature of this centralization of power, leaves little room for a “commons” framework, no matter how convincing the evidence about the benefits may be.

Private property and the State in their various forms are the two major legal and political institutions that carry on the dominant view of the world. The common wisdom, founded on the longstanding dualistic and reductionist opposition between state and market, shows them to be radically conflicting. It assumes, in a cryptic way, that state and the market have a zero-sum relationship: more state is equal to less market and less market is equal to

more state. In this reductive scheme the state and private property become quintessential of public and private poles of opposition. Of course this picture is totally false on both historical and modern levels because the two entities, as social and living institutions, can only be structurally linked in a relationship of mutual symbiosis. The fabricated clear-cut opposition between the two is a precise ideological choice of the individualistic tradition.

However, its historical falsehood is irrelevant in reflecting the hegemony of a given political discourse, so that the pervasiveness of state and private property, respectively, as representatives of public and private leaves no room for any third gender. This firmness and this reduction of the analysis and practice are actually the product of a common structure of property (market) and sovereignty (state) aimed at the concentration of power. Private structures (corporation) concentrate their decision making and power of exclusion in the hands of one subject (the owner) or within a hierarchy (the CEO). Similarly, public structures (bureaucracy) concentrate power at the top of a sovereign hierarchy, symbolized by the exclusion of any other decision making entity within a given sphere of jurisdiction (the model of territorial sovereignty and its political-administrative elements).

Many scholars, in particular Kenneth Galbraith, argue that the development of the private sector (determined by marketing techniques) requires a similar development within the public sector (which is, still, insufficient due to the lack of proper marketing investments). Here, Galbraith assumes a structural equivalence between the private sector and the public one, among which the former relies basically upon the idea-archetype of private property, whereas the latter relies upon the archetype of state sovereignty. Both archetypes are inserted into a fundamental structure: the rule of a subject (an individual or a company from one side, the State from the other side) over an object (a private good, a piece of property from one side, a territory from the other side). However, any structural dichotomy between public sector and private sector and the assumption that one is structurally opposed to the other is indeed a political and a cultural invention. Such opposition between two domains sharing allegedly the same structure does not exist but is a result of Western reductionist, quantitative, and individualistic thought. Hence, to some extent, the marketing pursued from time to time by the public (hierarchical and bureaucratic) sector may be called indeed propaganda, in so far as it does not introduce any relational ambition upon individuals, enabling some qualitative transformation of their being together, but rather tending to limit itself to the promotion of more individualism and consumption-based values.

Most of the goods produced by the current capitalist model of production – e.g. a new model of car, branded shoes, the umpteenth mobile phone – do not represent a need, either private or public. From the State perspective, nonetheless, these goods are needed in so far as their production boosts growth and development of the national economy. In this regard, “growth” is again conceived of as a merely quantitative function (production for the sake of production), which is a now completely irresponsible ideology. The need for private goods is created (or invented) by manipulating demand by means of specific and massive investments called marketing. Marketing is designed to persuade consumers to think that they need superfluous private goods and that these serve a precise useful function in satisfying their desires and wants. In some cases, marketing activities increase the consumption and

accumulation of private goods as if there was a need for them, thus damaging the commons (such as in the case of commercial adverts of bottled drinking water). The individual isolated from his community in nature succumbs finding himself functional to the production needs of capitalism, aimed at selling its products to the "lonely crowd." [12] Precisely in order to invent new private wants and needs the strategy of marketing was developed. Marketing produced consumer behaviors with devastating ecological effects by creating false images and materialistic myths of an egocentric and narcissistic character. The individual left alone, narcissistic and wanting, finds in products, in goods, in objects, rather than his fellow man or the environment which sustains him, his social contractual relationship. His own major relational horizon is determined "objective" by the system of prices to be paid for the satisfaction of various increasingly complex "needs."

Marketing is also used to promote the public sector. This is sometimes required in as much as the amount of goods produced by the private sector is so huge (e.g. cars) that the development of the public sectors activities (e.g. building parking lots and roads) is vital to repair (e.g. fostering sales of cars) to such over-abundance of production. Often, in these cases, state focused marketing is rather called propaganda. Such marketing both by the private and public sectors, is resulting in the overconsumption of common goods and their destruction and through market mechanism is distributing them unequally to the wealthy, depriving the poor of basic necessities.

The typical individualistic 'fiction' of the liberal tradition (the myth of Robinson Crusoe) disconnects need from real survival necessities (the necessities that can be satisfied in the qualitatively different but quantitatively constant way) and 'invents' the need in function of its very satisfaction (supply side economics). Thus here, it becomes clear that a qualitative paradigm submits to a quantitative one, because the more a need is induced, the more it grows, and the more money can be collected to fulfill its satisfaction. Unfortunately, ecology and 'systemic' thinking - the paradigms capable of revealing that these dynamics of individualistic accumulation are devastating for community life - are notably absent in contemporary politics, which has elected the "social sciences" (particularly microeconomics, political science and marketing) as its only repository of ideas (or as its ideological apparatuses in Althusserian terms). Contrary to Garrett Hardin's famed phrase in the "Tragedy of the Commons," "a commons is a place of no law and therefore ruin," it seems that state and market mechanisms, which rely on the "individual" as its object, are in fact the culprits of this ruin today. "Privatization usually provides incentives for rational exploitation of the resource. If the owner has property rights in the resource and those rights are tradeable, both the costs and benefits will accrue to the same owner and will be reflected in the market price of the resource, giving the owner the pecuniary incentive to refrain from destructive use. These incentives, however, are not necessarily consistent with sustainable use." (<http://www.uninomade.org/preliminary-question-about-the-commons/>)