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Non-Ownership and the Commons: Access and Exclusion in the Life of Communities

by **Alessandra QUARTA**[*]

L'article présente la catégorie des biens communs suivant son développement dans le système juridique italien. Les biens communs, fondés sur le principe d'accès, sont destinés à se heurter à un modèle de propriété basé sur le droit d'exclusion.

L'article analysera la centralité du système de gestion des biens communs et les relations entre les caractéristiques spécifiques des biens et l'organisation des groupes humains. Il s'agira finalement de redéfinir l'interaction entre la propriété (réinterprétée plus correctement comme « non-propriété ») et la communauté.

This article introduces the category of the commons and presents the main findings of our research into this concept in the Italian legal system. The commons are based on the principle of access and for this reason, they challenge the traditional rules of property law where the right to exclude has a pivotal role.

This paper will analyze the centrality of the system for the management of the commons, the relationships between the nature of assets and the organization of human groups. Our starting point is the presumptive necessity to redefine the interplay between property (more precisely, non-ownership) and community.

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Introduction

In recent years, the concept of *the commons* has been an important tool for revisiting the pillars of property law. In Italy, this discourse was prompted by a new legal definition of the commons, introduced in 2007, in a draft proposal to reform Section III of the Italian Civil Code on public goods. The Rodotà Commission defined commons "as those resources producing utilities functional to human development and fulfillment of human rights". The Italian Parliament, however, never enacted this proposed reform: thus, the commons continue to be absent from the Italian legal framework.

The *idea* of the commons garnered political success, thanks to social movements that applied it in righteous battles against privatizations of public spaces and anti-social uses of private assets. From a legal vantage point, these movements re-opened the debate on the legitimacy of the idea of property independent of its owner's public or private persona.

The commons have been employed in an urban context to indicate goods that are managed directly by citizens. In Italy, a new generation of local regulations has introduced innovative administrative procedures. Italian municipalities are facilitating collaboration with formal or informal citizen groups interested in managing and caring for urban commons. Transcending those tools typically framed by administrative law, private institutions (such as foundations and trusts) have been established to preserve urban commons in the interest of future generations.

This paper revisits the main landmarks in the recent re-opening of the debate in Italy regarding the commons in order to discuss two overarching issues. First, the paradigm of absolute property must be challenged by introducing the concept of access. This prerogative belongs to non-owners and is at odds with the centrality of the right to exclude, but it has the merit of preventing – or at least of inhibiting – owners' self-serving behaviors; this nexus between the right to use and the right to exclude merits discussion. Second, the emergence of the commons and the defense of an access-based paradigm of ownership illustrate the connection between the nature of assets and the organization of human groups, and dictate a re-definition of the interplay between property (more precisely, non-ownership) and community.

In the first part of this paper the nature of the commons is analyzed, in order to understand their impact on the legal construct of property. The effects of the commons on both private and public property are explored and interpretative tools for the description of an access-based paradigm of property law are provided. In the second part of this paper the traditional associations between goods, property rights, and private collective autonomy are discussed in order to demonstrate how an access-based paradigm of property law requires a new standard for the organization of communities. Comparative law is the dialectical lamplight throughout this text[1].

I. Ascendancy of the Commons and Criticism of an Exclusion-based Property Law

A) After the Oblivion: the Re-birth of the Commons

The renewal of the debate about the commons has been informed by 2009 Nobel Prize winner Elinor Ostrom's research GOVERNING THE COMMONS[2]. Henceforth, the commons are no longer those of Garret Hardin's *The Tragedy of the Commons*[3]: a lawless cesspool necessitating the introduction of individual and exclusive private property rights.

Ostrom's work ushered in a new *legal* discourse, after centuries of extraction of the commons[4]. In Feudal times, the term *commons* referred to

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1 See, *e.g.*, Mauro BUSSANI & Ugo MATTEI, "Diapositives versus Movies – The Inner Dynamics of the Law and Its Comparative Account", in Mauro BUSSANI & Ugo MATTEI (eds.), *The Cambridge Companion to Comparative Law*, Cambridge, Cambridge University Press, 2012, p. 1, at p. 3-9 (any reliable comparative research method on legal phenomena should stay close to what the law is and to how the law lives in different settings, regardless of what one would like the law to be).

2 Elinor OSTROM, *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge, Cambridge University Press, 1990.

3 Garrett HARDIN, "The Tragedy of the Commons", (1968) 162 *Science* 1243.

4 Michael HARDT & Toni NEGRI flag the internal relation between *extraction* and the commons:

> Contemporary capitalist circuits of production and reproduction … function primarily through the extraction and expropriation

natural resources – conceived as open fields or common forests – delivered from the exclusive control of monarchs, landlords, or other masters[5]. Peasants used them as shared pastures, for collecting wood or picking fruits and herbs: these practices, enabled by the commons, were essential for their survival. In effect, the commons and commoning practices constituted a *sui generis* welfare system.

Their disappearance can be regarded as a process in which legal structures contributed to commodification[6], transforming open fields and lands into capital. In England, the Enclosures Acts[7] legitimized the fencing of the commons[8], while in continental Europe the French *Code civil* (1804) provided solely for an exclusive model of ownership in which limitations to an absolute model were conceived as exceptions.

> of the common, both natural forms of the common and, most importantly, socially produced forms of the common. The common is not uniform or homogeneous, … but instead a field on which radical differences are expressed and interact, and as such the common is a framework for understanding the multiplicities within capital.

Michael HARDT & Toni NEGRI, "The Multiplicities Within Capitalist Rule and the Articulation of Struggles", (2018) 16 *tripleC: Communication, Capitalism & Critique* 444.

5 Peter LINEBAUGH, *The Magna Carta Manifesto: Liberties and Commons for All*, Berkeley, University of California Press, 2009.

6 Karl MARX defines *commodity* as "an external object, a thing which through its qualities satisfies human needs of whatever kind": Karl MARX, *Capital: A Critique of Political Economy*, vol. 1, London, Penguin Books, [1890] 1990, p. 125.

7 Regarding such enclosures of commons, MARX argues:

> [T]he law itself now becomes the instrument by which the people's land is stolen … The Parliamentary form of the robbery is that of 'Bills for Inclosure of Commons' … [A] parliamentary *coup d'état* is necessary for [the Commons'] transformation into private property … [T]he systematic theft of communal property was of great assistance … in swelling those large farms which were called in the eighteenth century capital farms.

Id., p. 885-886.

8 Katharina PISTOR, *The Code of Capital*: *How the Law Creates Wealth and Inequality*, Princeton, Princeton University Press, 2019, p. 29 ff.

In the contemporary era, the evolution of legal discourse on the commons has encountered two obstacles. On the one hand, the absence of explicit legal acknowledgment may condemn the commons to oblivion; on the other, the world allocates resources pursuant to a neoliberal worship of markets that demand a decentralized system of property rights. This context shadows a debate surrounding the commons in the field of private property rights. Many arguments, however, support their recovery through a process of resignification in the field of public goods. The Italian experience is emblematic[9].

B) The Italian Way to the Commons

In 2007, the Italian Government appointed a commission to prepare a proposal for the reform of Section III on Public Goods of the third book of the Italian Civil Code. This endeavour was undertaken in in response to research carried out by a group of scholars, at the prestigious *Accademia dei Lincei,* concerning the economic effects of privatizations[10]. According to that study, the Italian national patrimony – composed of immovables and state companies – needed to be managed in a more efficient way in order to avoid squandering public goods. The research flagged that the existing legal framework lacked robust categories or mechanisms to avert or to limit the privatization of public goods, which was at the whim of a fickle political majority. Water, other natural resources, cultural heritage, and artistic patrimony demanded special protection.

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9 See, *e.g.*, Ugo MATTEI, "Protecting the Commons: Water, Culture, and Nature: The Commons Movement in the Italian Struggle against Neoliberal Governance", (2013) 112 *The South Atlantic Quarterly* 366; Anna DI ROBILANT, "Property and Democratic Deliberation: The *Numerus Clausus* Principle and Democratic Experimentalism in Property Law", (2014) 62 *The American Journal of Comparative Law* 367, 390-394; Alessandra QUARTA & Tomaso FERRANDO, "Italian Property Outlaws: From the Theory of the Commons to the *Praxis* of Occupation", (2015) 15-3 *Global Jurist* 261; Maria Rosaria MARELLA, "The Commons as a Legal Concept", (2017) 28 *Law Critique* 61.

10 See, *e.g.*, David HARVEY, "The 'New' Imperialism: Accumulation by Dispossession", in Leo PANITCH & Colin LEYS (eds.), *Socialist Register 2004: The New Imperial Challenge*, London, The Merlin Press, 2003, p. 75 (equating privatization with enclosing the commons).

This argument was the basis for a legal critique of the main categories in which public goods were organized, those of *demanio* and *patrimonio indisponibile*. This legal critique highlighted the ease of moving assets from the first category to the second, for which alienability is permitted. In order to preserve 'the integrity of natural resources and cultural heritage to the benefit of present and future generation' from alienation[11], the Commission proposed the introduction of a new category characterized by full inalienability. This was the category of the commons, described as those resources producing utilities functional to human development and fulfillment of human rights.

A list of commons was drafted, and the main objective was to ensure its protection in the interests of future generations. To render this provision enforceable and to avoid a lack of legal standing for single or collective plaintiffs, an original remedy was proposed for the defence of the commons. In the field of public property, commons acquired a new meaning: goods that merit special protection because of their connection with the Constitutional framework. The word *commons* conveys the idea that public goods should be managed in the interests of present and future generations[12]; in the field of public property, this would be predicated on a State-*community* perspective as opposed to a State-*apparatus* one.

The Commission declared that commons could be public resources but also private goods: their formal ownership was considered less deterministic than their management, since only the latter is capable of ensuring access to non-owners and avoiding mechanisms of exclusion. This applies also to public properties, and it should be assessed according to the quality of the decision-making process. When national or local authorities – as formal owners – decide to sell public goods while ignoring citizens'

11 Giorgio RESTA highlights how problematic is the transfer from public to private in the age of economic and financial crisis, see, Giorgio RESTA, "Systems of Public Ownership", in Michele GRAZIADEI & Lionel SMITH (eds.), *Comparative Property Law: Global Perspectives*, Cheltenham, Edward Elgar, 2017, p. 237.

12 Similarly, in the United States, see, *Juliana* v. *United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (the public trust doctrine, with respect to natural resources, operates according to basic trust principles, which impose upon the trustee a fiduciary duty to protect the trust property against damage or destruction, and the trustee owes this duty equally to both current and future beneficiaries of the trust).

protests, they are exercising their right to exclude as private owners used to do.

The centrality of *management to ensure access* is the key to grasping the difficulty of framing a relationship between commons and property law as currently conceived[13]. Are commons able to support the elaboration of an access-based paradigm of property law? To answer this, the concepts of exclusion and access in property law theory must first be clarified.

C) Building an Access-Based Paradigm of Property Law: the Role of the Right to Exclude

The right to exclude is conceived generally as the *condicio sine qua non* for property[14]. Before introducing a critical analysis of this statement, it is useful to specify the meaning and implications of this power.

First, the right to exclude is the legal representation of an owner's freedom to decide who can enter his real property or access his personal property. This power is manifested in the act of fencing, and borders are the material representation of the legal power of exclusion. From an economic perspective, the right to exclude, in the case of immovables, permits the owner to reap every residual gain deriving from investment (including rent). The right to exclude ensures the owner is the residual claimant.

Second, the right to exclude guarantees the owner a sphere of autonomy, delineating that area in which he alone can make decisions about the use and future of a resource. The right to exclude includes its opposite: the owner is free both to deny access to his property[15] and to designate those

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13 For an interesting taxonomy of the role of access in private, public and common property see, Christopher RODGERS, "Towards a Taxonomy for Public and Common Property", (2019) 78-1 *Cambridge Law Journal* 124, 131-132.

14 Thomas W. MERRILL, "Property and the Right to Exclude", (1998) 77-4 *Nebraska Law Review* 730; Thomas W. MERRILL, "Property and the Right to Exclude II", (2014) 3 *Brigham-Kanner Property Rights Conference Journal* 1.

15 Daniel B. KELLY, "The Right to Include", (2014) 63 *Emory Law Journal* 857. In this statement, the word "property" is used to denote the object of the right of property. For this type of use, see, James PENNER, *The Idea of Property in Law*, Oxford, Clarendon Press, 1997, p. 110-111.

to whom access is granted[16], by exercising the right to *include*. Full exclusion and open access are the bookends of a nuanced relationship. The owner can prohibit intrusions without taking into consideration any reason supporting the request for access: in this respect, exclusion is full and perfect. Partial exclusion is also possible, in which the owner can include non-owners through a selective procedure that subordinates access to particular requirements or special conditions. At the far extremity of this continuum lies open access, a regime where no limit or condition exists.

Each model has associated transactional costs: the exercise of the right to exclude depends on the owner's economic circumstances. Perfect exclusion demands meeting expenses for the technical measures against intrusion, while partial exclusion demands introduction of solutions and tools for managing the selection process. Open access involves costs for maintenance and insurance. Generally, the owner will opt for a regime of perfect exclusion, which obviates the need for individual negotiations with an indeterminate group of non-owners.

In the civil law paradigm of property – based essentially on the relationship between the subject and the object – the right to exclude plays a starring role: this conception originated from the relationship between land and its owner[17]. The use of land as a paradigmatic object translates a partial vision of ownership based on durable and potentially eternal things, whose utilities can be managed in a regime of perfect exclusion. This picture, however, is limited: it does not make account for those things that have excess capacities[18] and that can be shared through a regime of partial access or open access, according to their concrete characteristics.

In the Anglo-American tradition, the bundle of rights model (in which the powers of the owner are not organized hierarchically) does not

16 Henry E. SMITH, "Exclusion versus Governance: Two Strategies for Delineating Property Rights", (2002) 31-52 *The Journal of Legal Studies* S453.

17 Ugo MATTEI, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction*, London, Greenwood Press, 2000, 83 ff.

18 Yochai BENKLER, "Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production", (2004) 114-2 *Yale Law Journal* 273.

accord a central role to the right to exclude. Nevertheless, in recent years, conservative U.S. legal scholars have promoted an alternative vision, a vision in which exclusion is increasingly prominent[19]. To counterbalance this dogmatic position, progressive scholars are calling for a private property regime based on human values and constitutional principles[20].

However, despite the centrality of the right to exclude, this power is not absolute since limitations exist. In continental Europe, for example, both the French and Italian civil codes provide for special cases in which the owner cannot oppose non-owner intrusion. These examples are derived from neighbor relationships, and the most original hypotheses are based on a rural context.

In the Anglo-American tradition, the competing right to exclude and non-owners' access are often balanced. In England, the right to roam allows visitors to go, walk, or camp on private land, and this limitation of private ownership is not classified as a regulatory taking that need be compensated[21]. In the United States, the balancing of exclusion and access is found in the solutions to conflicts between private property and freedom

19 T. W. MERRILL, "Property and the Right to Exclude", *supra*, note 14; Henry E. SMITH, "Property as the Law of Things", (2012) 125 *Harvard Law Review* 1691.

20 Gregory S. ALEXANDER, Eduardo M. PEÑALVER, Joseph W. SINGER & Laura S. UNDERKUFFLER, "A Statement of Progressive Property", (2009) 94-4 *Cornell Law Review* 743; Joseph William SINGER, *The Edges of the Field: Lessons on the Obligations of Ownership*, Boston, Beacon Press, 2000; Jedediah PURDY, *The Meaning of Property: Freedom, Community, and the Legal Imagination*, London, Yale University Press, 2010.

21 Jerry L. ANDERSON, "Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks", (2007) 19-3 *Georgetown International Environmental Law Review* 375; Judith PERLE, "The Invisible Fence: An Exploration of Potential Conflict between the Right to Roam and the Right to Exclude", (2015) 3-1 *Birkbeck Law Review* 77. The right to roam exists also in Sweden, where it is called *allemansrätt*: everyman's right. See, Peter H. KENLAN, "Maine's Open Lands: Public Use of Private Land, the Right to Roam and the Right to Exclude", (2016) 68-1 *Maine Law Review* 185, 189-190 ff. for an investigation on the right to roam in the United States; Filippo VALGUARNERA, "Access to Nature", in Michele GRAZIADEI & Lionel SMITH (eds.), *Comparative Property Law: Global Perspectives*, Cheltenham, Edward Elgar, 2017, p. 258.

of speech[22], and to disputes concerning the existence of public rights to beach areas[23]. In all these cases, access to non-owners is not granted by the owner – and thus it does not result from the right to include – but derives rather from a concrete assessment of positions and interests. Access functions as a counter-principle over which the category of non-ownership is built. Let me restate this: ownership and non-ownership are two sides of the same coin and exclusion and access are their concrete representations.

We can conclude that the commons are a non-ownership institution based on access. In this sense, the commons – which emerges by enhancing access – does not constitute a new regime for allocating resources, but rather is the opposite of property[24]. Now, it is easier to find a response to the question: is the commons compatible with exclusive private property? The answer is yes, because the commons depends on the identification of a set of principles through which the idea of access is integrated within the rules of property law. Access is not conceived as a prerogative that depends on the autonomous decision of the owner, but rather as a claim enforceable against him.

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22 These conflicts take place generally in shopping malls, spaces that are both private and open to the public. Nevertheless, they are often conceived as public urban areas, since in many cities they represent contemporary squares. For this reason, and given that shopping malls are often crowded, social movements and political parties use them to organize demonstrations, distribute leaflets, and collect petition signatures. Are citizens free to express their speech there? Can the private owner exclude them from her building? The California Supreme Court has affirmed that protesters have free speech rights granted by the U.S. Constitution and the California Constitution, and the exercise of those rights in a shopping mall cannot be prohibited. See, *Robins* v. *Pruneyard Shopping Center*, 23 Cal. 3d 899 (Cal. 1979). Interesting examples concerning the relationship between access and exclusions characterize Canadian property law, see, Sarah E. HAMILL, "Common Law Property Theory and Jurisprudence in Canada", (2015) 11 *Osgoode Legal Studies Research Paper Series* 104.

23 Many such cases are to be found at <http://www.beachapedia.org>; see, also, Steve A. MCKEON, "Public Access to Beaches", (1970) 22-3 *Stanford Law Review* 564.

24 This expression has been used by James BOYLE to describe the public domain in the field of intellectual property. See, James BOYLE, "Foreword: The Opposite of Property?", (2003) 66 *Law and Contemporary Problems* 1.

D) Use and Exclusion: A Legal Contradiction?

The description of an access-based paradigm of property law can be elaborated by observing the relationship between the right to use and the right to exclude. In property law, the latter prerogative is always protected even if the owner does not utilize his resource. In other words, the right to exclude is enforced equally if a building is used daily or if it is abandoned.

This approach is justified by assuming that the right to use normally includes the right *not* to use: the owner is free to benefit from the asset's current value or to accumulate and enjoy it in the future. This description works perfectly in a legal system where property law has been shaped on the form of land, typically a safe-haven asset: in this sense, the right to exclude ensures the owner will be free to make present and future management choices. Meanwhile, thanks to the non-applicability of extinctive prescription, the owner's loss of interest in using her asset has no legal effect[25].

This outcome is curious, however, when we consider the myriad characteristics of land. Although land is durable, it requires attention: the owner should take care of it through agricultural activities or at least maintain it to preserve its use value and its exchange value. In Roman law, owners who did not care for their fields were generally condemned and lost their political rights (because they were subject to an *officium*, a sort of general duty). This sanction was applied also to knights neglecting their horses: such knights' behaviour was considered contemptible since animals were essential to defending the Roman *res publica* against attacks.

This Roman approach has disappeared, and the right not to use is generally admitted in current property law. Moving from the main characteristics of goods to their regulatory regimes, the new ecological

25 See, Johan VAN DE VOORDE, "On the Unity or Disunity of Acquisitive and Extinctive Prescription. Or How Daring Reinterpretations are not Always Right", in Dorothy GRUYAERT, Eveline RAMAEKERS & Luke ROSTILL (eds.), *Property Law Perspectives IV*, Cambridge, Intersentia, 2016, p. 95.

sensibility that seeks a generative property rather than an extractive one[26] necessitates a re-opening of the debate on the duty of care. Fields devoted to agricultural activities, buildings, and fixtures need to be maintained; otherwise, their impairment can harm the collectivity and the environment by resulting in unsafe, polluting, and dangerous properties. The same principle shapes human interventions with natural resources such as rivers or forests, which should be motivated by their preservation. A similar solution would not be alien to Western legal traditions: it's generally accepted in the field of intellectual property, for example, that owners should use their trademarks or patents to keep their exclusive rights and avoid their return in the public domain[27].

There are analogous applications in the domain of material things. In the Italian legal tradition, the contrast between the 'right not to use' and 'the right to exclude' is present in many contexts. The Italian civil code regulates the special case of expropriation that public authorities can order if abandonment of assets interesting for national production damages the latter (Article 838). Although this rule is testament to the fascist origin of the Italian civil code, we can stress here that if the owner does not use his assets, he can lose his property rights. Another interesting example is found in the Italian law of 1978 that introduced a special regulation for those plots of land not cultivated by their owners and abandoned for at least two years[28]. In these circumstances, the right not to use is not punished; it represents the necessary condition for a public procedure to invite cooperatives and other private entities to propose plans for renewing cultivation.

In Belgium, the public administration of the Municipality of Ghent works as an intermediary, by making an inventory of abandoned buildings and putting private owners in contact with associations looking for a place

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26 Fritjof CAPRA & Ugo MATTEI, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community*, Oakland, Berrett-Koehler Publishers, 2015.

27 Oskar LIIVAK & Eduardo M. PEÑALVER, "The Right Not to Use in Property and Patent Law", (2013) 98-6 *Cornell Law Review* 1437.

28 *Norme per l'utilizzazione delle terre incolte, abbandonate o insufficientemente coltivate*, 2.3.65 - L. 1978, n. 440.

to organize their activities[29]. Similarly, in Italy and France, temporary uses for abandoned public or private buildings (especially former industrial plants) have been assigned by municipalities who are looking to revitalize their urban plans and thus, assign space to citizens' initiatives[30].

These examples demonstrate that the link between the right not to use and the right to exclude can be broken by both assessing the interest of an owner in having something he does not use and introducing a solidarity approach through which property law can work in an inclusive way.

Even if such regulations exist, it could be useful to provide courts with principles to adjudicate problematic connections between the right not to use and exclusion. Challenges to this paradigm often derive from illegal acts, particularly occupations of abandoned buildings[31]. There are many examples in Europe of illegal occupations that constitute re-appropriations of abandoned urban spaces and buildings. Such "crimes" are generally committed in order to find a place in which solidarity initiatives can be organized and services can be supplied collectively. In these cases, occupations are not motivated by individual interest: they respond to a collective need. The point is to provide courts with interpretative tools through which they can move beyond the connection between the right not to use and exclusion, by considering both the owner's concrete interest and solidarity issues. The result could be an access-oriented decision: private property continues to exist, but the owner's prerogatives are concretely and temporarily redistributed.

This interpretative attempt meshes nicely with the idea of the commons. It is worth recalling here the general definition of the commons: commons can be public or private assets; they produce utilities functional

29 See the final publication of the European project Refill, undertaken by the Municipality of Ghent: <https://urbact.eu/sites/default/files/media/refill_final_publication.pdf>.

30 For an overview of temporary uses, see, Daniela PATTI & Levente POLYAK, "From Practice to Policy: Frameworks for Temporary Use", (2015) 8-1 *Urban Research & Practice* 122.

31 Eduardo M. PEÑALVER & Sonia K. KATYAL, *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership*, London, Yale University Press, 2010, p. 55 ff.

to human development and fulfillment of human rights. Thus, the condition of abandonment together with the presence of a collective interest in a solidarity function and in reuse are the key elements for classifying a private asset as a commons. This definition is capable of including immovables used for organizing solidarity initiatives, provided the internal organization of the community appointed to management is able to ensure access and inclusion. This approach offers another perspective for framing legal occupations: it represents the concrete act through which an interest for using an asset is expressed as well as the manifestation of a collective need. A regulation on the commons passed recently by the Italian municipality of Turin constructed such occupations as *de facto* offers to conclude a "civic pact" to which the municipality may or may not agree within a reasonable time. Thus construed such initiatives are less likely to be criminalized. Indeed, the management of these commons avoids the abandonment of buildings and their resulting ruin, preserving the patrimony for future generations.

E) Interpretative Criteria for an Access-Based Paradigm of Property Law

Interpretative criteria can assist courts in resolving cases of antagonistic uses or disputes between inactive owners and active possessors[32]. In particular, cases of illegal occupation of abandoned immovables can be resolved by an innovative legal reasoning that takes into consideration different perspectives. Before addressing those perspectives, two points need to be clarified. First, the originality of the criteria ought not to alarm judges, since they share the same theoretical underpinning as that bestowed under the Western legal tradition to acquisitive prescription: *usucapio* and adverse possession are deemed to have a redistributive function[33]. Second, the criteria do not respond to a *de jure condendo* perspective, since judicial decisions and a case-by-case approach seem to be more effective than legislative reform that could be affected by the clash between conflicting interests.

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32 See, Alessandra QUARTA, *Non-proprietà. Teoria e prassi dell'accesso ai beni*, Napoli, Edizioni Scientifiche Italiane, 2016, p. 280 ff.

33 *Id.*, p. 202 ff.

As for the criteria themselves, the courts should give consideration to both the state of necessity that presses individuals to infringe upon private ownership and the owner's concrete and effective interest in maintaining exclusive enjoyment of the resource. When the latter cannot be demonstrated, access by non-owners should prevail. Second, assessment of the owner's interest in using the resource should not take into account future generic uses that are relied on the courts to justify the abandonment. On the contrary, future uses should be considered relevant for prohibiting non-owners' access only if they have been concretely planned and the related activities are imminent. Temporary uses thus gain importance. The non-owner should not change the economic function of the resource, in order not to compromise the owner's residual claimant position.

In accordance with these criteria, the courts will be able to reconcile the interests of possessors with those of the owner; assets are used to fulfill collective needs, as part of an inclusive property law. In other words, an access-based paradigm of property redeems the category of the commons and the practice of commoning when it concerns private goods[34].

II. Non-Ownership, Commons, and Private Autonomy

A) Solutions for Managing the Commons

The theoretical framework described in Part I calls for models of management and care of valuable resources that are not based on exclusion or exclusivity. In particular, we have considered the impact of those models on property law within an access-oriented model.

In the field of the commons, ownership is not essential and the management of resources assumes a central role in ensuring that the commons are used with full respect for human rights, human development, and the interests of future generations.

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34 Ugo MATTEI & Mark MANCALL, "Communology: The Emergence of a Social Theory of the Commons", (2019) 118-4 *South Atlantic Quarterly* 725.

In recent years, the Italian debate has focused on models for managing the commons: while commons exist outside of the private and public divide as far as ownership is concerned[35], analysis of their management reveals that they are *between* these two poles.

In Italy, the first model tested for managing a resource as a commons was based on a public law solution. After a successful referendum through which privatization of the water supply system was blocked, the municipality of Naples decided to transform the legal nature of the company that managed this local public service and to introduce a public body. It was not conceived as a traditional public institution; but rather, in order to include citizens in its management, a sort of mini-Parliament was introduced and included representatives of the public body's employees, environmental associations, water experts, and citizens[36].

A second Italian model, originally employed for the management of an occupied theatre as a commons, is the foundation. The legal category of private autonomy was exploited to introduce a new organization for this non-profit institution, in which the centrality of the patrimony was balanced with the participation of those subjects (actors, members of the audience, sponsors, etc.) who were variously engaged in the life and management of the theatre. Recently, the model of the foundation has been improved by the study of the Community Land Trust[37], which provides tools for enabling the participation of persons who are not directly involved in management but who are affected (positively or negatively) by CLT activities (for example, residents of the neighborhood where the building is based).

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35 To understand the relationship between commons and the public-private devide see Maria Rosaria MARELLA, *Oltre il pubblico e il privato. Per un diritto dei beni comuni*, Verona, Ombre corte, 2012; Ugo MATTEI & Alessandra QUARTA, *The Turning Point in Private Law: Ecology, Technology and the Commons*, Cheltenham, Edward Elgar Publishing, 2018; F. CAPRA and U. MATTEI, *supra*, note 26.

36 U. MATTEI & A. QUARTA, *supra*, note 35, p. 80-82; A. DI ROBILANT, *supra*, note 9, 394.

37 Antonio VERCELLONE, "The Italian Experience of the Commons. Right to the City, Private Property, Fundamental Rights", (2020) *The Cardozo Electronic Law Bulletin* 1.

A third model has been tested in the field of urban commons: public assets belonging to the municipalities' public patrimony[38]. This solution is regulated by municipal acts adopted by more than 200 Italian cities, and is based on a pact of cooperation that formal or informal groups of citizens sign with the municipality for regenerating, managing, and taking care of the urban commons[39]. The assignment of urban commons is not exclusive; access should always be recognized to those persons who are not yet part of the community of care. Thus, despite the fact that this tool has been introduced by a public local act and it is not a product of private collective and civic autonomy (as the foundation is), private law and private rules for organizing the community of care play a fundamental role in ensuring access and avoiding exclusion.

B) Communities, Private Autonomy, and the Commons

Private autonomy governs the internal organization of human communities: models, forms, and limits are generally fixed by law, and within this framework members can decide how to arrange their group. In this research, our focus has been on spontaneous communities[40], those created for responding to a shared need and managing a public space or private building as a commons. The question is: are commons able to shape the structure of Spontaneous Communities for the Commons (SCC)?

Let us recall here the general relationship between ownership and the communities' structure: property law is able to influence the latter; the

38 Maria Rosaria MARELLA, "The Law of the Urban Common(s)", (2019) 118-4 *South Atlantic Quarterly* 877; Sheila R. FOSTER & Christian IAIONE, "Ostrom in the City: Design Principles and Practices for the Urban Commons", in Blake HUDSON, Jonathan ROSENBLOOM & Dan COLE (eds.), *Routledge Handbook of the Study of the Commons*, New York, Routledge, 2019; Sheila R. FOSTER, "Collective Action and the Urban Commons", (2013) 87-1 *Notre Dame Law Review* 57.

39 Ugo MATTEI & Alessandra QUARTA, "Right to the City or Urban Commoning? Thoughts on the Generative Transformation of Property Law", (2015) 1 *Italian Law Journal* 303.

40 Amnon LEHAVI, "How Property Can Create, Maintain, or Destroy Community", (2008) 10-1 *Theoretical Inquiries in Law* 43, 59 ff.

regulation of condominiums is probably the best example[41]. Property law indicates how to balance exclusive ownership of private apartments with common ownership of shared parts of the building. However, this special coexistence of exclusive and collective forms of ownership demands a set of rules for defining personal rights, duties, and the system of participation. Conflicts usually derive from the limitations to enjoyment of individual property rights and the coexistence of exclusive positions in a shared space. In spite of the voluntary nature of this community, no exclusion mechanism is permitted and the presence of individual property rights does not allow for the expulsion of members from the group. The interplay between individual and common property shapes a community deprived of the rights to select members and to exclude them.

Conversely, in the field of the commons we are dealing with two main situations. The community can be a formal group that adopts one of the legal structures regulated by law (*e.g.*, an association); or alternatively, the community can function as an informal group, which does not adopt a precise legal structure but nevertheless defines its internal organization, often in an original way (perhaps codified in a charter) with regards to its system of decision-making and representation.

In both these formulations, the communities include members according to the values identified by their charters or legal statutes, which lay down rules and procedures for membership and expulsion. Generally, the formal communities are defined by legal statute and the informal ones are addressed on a case-by-case basis. Even if national regulations establish limits or a general procedure for expulsions (as occurs in Italy)[42], the community composition is left mainly to private autonomy. Thus, it is able to influence the management of the commons and, in particular, the public use of the space and the concrete arrangement of access. The risk is that the selection of new members or simple users reproduces the right to exclude at the level of composing the community.

41 Cornelius VAN DER MERWE (ed.), *European Condominium Law*, Cambridge, Cambridge University Press, 2015.

42 *Italian civil code*, art. 32.

This risk is appears all the greater when we consider that the courts tend not to evaluate the merit of a community's inclusion/exclusion decision, since it is the expression of its private autonomy, and avoid meddling in internal organization and regulation[43]. This type of problem, however, can be analyzed from a different vantage point, focusing on the enforceability of access. Similarly, we should consider how non-owners who are not part of the community can criticize and inspect the management in those situations in which it does not preserve the good in the interests of future generations.

These two points illustrate the need for the creation of a "law for the commons", in which models, tools, and solutions are defined. In general, a common core of rules can be designed by analyzing how communities concretely manage the commons and face related problems. As legal scholars, we need to think about the relationship between non-ownership and communities, since their internal organization is able to render invisible or destroy the category of the commons.

It is useful to revisit the proposal of the Rodotà Commission, which has been re-introduced in Parliament through popular initiative by the collection of 50,000 required signatures. Beyond definitions and the list of resources, we find also a remedy for protecting the commons. According to that text, "Any individual ... is entitled to bring an action to enjoin management decisions that harm or threaten access to the preservation" of the commons[44]. This remedy is an injunction and, according to the preparatory works of the proposal, it was conceived mainly to react to privatizations decided by a public owner of the commons[45]. The definition is broad, however, and we think this remedy could also be used for enforcing access and criticizing the SCC in the management of the

43 A. LEHAVI, *supra*, note 40, 68.

44 A. DI ROBILANT, *supra*, note 9, 394.

45 A legal strategy for giving the commons the same protection as private property could be achieved by qualifying them as possessions pursuant to the *Convention for the Protection of Human Rights and Fundamental Freedoms*, November 4, 1950, ETS, art. 1 (Protocol 1) [European Convention on Human Rights]. See, Ugo MATTEI, Rocco Alessio ALBANESE & Ryan J. FISHER, "Commons as *Possessions*: The Path to Protection of the Commons in the ECHR System", (2019) 25-3 *European Law Journal* 230.

commons. In this way, non-ownership plays a role in the internal organization of the community and negates the power of the private sphere to re-introduce individualistic mechanisms.

Conclusion

This article describes the ascendancy of the commons as a new institution of non-ownership. The possibility to conceive of the latter as part of the paradigm of property law has been demonstrated, and the dichotomy of exclusion/access has been described starting from this new theoretical equilibrium. Commons identify private or public assets that should be managed in the interests of future generations; access and public use should be ensured by the community that takes care of them. We should understand the new interplay between non-ownership and communities, and focus on the internal organization and private regulation the group establishes for managing the commons. Traditionally, we used to emphasize the influence of property regimes on the definition of communities and their rules; this approach has been applied in this paper, by taking into account the main features of the commons. The time has come to promote a paradigm shift, to assess how the concrete arrangement of communities is capable of influencing the management of the commons.

This article is one small step forward. Future research is needed in order to understand these novel dynamics. From a methodological point of view, we need factual and contextual research to map out solutions[46] and to study the life of the law[47]: commons and their communities are organic categories, and our law libraries are not equipped to capture their constant transformation.

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46 This is the aim of the project "Generative European Commons Living Lab" (gE.CO Living Lab) funded by the European Union under the Horizon 2020 program. More information is available at https://generative-commons.eu/.

47 See, Laura NADER, *The Life of the Law: Anthropological Projects*, Berkeley, University of California Press, 2002.