How to de-marginalize commons for de-commodificaton as a legal concept?

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My first statement is the following. Ostrom has 'no more than nuanced, no more than footnoted' the persistent dominance of the private property paradigm. Let me illustrate my statement with Ostroms original empirical cases studies. Ostrom looked at historical Japanese and Alpine commons. I state both commons are historically, culturally and geographically remote enough, not to threaten the western *fetishism* of private property. Firstly, the historic case of Japan, although it's Western attitude it remains thé example of an isle in splendid isolation with a very own cultural-identity which clearly differs from our own western geo-historical specificity. Secondly, the Swizz Alpine commons: although the latter are situated in an archetypical capitalistic state, right in the heart of Capitalistic Europe, their location high in the Alps makes them, intellectually, remote enough not to threaten the dominance of private property as the institutional servant of market-capitalism.

The empirical study of prevailing, traditional commons measuring their efficiency, has, and now I quote legal scholar Ugo Mattei: "turned the commons into a tranquilizing and even pacifying paradigm". With Ostrom the concepts of justice and distribution gave way to efficiency, as such I situate her in the same normative tradition as Hardin, the utilitarian tradition.

Nevertheless, I do not deny capitalism has planted it flags on every human trimmed Alpine mountain top and set foot on nearly each desolated island. And I underscribe to the merits of studying their sustainability despite capitalistic pressures. So let me restate my first statement to: Ostrom has no more than nuanced, no more than footnoted the private property paradigm, but also not less! Quite an achievement. Yet I am skeptical the revolutionary roots of a post-capitalistic society are to be discovered in the study of idealized traditional village communities that co-manage a resource.

I suggest we take the struggle for the commons from the "mental periphery" to the capitalistic valleys and the urbanized lowlands of modern, continental Europe and frame *commoning* as *une lutte urbaine*, an urban struggle. As a protest against the continuous commodification of space and the unequal distribution of collectively produced value. This inequality is according to me the result of one particular discrimination ground which is apparently completely legal: namely, discrimination based on purchasing power.

By doing so I do not center the commons around a shared resource, as Ostrom did, I center it around the fundamental right to enjoy the benefits of urbanization, its positive externalities.

Ostrom analysis is in my opinion not useful for the urban commons, as it is centered around resource management. What is the harvest of the parcels which are part of an urban land market system? The harvest is the unearned rent created by the collective of the urban.

The urban is here defined as the major site of production of value (Negri 2008; Hardt and Negri 2009). If we define the urban 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).

The commons should aim to eliminate the influence of this accumulation of rent which hinders the access to urbanized lands.
The framing of commons as an urban struggle calls in the right to the city, a particular interesting concept for us, researchers of the commons, as it allows us to connect legal theory with studies of urbanization. So let's bring in some legal theory.

Legal historian Yan Thomas describes the city as just a name given to the process of sidelining individual rights, in his original words: putting individual rights between brackets.

However, by contrast to this reading the development of the urban by formal urban planning is exactly the structuring of private properties and its effects. The city is –certainly in legal terms- reduced to binary scheme of public property and private property.

The reduction of the city to this binary scheme is the result of centuries of non-neutral reciting of Roman law favoring private property. This process of eliminating particular roman rules which where pro collective property has eventually been codified in the Code Napoleon: the formalization of the legal marginalization of law of the commoners and non-state "vernacular" law in general.

Indeed the marginalization of the commons matured with the upcoming of the nation states. The commons where appointed to the binary scheme of either private property (hence parceled out dispersed land use governance appointed to individual owners) or public property (hence centralized power appointed to the state). According to the theory of access introduced by Ribot and Peluso and further developed by Sikor and Lund, the nation state gained its legitimacy by appointing former commons property to individuals whether or not against the market value. This is even connectable to the legal philosophical contract theories which conceptualize the *res communes* as something of the past, something which only occurred during *the state of nature*.

According to Ugo Mattei, state sovereignty and private property have exactly the same core: they are both based on the logics of exclusion. I do follow this analyses of Mattei, however I don't agree with his proposal to get rid of the nation state which has sold its soul to neo-liberalism by neglecting its redestributional tasks.

As legal-institutionalist Deakin argues we still need the nation state as a main legitimizer, as it still is presumed to represents a critical mass. If want to demarginalize the commons in the legal sense we have to do it through the nation state.

I am not convinced the landed commons will be institutionalized through international law, the usual starting point of a legal research on the landed commons.

International law has hardly no jurisdiction when it concerns landed commons. It has only jurisdiction over the global commons of the high seas, the air, etc. I state these are the mere left-overs of the nation states. The residue of state law. The global gommons are so vast that state policing or their parceling out is not worth the effort, they are simply not scarce enough. These global commons are hardly governed and thus open-access -Indeed the modern equivalent of Hardin's grazing lands- However, when such a resource suddenly becomes scarce -for example because of air pollution-, an international treaty commodifies the right to pollute. We didn't parceled out the air, however we did parceled out and marketized pollution.

I am equally skeptical of the recognition of commons by the European law and its supranational bodies. As it exactly the EU -with its free market horizon- is a very important motor of commodification and marketization and is directly responsible for the significant decline in public management of local resources: the transfer of public functions to the private realm, in other words, a shift in control from local governments, which are affected by EU-fiscal strains and -budget costs, to private groups

However, paradoxically, I also see a change in this crisis of neo-liberalism, this "financial state of exception", for the commons to be legally recognized by the nation state.

However this will not occur if we don't put the legal conceptualization of the commons on the agenda of legal scholarship. Therefore I state we should reorientate the legal reasoning from mere doctrinal repetitions to an experimental field, in which the hypotheses of the commons as the theoretical concept that if installed has the potential to struggle against commodification and introduce/struggle for new models of property and management (use rights arrangements). "The power of a hypothesis is that it enables counterfactual reasoning that unlocks new theoretical possibilities." (Mattei & Rossi).

This hypothesis has to be tested in the laboratory of the urban. In this respect, Hannuchi and Tappei's research on the performativity of the commons is interesting. Theses scholars argue the study of the performativity of the concept of the commons has been a blind spot in the studies on the commons. The performativity of a theoretical concept can be defined as the process taking place when this theory is put into the world by practitioners and popularisers it reformat and the phenomena they intend to describe, in ways that

bring the world in line with theory. Performativity is a process within which socio-technical arrangements are being modified and redesigned to enable the existence and relevance of a new statement, concept, image, theory or model. The framing of the commons as a hypothesis goes hands-in-hands with the power of performativity as a socially transformative, imaginative and collective political engagement that works simultaneously as a space of social critique and as a space for creating social change

I forward three possible meta-legal strategies to study and experiment with the performativity of the *commons*:

1. Fistly, historio-legal action-research. We could do this by exploring forgotten legal figures like 'les biens communaux et les choses communels' which surprisingly survived the legal marginalization by the Code Napoleon.[1]
2. Secondly, action-research by legal design: we make some creative formal assemblages of existing legal figures like leasehold, together with the figure of the cooperative…
3. Thirdly, the politico-legal action-research: the *hacking* of existing legal figures.[2]

The latter one, is less radical as it sounds. We could mobilize the Hohfeldian idea of the bundle of property rights to hack the constitutional embedded figure of property, in the words of di Robilant (2014): democratic experimentalism in property law. This is no wihfull thinking it occurred in Italy with the referendum on *water commons*.

According to the bundle of rights theory, property is a bundle of rights which exist out of the right to access, use, exclude, destroy, improve and alienate).

I suggest we introduce a new basis of discrimination to resolve another one. Not to replace the market (and its discrimination mechanism) entirely, but to offer alternative choices to people how they want to be excluded. I suggest we include or exclude people based on their willingness to be a co-steward of the land rather than a capitalist and their willingness to denounce the right to harvest unearned rent. If the candidate-steward is willing to denounce this right he is allowed to use the land and be a member of the collective governance body that governs the land use.

As such the empty and abstract right to the city is translated as a the right not to be excluded to the urban via the land market system. In other words, it is specified as the right not to be discriminated based on ones purchasing power. The latter is realized because the institutional arrangement put on a landed resource has abnegated the *cité des merchants*, the logics of the merchant.

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[1] Art. 542 and Art. 741

[2] See f.e. the institutionalization of the water commons in Italy through a referendum.