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THE COMMONS

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LEGAL IDEOLOGY AND THE COMMONS: WHY ARE JURISTS FALLING BEHIND?

ABSTRACT
The last quarter of a century has featured a surge in interest and studies on the commons, spearheaded, of course, by the efforts of Elinor Ostrom. These efforts have problematized the once well-established paradigm of the tragedy of the commons most clearly described by Garrett Hardin in 1968. One could say that the commons, thus, have become a fundamental field of study in most social sciences. This is not the case in the field of legal scholarship (with one noticeable exception that I will discuss later), which leads me to the overarching issue of this essay, namely the difficult relationship between jurists and the commons. The phrase "difficult relationship" does not refer to an explicit antagonism, but to something even worse: complete indifference and a scandalous lack of knowledge. While my main purpose is to try to explain this sorry state of affairs, I also hope to make a more general point on the nature of law and legal change. In this sense, the commons can be considered a case-study in legal theory. The main issue of this paper is to tackle following sub-questions. What is the status of commons in the Western European legal discourse? Why do most legal scholars pay such a poor attention to the growing literature on the commons in other disciplines? What factors contribute to this peculiar case of cultural deafness? What promise of improvement does the future hold?

KEYWORDS
commons, law, paradigm shift, legal change

1. Posing the question

Let us start with a true but banal statement: since at least the 1990s the commons have become a major topic in almost all social sciences. If I had no fear of overburdening the patience of my readers with an even more banal phrase, I would speak of a paradigm shift. The clearest manifestation of the success of the commons – and of the critique levelled against the previous paradigm, the "tragedy of the commons" – is the Nobel Prize for Economics awarded to Elinor Ostrom in 2008. In her work "Governing the Commons", Ostrom shows that Garret Hardin's prediction about the destruction of common goods because of overuse is less than accurate in a wide array of practical cases. I am not going to expand further on the vast front of research that is being conducted in the field, nor am I going to discuss the merits of Ostrom's work and of her design principles for a functioning commons regime. I am instead going to focus on the role, or rather its absence, played by legal scholars.

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The most perceptive readers have probably noticed that I opened this Article by mentioning "*almost* all social sciences". Among these, legal scholarship is playing the role of the great absentee. Of course, this statement needs some qualifications. Firstly, there is at least one legal field that has displayed a healthy interest for the commons: intellectual property law. However, the inroads made by the new paradigm in intellectual property can easily be explained by the peculiar goods which the field is concerned with. Indifferent to the limitations typical of material goods, intellectual property can be shared without diminishing its functionality. This feature has of course been stressed by the development of information technology, generating a wide set of practical issues that lend themselves exceptionally well to be addressed through the prism of the commons. Secondly, there is a minority of legal scholars that has displayed a considerable interest for the commons even outside of intellectual property. A particularly interesting case concerns the Italian legal academia, spearheaded in this regard by scholars such as Ugo Mattei and Stefano Rodotà.[1] These have managed to effectively bridge the gap between the academic analysis and the political discourse, injecting the commons in the national political debate. Moreover, the Italian Court of Cassation itself has been influenced by the work of the aforementioned scholars in a series of cases concerning enclosed fisheries in the Venetian Lagoon.[2]

Regardless of the importance of these exceptions, it is difficult to deny that the average Western legal scholar is unaware of, or at least not interested in, the rich debate about the commons that in the last decades has been so crucial in other social sciences. In this article, I will try to explore some of the factors that have contributed to making the legal discourse a less than fertile ground for the commons. Such an exercise is of obvious interest for legal scholars, as it offers an occasion to discuss the capacity of the legal discourse to relate to other social sciences and to update its own theoretical foundation. It is fair to say that many of the challenges that our societies are facing transcend the classical distinction between private and public law, which mirrors the state-market dichotomy. For instance, one could argue that the preservation of the biological conditions for our survival on the planet requires a different approach to law. Until now, the recipe has largely mirrored Hardin's recommendations. In other words, private law, concerned with interest of individual parties in the present, handles the resources that are on the market with little concern for the interests of future generations. These are instead dealt with by applying a band aid of public law, commonly known as environmental law. A strong case can be made for a restructuring of private law itself to take into consideration collective interests. Such a realignment will be difficult to achieve without a better understanding of the commons and the theoretical work that is being done in the field by other social scientists.

The topic, however, is not an insular one. The attitude of legal scholarship towards the commons, or indeed any other socially desirable institution, is a crucial factor for the success of said institution. For better or worse, law is the main normative tool of the West and its conceptual landscape defines the way states, as

1 Of particular interest are the works of the Rodotà-commission, charged with reforming the provisions of the Italian Civil Code about public goods. See Mattei et al. 2010.

2 Cassazione, S.U., nr. 3665, 3811, 3812, 3813, 3936, 3937, 3938 and 3939 of 2011.

represented by judges and civil servants, describe reality and define facts as relevant or irrelevant for decision-making. One could speculate about what long-lasting success 19th century liberalism would have had without the enthusiastic participation of jurists. Non-lawyers invested in promoting the commons as a tool to promote social progress, be it in the form of sustainable development or in the form of a limitation of free market capitalism, would therefore be wise not to ignore the legal discourse, as its particular nature may very well nullify any advances achieved in other fields and domains.

The main issue of this article can be articulated in a few sub-questions: a) What is the status of commons in the Western European legal discourse? b) Why do most legal scholars pay such a poor attention to the growing literature on the commons in other disciplines? What factors contribute to this peculiar case of cultural deafness? c) What promise of improvement does the future hold?

2. Property: at the heart of the Western private law

To understand the shaky status of the commons in the legal discourse it is useful to have a basic appreciation for the majestic role played by property in Western private law. In fact, one could argue that the core of the Western legal tradition, which was largely moulded in its current shape during the 19th century, is born out of an ideological reaction against the commons and a matching support for private property. The topic that I am now addressing is of immense historical complexity. Thus, I can only offer a few snapshots from the French and the English legal systems, which can be considered good representatives of their respective legal families (the civil law and the common law).

Already in the earliest years of the Norman domination, the commons, a constant feature of the English countryside since the Saxon time, had come under strong pressure from the aristocrats, especially keen on enclosing forests to use them for their favourite pastime: hunting (Wright 1928: 166–167; Shoard 1999: 100). The most serious menace against the commons did, however, arise during the 16th century, when the profitable wool-trade (largely responsible for making England a dominant economic power and for starting capitalism itself) encouraged a transition from agriculture to shepherding (Scrutton 2003: 72). This growing industry required an intensive use of land and greatly accelerated the enclosure of the commons. This development is eloquently depicted by Thomas More in his Utopia. Hythloday is explaining the causes of criminality in England:

> The increase of pasture, (...) by which your sheep, which are naturally mild, and easily kept in order, may be said now to devour men and unpeople, not only villages, but towns: for wherever it is found that the sheep of any soil yield a softer and richer wool than ordinary, there the nobility and gentry, and even those holy men the abbots, not contented with the old rents which their farms yielded, nor thinking it enough that they, living at their ease, do no good to the public, resolve to do it hurt instead of good. They stop the course of agriculture, destroying houses and towns, reserving only the churches, and enclose grounds that they may lodge their sheep in them. As if forests and parks had swallowed up too little of the land, those worthy countrymen turn the best inhabited places into solitudes; for when an insatiable wretch, who is a plague to his country, resolves to enclose many thousand acres of

> ground, the owners, as well as tenants, are turned out of their possessions by trick or by main force, or, being wearied out by ill usage, they are forced to sell them; by which means those miserable people, both men and women, married and unmarried, old and young, with their poor but numerous families (since country business requires many hands), are all forced to change their seats, not knowing whither to go; and they must sell, almost for nothing, their household stuff, which could not bring them much money, even though they might stay for a buyer. (More 1751: 17–18)

Despite the early concerns of several prominent English intellectuals, the enclosure movement accelerated and did eventually receive a strong support by the Parliament starting in the 18th century (Neeson 1996; Mingay 1997: 20). The enclosures did also leave clear traces in the common law. The primary and most vulnerable target were the customary rights that depended on the rightsholder's status (for instance, as inhabitant in a village). The Gateward's Case of 1607, frequently quoted in the following centuries, concerned a case of trespass in which the defendant claimed a customary right for the inhabitants of the town of Stixwold in Lincolnshire to pasture their animals on the land of the plaintiff. The Court of Common Pleas rejected this argument by affirming that such a right of common would have been too uncertain:

> What estate shall he have who is inhabitant in the common, when it appears he hath no estate or interest in the house (but a mere habitation and dwelling), in respect of which he ought to have his common? For none can have interest in common in respect of a house in which he hath no interest. (...) Such common will be transitory, and altogether uncertain, for it will follow the person, and for no certain time or estate, but during his inhabitancy, and such manner of interest the law will not suffer, for custom ought to extend to that which hath certainty and continuance. (...) It will be against the nature and quality of a common, for every common may be suspended or extinguished, but such a common will be so incident to the person, that no person certain can extinguish it, but as soon as he who releases, &c. removes, the new inhabitant shall have it.[3]

This principle was then applied, in 1741, in Dean and Chapter of Ely v. Warren, concerning a common right of turbary.[4] The court concluded that "an occupant, who is no more than a tenant at will, can never have a right to take away the soil of the lord". In a similar fashion, the Court of Common Pleas in the case Steel v. Houghton (1788) denied the customary right of the poor of a parish to glean on the fields after harvest. Of course, the courts' antipathy towards property rights different from individual property did not develop in a cultural void. The 16th and 18th centuries saw the rise of natural law political theories that promoted property as a fundamental human right. The most well-known is without a doubt John Locke's work (1986: 129), which assumed that property already existed in the state of nature and that the state, created through the social contract, had among its core duties to protect it. In the realm of legal scholarship, William Blackstone (1765–1769: 2), in an often-quoted passage of his *Commentaries on the Laws of England*, encapsulated the ideological passion for individual property typical of his epoch:

3 Gateward's Case (1607) 77 E.R. 344.
4 Dean and Chapter of Ely v. Warren (1741) 26 E.R. 518.

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

As pointed out by Carol Rose (1998: 601), it might be the case that this quote has been overused and isolated from its context. A broader reading of Blackstone certainly results in a richer and more nuanced impression of his view of property rights. However, the success of these bombastic lines is by itself revealing.

A similar development occurred in France, although filtered through a very different legal tradition. As in England, farmers in a large area of France relied since the Middle Ages on common rights on the land. As in England, these rights came under pressure at first by the aristocracy, wanting to extend its control over the land, and later by novel economic theories, best represented by the influential physiocratic movement, which promoted individual ownership of the land, reasoning that only an individual owner would invest the capital needed to develop the resource adequately (Quesnay 1969: 331–332; Samuels 1961: 99). The Crown itself, during the 18th century, actively promoted a division of common land among individual owners, although only with limited success (Vivier 1998: 35). This can in part be explained by the fact that the Crown could not muster the strength to attack the feudal system on which its own power was based.

The French Revolution was obviously not constrained by such considerations. Individual property became in fact the new ideological foundation of the bourgeoisie in power, effectively substituting the religious basis of the monarchy. A clear signal of the new status attributed to private property came as early as in 1789, firstly with the decree of the 4th of August which abolished the feudal order (Lévy-A. and Castaldo 2010: 459–460) and a few weeks later with the Declaration of the Rights of Man and of the Citizen. Article 17 states that:

> Property being an inviolable and sacred right, no one can be deprived of private usage, if it is not when the public necessity, legally noted, evidently requires it, and under the condition of a just and prior indemnity.

Those political acts, however, could not have been translated into factual social change without an alliance between the ideals of the revolutionary bourgeoisie and the *hommes de loi*. After a short crisis brought about by the revolutionaries' distrust for judges and lawyers – who were perceived as an expression of the old regime – jurists became an integral and vital part of the new order (Kelley and Smith 1984: 202–203).

The most prominent result of the alliance between the jurists and the bourgeois ideology is the Code Civil of 1804. This monument of French private law embodied many of the ambitions of the Revolution: a radical simplification of the sources of law (with legislation acquiring monopoly, at least formally), the unification of the legal subject, the idea that legislation should be linguistically accessible. Most importantly, property became the central pillar of the whole Code, with two of its three books expressly dedicated to it. Article 544 defines property as:

> (...) le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements.

The phrase "the most absolute way" is obviously a poetic license (as nothing can be more absolute than anything else) aimed at emphasizing the importance of property in the new social order.

3. Law and society: mirrors or bubbles? The problem of self-referentiality

The previous section, despite its inevitable brevity, has hopefully managed to establish that modern Western private law has been shaped by an alliance between the bourgeois ideology and the legal community, inserting private property, conceived as an individual and exclusive right, at its very core. This fact, however, cannot by itself explain the peculiar impermeability displayed by contemporary legal scholarship to the rich theoretical work that has made the commons such an important field of study in other social sciences.[5] After all, the bourgeois ideology managed in its heyday to influence much more than just the legal community. Why then does other scholarly fields show a much greater capacity to adapt to changing circumstances? Moreover, if the legal community was so welcoming towards the liberal ideology, why has it been so refractory towards later developments? An interesting example of this cultural stubbornness is provided by the Italian legal system, where the republican constitution of 1948 – influenced by the necessity to combine all the political forces that had opposed the fascist regime, including Catholics, liberals and communists – at Article 42 attached a "social function" to private property. With few interesting exceptions, for example Pugliatti 1964: 278, this normative element was largely ignored by Italian legal scholars in the following decades.

To address the issue, it is thus crucial to narrow the discussion to the specific conditions that might set apart legal scholarship, and more generally the legal community, from other scholarly fields. The trajectory of this topic inevitably gets intertwined with the broader issue of the relationship between law and the general culture. In an insightful article published on *The American Journal of Comparative Law*, William Ewald describes two main types of theories: theories that conceive law as a reflection of a specific aspect of society such as the economy (Marx) or the *Volksgeist* (Savigny). Ewald (1995: 491) gives these theories the apt label of "mirror theories".[6] According to these theories law is simply "life of man itself, observed from a particular perspective" (von Savigny 1828: 30). On the opposite side of the spectrum, we find conceptions of the relationship between law and society that we could (but Ewald does not) call "bubble theories", that consider law as pertaining to a sphere largely isolated from the general culture. Although you could find several types of legal scholarship that historically displayed surprisingly little concern for the actual problems of society, such as both the German and American brands of legal formalism that thrived during the 19th century, it is rare for a legal scholar to claim that law and jurists are culturally isolated from society at large. One of the few well-known jurists that have made this claim with some degree of consistency is professor Alan Watson. Ewald identifies two variations of this claim in Watson's

5 For a collection of articles about the commons written by scholars in a variety of fields (law being represented only by Carol Rose) see Ostrom et al. 2002.

6 See Ewald 1995: 491.

writing. He calls them "weak Watson" and "strong Watson", the first being more nuanced and therefore more convincing. I am going to focus just on "weak Watson" for the purpose of this Article.

Watson's thesis is complex and touches upon four main areas of legal scholarship and their mutual connections: legal history, comparative law, law and society and legal transplants. His main critique against the mirror theories develops from his view on the social role played by legal elites, the agents of the legal tradition. These consider the sources of law "as a given, almost as something sacrosanct (...)" (Watson 1985: 119). Lawyers tend, in other words, to look backwards, seeking legal authority to support the claim that a certain rule is legally valid. As Watson puts it, "it is being in conformity with 'lawness' that makes law law" (Watson 1985: 119). The legal tradition tends therefore to be circular and, to some extent, isolated from the rest of the cultural life of society. The claim, at least in the case of "weak Watson", is not that the legal tradition is completely detached from other parts of society, nor that it does not to some degree reflect the values and aspirations of a certain culture. Watson rather criticizes the assumption of the most extreme mirror theories that law is a direct an immediate response to impulses external to the legal tradition. He does so by presenting several examples, from both Roman and English law, that show how the legal tradition keeps alive, often for centuries, rules that has ceased to have any meaningful social purpose (Watson 2001: 23).

Watson is not the only legal scholar who has been pointing out the self-referentiality of the legal tradition. A major contribution in this direction has come from the German scholar Günther Teubner (1988: 1) who introduced the concept of "legal autopoiesis" to break "a taboo in the legal thinking – the taboo of circularity". Legal autopoiesis is an adaptation of Niklas Luhmann's notion of social autopoiesis, which in its own turn is derived from the biological notion of autopoiesis. More precisely, the legal system, according to this vision is a second order autopoietic system, autonomous with the regard to the first order autopoietic system, namely society itself. The term autopoiesis refers, in its essence, to the capacity of a system to reproduce and maintain itself.

An important difference between Teubner and Luhmann is that Luhmann conceives the alternative autonomy/heteronomy as a rigid dichotomy (Teubner 1993: 2). Teubner conceives autonomy as a matter of degree and develops a model according to which the autonomy (and thus self-referentiality) of law develops in three stages. In the first phase, law is socially diffuse, meaning that "the elements, structures, processes, and boundaries of the legal discourse are identical to those of general social communication – or, at least, are heteronomously determined by social communication" (Teubner 1993: 36–37). In a second phase, law achieves partial autonomy by the formation of components – such as legal procedures, legal acts, legal norms and legal doctrines – that tend to separate from society (the first order autopoietic system). These components, in a third phase, are coupled together in a hypercycle. The hypercycle entails that "law begins to reproduce itself in the strict sense of the word if its norms and legal acts produce each other reciprocally and process and dogmatics establish some relationship between these" (Teubner 1993: 33).

Teubner's theoretical model shares several points of contact with Watson's claims. A few differences, however, should be pointed out. The most obvious, but also the least important for our purposes, is that Teubner's model, and general

style, is considerably more abstract than Watson's. Both authors take advantage of biological metaphors, but Watson's transplant metaphor is more accessible and readily understandable than Teubner's autopoiesis and hypercycle. On the other hand, Teubner's model, because of its abstract nature, capture a larger slice of social reality, as it conceives law as one among several autopoietic systems. More to the point, Teubner (1998: 16), following his own model, stresses that law has achieved a high degree of autonomy from the national culture and that institutional transfers (transplants, in Watson's terminology) are not "longer a matter of an inter-relation of national societies" but rather of "a direct contact between legal orders within one global legal discourse". Teubner (1998: 16–17) however, criticizes Watson for neglecting law's residual cultural ties. It is unclear if Teubner's critique encompasses all of Watson or just "strong Watson", to adopt Ewald's vocabulary. Moreover, while Watson sees a clear connection between the historical importance of legal transplants for legal change and the peculiar nature of the legal elites, Teubner (1998: 16) prefers to point out "the inner logics of the legal discourse itself that builds on normative self-reference and recursivity". To stress the internal logic of the law carries some undeniable advantage. In particular, it avoids the suspicion that the theory is too closely tailored to the historically close-knit English legal community and thus makes the reasoning easier to extend to other legal traditions.

Teubner (1998: 18) formulates four theses about the ties between law and society:

(1) Law's contemporary ties to society are no longer comprehensive, but are highly selective and vary from loose coupling to tight interwovenness.

(2) They are no longer connected to the totality of the social, but to diverse fragments of society.

(3) Where, formerly, law was tied to society by its identity with it, ties are now established via difference.

(4) They no longer evolve in a joint historical development but in the conflictual interrelation of two or more independent evolutionary trajectories.

The normative processes of the legal tradition have parted ways, according to Teubner, from the mechanisms responsible for producing social norms, leaving broad areas of the legal landscape relatively isolated from society. Teubner (1998: 18) then explores the different types of ties that law still has with society. This ambition, as I will be discussing further on, is particularly interesting for legal scholars who intend to formulate strategies to bring ideas and concepts formulated in other social sciences into the legal tradition.

As stated in his first thesis, Teubner (1998: 18) sees the ties between law and society as being generally loose, in the sense that the law mainly confronts social conflicts "on the ad hoc basis of legal 'cases'". There are, however, areas of the law where the legal tradition is much more closely coupled with other social discourses. A key example in Teubner's analysis is played by contracts, that he sees as tightly coupled (in a so-called "ultracycle") to the economic discourse. This not unproblematic. As Teubner (2007: 68) explains:

> Private law receives (...) information about the rest of society quasi automatically and almost exclusively through the cost-benefit calculations of the economic discourse. Any other discourses in society, whether research, education, technology,

> art, or medicine, are first translated into the world of economic calculation, allocative efficiency, and transaction costs and, then, in this translation, presented to the law for conflict resolution. This means a serious distortion of social relations. This distortion of social relations by their economic contractualization has four dimensions: (1) bilateralization-complex social relations are translated into a multitude of closed bilateral relations; (2) selective performance criteria; (3) externalization of negative effects; and (4) power relations.
>
> This shows how urgently private law needs rid itself of this monopoly of economic calculation and forge direct contact with the many other social subsystems in society that have different criteria of rationality than the economic discourse.

As Teubner (2007: 68) admits, there are instances in which the legal tradition inserts corrections which allow private law to connect to other social discourses, such as good faith clauses in contract law, but their effect is too limited to effectively challenge the dominance of the economic efficiency paradigm. This aspect of Teubner's analysis is of particular interest for the subject of this article. It is important to remember that the main coupling between legal scholarship and the economic discourse is the influential law & economics movement, in which the orthodox view on property rights, most famously elaborated by Harold Demsetz (1967: 348–349), has been that individual, exclusive and transferable property rights are a key element for an efficient allocation of resources, as they favour the so-called internalization of externalities. The historical roots of this argument, regardless of the sophistication of the surrounding theoretical discourse, are deep, as it can be found, for instance, both in Aristotle and in the already mentioned physiocratic school. Another way of expressing this idea is simply that the possibility to exclude others from using a resource provides an incentive to the owner to invest in his property. The point of contact between the legal discourse and economics is, in other words, quite small and it serves to reinforce, rather than dispel, the ideological bias against the commons that we saw erupt during the 18th and 19th century.

What lessons can be learned from Watson's and Teubner's analytical models for the issue of relative impermeability of the legal tradition to the theoretical developments concerning the commons? In addressing this issue, we must first of all recognize that there is a significant overlap between the two models. Both Watson and Teubner clearly oppose the more simplistic versions of the mirror theories. They also identify some peculiarity in the legal discourse that makes it a closed, self-referential subsystem in society. Law, in other words, follows its own patterns and conceptual structures in relative isolation from what theoretical advances occur in other segment of social science. In the areas of law that regulates the consumption of natural resources, this path dependence of the legal tradition has prevented the adoption of a new legal category, the commons, despite its relevance in other social sciences and despite its obvious usefulness to collect similar phenomena under one conceptual umbrella. Using Teubner's explanatory model, the commons have made a negligible impression on most legal scholars due to the fact that the main coupling between legal scholarship and other social sciences is law & economics, which is founded on the tragedy of the commons.

A particularly interesting jurisdiction, from this point of view, is Sweden. It is hard to deny that the Swedish legal tradition contains some prominent legal institutes that other social sciences would immediately recognize as commons. One

such phenomenon is the so-called *allemansrätt* (literally "every man's right"), which allow every person to walk on someone else's private land, pick a reasonable quantity of mushrooms or berries, and even plant a tent and spend a night or two. There are limits, expressed for instance in criminal law, that protects the privacy of the landowner as well as his economic interests, but among cultural geographers, for instance, there is no hesitation in categorizing this phenomenon as a commons (see for example Sandell 2011: 5). The legal discourse has yet to develop a similar category. Something similar can be said about the right of the Sami, established in legislation as well as well as in case law, to use the land, including someone else's private land, for reindeer husbandry (Bengtsson 2011: 527). Also in this case, especially interesting as it clearly reminds us of the chief example discussed by Garrett Hardin in his analysis of the "tragedy of the commons", the legal discourse seems not to have taken notice of the commons.

As mentioned, one large area of the law where an interest for the commons has flourished is intellectual property. Using Teubner's model, one could argue that this is a segment of the legal discourse that features a tight coupling with other social subsystems and that this is largely due to technological novelties that have made the classical property paradigm inadequate.

4. Legal ideology at work: incrementalism vs. institutional design

While the focus of legal scholars such as Watson and Teubner is largely to describe the relationship between the legal tradition and the surrounding social environment, there is also a strand of legal scholarship that has manifested the ambition of changing the way the legal discourse operates, effectively erasing the cultural inertia described by Watson. This theme can be found among legal realists both in Scandinavia and in the American legal tradition. I am referring, in particular, to the Swedish scholar Vilhelm Lundstedt (whose work, from this perspective, has in more recent times been discussed by Ulf Petrusson and Mats Glavå) and to the Brazilian-American scholar Roberto Unger, most prominently in his book "What Should Legal Analysis Become?".

Both Lundstedt and Unger conceive the duty of legal scholarship as something more than the incrementalist aspiration to perfect the coherence and quality of the legal system one little corner at a time. They rather regard legal analysis as a tool for institutional design. In other words, their ideal jurist is not merely the judge, as is the case for most law schools, but also the legal expert lending her knowledge to legislative reforms.

Lundstedt was one of the most prominent legal scholars to follow in the theoretical footsteps of Uppsala philosopher Axel Hägerström (1868–1939), whose ambition was to grant law scientific value by cleansing it from the influence of metaphysics. Hägerström pointed out that already the much-celebrated Roman law featured rituals, such as *mancipatio* (the ritual of buying a *res mancipi*, which imposed on the buyer to recite a solemn statement and to put a piece of bronze on a scale), that were nothing short of magical. Hägerström (1927: 25) also criticized, often in harsh terms, the attempts of the European legal scholarship to reframe this genetic defect of Roman law by attributing to it a rational meaning (for instance,

claiming that the *mancipatio* ritual simply was a way for the buyer to express his intention to conclude the purchase).

Lundstedt developed Hägerström's ideas by criticizing what he called "legal ideology", the idea that some concepts, that have no connection with reality and occupy an autonomous space in legal reasoning, are objectively true rather than being constructed and shaped by jurists. Glavå and Petrusson (2002: 109) remark that this attitude responds to at least two deeply felt needs: the scientific need to present law as the study of an objective reality and the democratic need not to depict lawyers as producers of norms. Concepts such as "ownership", "rights" and "duties", according to this point of view are, at best, linguistic representations of psychological phenomena and did not have the dignity of facts in and by themselves.

For instance, if a subject A has recently purchased a certain product, and subject B somehow damages the product, a common way of framing the analysis would be to say that B owes damages to A by virtue of A having ownership of the damaged product. The idea of ownership therefore acts, according to Lundstedt, as a metaphysical and entirely unnecessary part of legal analysis. Lundstedt instead suggests that A's status with regard to the product is defined by a series of psychological mechanisms of variable complexity. A's position would be completely empty of factual meaning if there was not a state apparatus able to defend his control over the purchased product and if other subjects – because of fear of processual consequences, as well as because of their culture and morality – did not abstain from interfering (Lundstedt 1944: 518). Once the veil of metaphysics is removed from legal analysis, the legal system appears as a machinery whose wheels are humans and their psychological structures. This frees the actors of the legal system – the legislature, the courts, the legal scholars – to observe law from "realistic viewpoints" which can be used to further "social welfare", so described by Lundstedt (1956: 140):

> With the method of social welfare (...) as a guiding motive for legal activities, I mean in the first place the encouragement in the best possible way of that – according to what everybody standing above a certain minimum degree of culture is able to understand – which *people in general strive to attain* [italics in the original].

In other words, Lundstedt saw the "legal ideology" as the main obstacle to reorienting legal scholarship from being a merely incrementalist endeavour to becoming a tool for social engineering. This view was clearly influenced by the political inclinations of Lundstedt, who was deeply involved in the social democratic party, responsible for the large wave of reforms that, during the 20th century, generated the Swedish welfare state.

A similar position, despite the well-known differences between American and Scandinavian legal realism, has been formulated by Roberto Mangabeira Unger, who criticizes legal scholarship for its inability to turn legal analysis into "institutional imagination". Legal scholarship, in Unger's view, should be a driving force in elaborating new and better institutional arrangements but has been unable to do so because mainly because of what Unger (1996: 7) calls "institutional fetishism": the tendency of legal scholars to preoccupy themselves only with existing institutional arrangements, which are only a subset of all possible arrangements. Legal scholars, in other words, are usually quite happy to polish their respective fields, changing a few rules here and there, but without letting their institutional imagination run

unbridled. This appears as another way of framing Watson's circularity argument ("it is being in conformity with 'lawness' that makes law law"). However, its cause is not traced back to the idiosyncrasies of the legal elites, nor is it considered the product of an unavoidable feature of the legal discourse. Its root is rather to be found in the "rationalizing legal analysis", which is "a way of representing extended pieces of law as expressions, albeit flawed expressions, of connected sets of policies and principles. (...) Through rational reconstruction, entering cumulatively and deeply into the content of law, we come to understand pieces of law as fragments of an intelligible plan of social life" (Unger 1996: 36).

5. Conclusions

Several factors seem to contribute to the relative impermeability of the legal discourse to the commons. A crucial aspect of the Western legal tradition is its self-referentiality. This idea can be expressed by referring to jurists' deeply felt need to base reasoning on normative authority (jurists tend to be looking backward) or, in more sophisticated terms, by discussing the legal tradition as an autopoietic subsystem in society. Regardless of the details of the preferred explanatory model, Watson, Teubner, Lundstedt and Unger all conceive the legal tradition as more or less circular, with limited ties to other social discourses. How these ties are formed can to no small degree be explained with reference to ideological and cultural forces.

To use a physics metaphor, one could say that, though history, different ideas has exercised different degrees of gravitational pull on the legal tradition. The "mass" of these notions is largely determined by political, ideological or technological factors. When the mass is large enough large chunks of the legal tradition will start circling around these concepts creating new trajectories. The liberal revolutions of the 18th century, as well as the cultural and political hegemony of the bourgeoisie during the 19th and 20th century, has projected the individualistic and exclusionary notion of property into the centre of the Western legal tradition, making other elements of the legal discourse reorient themselves accordingly. With a slight exaggeration, one could say that the Western private law is, by and large, still following the planetary orbits that emerged during the 19th century. A challenge to the gravitational pull of private property has emerged, not only scholarly but also politically, as a response to the perceived failure of the state-market dichotomy following the 2008 economic crisis. However, while the commons have managed to become an important part of the political platforms of movements critical of the status quo, such as Occupy Wall Street in the United States, the Indignados in Spain and the Movimento Cinque Stelle in Italy, they have yet to have a significant impact on mainstream politics. A true paradigm shift will therefore require a considerable amount of political and intellectual energy and will, in any case, be delayed vis-à-vis other social sciences.

Legal education, especially in Europe, puts emphasis on interpretation and application of the law. Jurists are trained to be judges rather than to assist in legislative reforms. This aspect is clearly connected to the circularity of the legal discourse, as law students will be trained to work within institutional arrangements that have already been legitimized by the legal tradition. This, to use Lundstedt's terminology, reinforces the legal ideology, namely the idea that legal concepts and

ideas are an objective reality that is given to jurist rather than created by the legal community. The legal autopoiesis described by Teubner seems to imply not only a detachment of the legal discourse from the production of social norms but, on a deeper level, also a psychological detachment between the legal community and the intellectual responsibility for its own conceptual world.

These observations allow us to formulate some rudimentary strategy to close the gap between the Western legal tradition and the commons. If one agrees with Teubner's view of the legal discourse as characterized by varying degrees of autonomy, it is sensible to inject the commons paradigm into areas of the law where the coupling with other social sciences is relatively close. We have already mentioned intellectual property law. Other promising areas are those where property rights interact with obvious public interest, such as environmental law. It is clear, for instance, that the notion of sustainable development, which since the Rio Declaration on Environment and Development of 1992 has become a central concept in environmental law, has strong ties to the commons, insofar both require that attention is paid to the preservation of the resource for future generations.

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Filipo Valguarnera

Pravna ideologija i zajednička dobra: zbog čega pravnici zaostaju?

Apstrakt

U poslednjih četvrt veka bili smo svedoci rasta interesovanja i istraživanja zajedničkih dobara koje je predvodila Elinor Ostrom. Ovi napori su doveli u pitanje prethodno ustanovljenu paradigmu tragedije zajedničkih dobara koja je najbolje izražena u radu Gareta Hardina iz 1968. godine. Moglo bi se reći da su u međuvremenu zajednička dobra postala sfera istraživanja od fundamentalne važnosti u društvenim naukama. To nije bio slučaj kada je reč o pravnoj misli (uzimajući u obzir da postoji jedan izuzetak koji će biti analiziran kasnije) i to je tema ovog eseja, naime, složeni odnos između zajedničkih dobara i pravnika. Izraz „složeni odnos" ne treba da upućuje na otvoren antagonizam, već na nešto još gore: potpunu ravnodušnost i skandalozan nedostatak znanja. Iako je moj glavni cilj da ovde objasnim dato stanje stvari, namera mi je da takođe iznesem opštiju tvrdnju o prirodi prava i pravne promene. U tom smislu zajednička dobra se mogu uzeti kao studija slučaja u pravnoj teoriji. Ovaj članak će razmotriti sledeća potpitanja. Koji status zajednička dobra imaju u zapadno-evropskom pravnom diskursu? Zbog čega većina pravnih mislilaca obraća tako malo pažnje na rastuću literaturu o zajedničkim dobrima? Koji faktori su na delu u ovom čudnom slučaju kulturnog slepila? Da li postoje razlozi da u budućnosti dođe do promene u tom pogledu?

Ključne reči: zajednička dobra, pravo, promena paradigme, pravna promena