

COMMON PROPERTY AND (PRE) DISTRIBUTIVE JUSTICE¹

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Abstract:

This paper discusses the impact that so-called common goods might have in distributive social regimes. While questioning some of the most accepted notions of property rights, it suggests the philosophy of natural rights and of the *bundle of rights* to conceptualize it as a particular constellation of collective rights involving different agents, who shape a sort of fiduciary relationship. Common property thus understood appears as a way of fostering a pre-distributive regime in which the property rights of wealth and productive assets are designed for, and applied in the structural circumstances of the distribution itself, and not merely in response to the outputs of a unfair and unequal system of distribution.

Keywords:

Commons, Property Rights, Pre-distribution, Fiduciary Relationship.

Resumen:

Este artículo discute el impacto que los llamados bienes comunes pueden tener en los regímenes de distribución social. Cuestionando algunas de las nociones más aceptadas de los derechos de propiedad, se sugieren la filosofía del derecho natural y del *bundle of rights* para conceptualizarlos como una constelación de derechos colectivos que implican a varios agentes que conforman una suerte de relación fiduciaria. La propiedad común entendida así aparece como un modo de fomentar un régimen pre-distributivo en el que los derechos de propiedad de la riqueza y los activos productivos estén diseñados y aplicados sobre las circunstancias estructurales de la misma distribución, y no simplemente como respuesta a los resultados de un sistema de distribución injusto y desigual.

Palabras clave:

comunes, derechos de propiedad, pre-distribución, relación fiduciaria.

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INTRODUCTION

Although common and collective property is not a new phenomenon, recently they have attracted significant attention. The debate between Garret Hardin (1968) and Elinor Ostrom (1990) revived the discussion while awakening the interest of different disciplines. Such attention may be explained by commons' impact in different spheres of contemporary societies: in the technology and the Internet because the *free* software and new devices; in culture due to the rise of new intellectual property rights; in scientific research as a result of new patents; in the economy because of new collaborative practices. Nevertheless, the meaning of the term is probably confusing.² On the one hand, this might be because the juridical status of the commons has been overemphasized due to the emergence of new patents and property rights. On the other, because its current meaning usually overlooks the historical configuration of the commons in shaping multiple forms of political organization and mobilization.

Hence, this paper works with a twofold interpretation of the commons, first as material or immaterial resources subjected to particular configuration of property rights and, second, as historically-framed political, ideological and economic practices which, accordingly, promote different regimes of self-governance, mobilization and multiple expressions of social conflict. Such a perspective, however, should give more attention to the effects of commons on productive and reproductive social structures and, specifically, how these kinds of resources would interpellate the realm of distributive justice. Should we include the common property regime when discussing distribution and justice issues? In considering this question, the paper addresses two main points. First, the study of what the so-called political

² Commons, usually identified as natural resources collectively managed by peasants, are now divided among material (housing, infrastructure), immaterial (codes, patents), natural (water, environment, air), cultural (knowledge), global, and local dimensions. Efrat Eizenberg (2012) uses the term "actually existing commons" in referring to those goods not ruled by the state or markets but shared within urban areas. Charlotte Hess (2008) uses the term "new commons" for those related with culture, knowledge, markets, and global interests. The aim of this paper however, it is not to discuss its substantial definition, but its operational conceptualization to emphasize the dual dimension of the commons: the juridical (property rights) and the political (governance practices they entail). Elsewhere (Laín, 2015) it has been discussed the reasonability of drawing a comparison between the natural historical commons and the current forms (free software, new patents, etc.).

economy of the commons is. This categorization (though with different names) appears throughout history, from the medieval tradition until present-day scholars. In adopting this framework, the paper will present as a problem the most widely accepted meaning of property, which has tended to oversimplify the complexity and the scope of actual property rights. Second, by clarifying this issue, the paper explores the role of the commons (and of the associated property regimes) in redefining the logic of distributive justice. In doing so, it examines the so-called post-distributive justice regime while proposing some advantages that a pre-distributive model based on the use of commons could provide.

1. COMMON PROPERTY. A HISTORICAL APPROACH

Under different labels and backed by distinct ideologies, what it might be called the political economy of the commons has existed at least since the fifteenth century. It was originally associated with the philosophy of jusnaturalism and natural rights, although during the late eighteenth century its religious character adopted a more secular and revolutionary viewpoint. The foundations of natural rights were expressed by Thomas Aquinas for whom, *in extrema necessitate omnia sunt communia*³, a position which was also taken up by Thomas Müntzer during the German Peasant Revolt in 1524, when he defended the small farmers' right to retain common properties that secured their reproduction. During the sixteenth century, natural rights were progressively detached from a strictly theological interpretation as it adopted a more revolutionary and secular character. Still within a religious framework, however, the Dominican theologian Francisco de Vitoria provided a new framework in response to the context of colonialism and slavery. His lectures were enormously influential and innovative by shedding medieval mysticism. Following Justinian's *Digest* (530–533 CE), he developed a crucial argument when sustaining that *dominium* did not mean *ius*. For Vitoria, as Tuck (1979) suggests, these Latin terms would contain two different ideas. Those who enjoy legitimate use or usufruct have a *ius* of a kind, but they are not *domini*, since

If someone takes something from a usuary or a usufructuary or a possessor, that is described as a theft, and they are bound to restore it, but such people are not true domini; just as if I am the proprietor of a horse which I have hired to Peter, and I then take it from him, I am guilty of theft, (...) but it is not taken against the will of the proprietor, for I am the

³ "In cases of extreme necessity all things are common and, therefore, it does not seem a sin if one take a thing which belongs to another, because the necessity makes it common", de Aquinas, (1999[1250?], II, II. §66, Art. 7: 549).

proprietor, but against his will who has legitimate possession of it.⁴

Hence, the new philosophy influenced by the Spanish Salamanca School differentiated between *ius*, the positive right to use or usufruct, and *dominium*, the natural right to dispose of external things at will. This juristic turn (MacGilvray, 2011) recognised the need for positive restrictions on the *natural dominium* by including it in the *ius civile*.⁵ This shift was triggered by two contextual events. First it was a result of the colonisation of the Americas and enslavement of the Indians. It was Bartolomé de las Casas, along with Francisco de Vitoria, who famously declared that “all human races are one”, thus implying the inclusion of all individuals – Indians too – under the heading of human rights of freedom, happiness, self-defence and to set up governments by consent (Tierney, 2004). The second reason was the emergence of despotic and feudal powers and governments in Europe during the sixteenth century. Their unrestricted *dominium* over external things (land) and over people (slaves), was challenged by de las Casas: “Liberty is a right instilled in man from the beginning.”⁶ With his new universalistic interpretation of natural rights, he embraced the medieval maxim, “what touches all is to be approved by all”. The logical consequence of this requirement was that Spanish laws could only be legitimate with the Indians’ consent. Moreover, it entailed a crucial political implication: where the natural right to liberty was concerned, the consent of a majority could not prejudice the rights of minority individuals withholding consent.⁷ So, the medieval idea of individual natural sovereignty came to acquire a collective dimension. It was by the end of the century when John Locke re-framed natural rights philosophy in political and economic terms. By criticising the absolute despotism of European monarchies and the Cromwellian government, he stated the need to “declare” natural rights and to subordinate to them all civil powers –individual, social, and governmental:

To understand political power right, and derive it from its original, we must consider what state all men are naturally in, and that is, a state of perfect freedom to order their actions and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature; without asking leave, or depending upon the will of any other man.⁸

⁴ de Vitoria, *Comentarios a la Secunda Secundae de Santo Tomas*. Quoted by Tuck (1979: 47).

⁵ MacGilvray refers to freedom and not to property although the “juridical turn” actually involves both concepts.

⁶ Quoted by Tierney (2004: 11)

⁷ *Ibid.*

⁸ Locke, (2003[1690], Book II, Chap. II: 101).

Locke defended the idea that, within the state of nature, all men were equally free thanks to the right of appropriation (to *dispose*) of external goods since this determines their survival, their right of self-preservation. His new natural rights implied therefore the *potestas* or the individual's right to his or her body and faculties, which meant a radical break from the medieval tradition in which God was the only sovereign of all goods and men. Hence, Locke's political perspective can be seen as the philosophical background of the new human rights doctrines, including the right of existence and of the citizens' sovereignty. His theory not only included the individual inalienable right to self-preservation, but also extended it to all humankind (II, §135), becoming a collective duty: "the state of nature has a law of nature to govern it, which obligates everyone" (II, §6). In the state of nature, he warned, "wherein all the power and jurisdiction is reciprocal, no one having more than another (...) should also be equal one amongst another without subordination or subjection."⁹ His theory, while defending private property as the means of securing the individual's self-preservation and liberty, also embraced the same right for all humankind. As a result, the right of appropriation was not naturally unlimited. Rather, it had to be positively restricted.

The Lockean conception of property rights and its fiduciary character nourished the philosophy of the American and the French revolutions. For example, it was Benjamin Franklin who stressed the need to protect the natural right of self-preservation, saying that all property necessary to a man for its conservation is

his natural Right, which none can justly deprive him of: But all Property superfluous to such purposes is the Property of the Publick, who, by their Laws, have created it, and who may therefore by other laws dispose of it, whenever the Welfare of the Publick shall demand such Disposition. He that does not like civil Society on these Terms let him retire and live among Savages. He can have no right to the benefits of Society, who will not pay his Club towards the Support of it.¹⁰

Franklin's theory should be included within this new natural rights view that embraced both individual and collective. Natural rights (life, liberty, self-preservation, and the pursuit of happiness) were backed by the right of property that must ultimately be restricted in order to protect the natural rights of all. Thomas Jefferson emphasized the very same idea: property was not an unlimited right, since

no individual has, of natural right, a separate property in an acre of land

⁹ *Ibid.*

¹⁰ Letter to Robert Morris, December 25, 1783, in Smyth (1905-7: 375).

(...). By a universal law, indeed, whatever, whether fixed or movable, belongs to all men equally and in common. Stable ownership is the gift of social law, and is given late in the progress of society.¹¹

In other words, priority has to be given to the universal natural right (of existence) which civil laws must develop and apply. Individual property rights both in America and in France were thus provided by the positive translation of the natural rights, namely, the new American and French constitutions. In France, it was the *Déclaration des droits de l'homme et du citoyen* ratified in 1789, the juridical device which sought to define natural rights. Between 1789 and 1795, such a “positive translation” of natural right shaped the political scenario. It should be noted that the second article of the *Déclaration* clearly stated the main natural rights *in* revolution: “liberty, property, security, and resistance to oppression.” Revolutionary property was thus defined as “inviolable and sacred right” of which “no one may be deprived” though it must be limited and “public necessity, legally determined, shall clearly demand it” (art.17). In this regard, Maximilien Robespierre provided a new genuinely revolutionary natural rights’ approach. Concerned about the catastrophic effects of grain and flour speculation of Turgot’s political economy in 1775, he designed a set of laws (and a moral conception) in order to restrict the *unlimited* freedom of property and commerce. He left no doubt as to where he stood in his commitment to the natural right of existence:

What is the first object of society? It is to maintain the inviolable rights of man. What is the first of these rights? The right of exist. The first social law is thus that which guarantees to all society’s members the means of existence; all others are subordinated to it. Property was only instituted or guaranteed to cement it. It is in order to live that we have property in the first case. It is not true that property can ever be in opposition with men’s subsistence.¹²

It is not the aim of this paper to scrutinize all the revolutionary legislation. Nevertheless, it should be noted that both republican parties (the Jeffersonian-democrats and the Jacobins) re-shaped the natural rights philosophy in accordance with their distinct contexts. Although Jefferson used the term “virtuous economy” and Robespierre embraced the idea of “popular political economy”, both were reasoning within the same framework: if inviolable natural right was to be the fundamental goal, then property right must be instituted in order to *cement* them, as Robespierre reclaimed. Property, thus, was interpreted as a fundamental institution supporting both individual and collective freedom, as well as happiness, self-preservation and

¹¹ Letter to Isaac McPherson, August 13, 1813, in Appleby & Ball (1999: 579-80).

¹² *Discours sur les subsistances*, in Robespierre (1886: 85). Emphasis added.

fulfilment. As means for securing these political values, property rights were theorized in multiple ways. In doing so, the new natural rights theory gave to political sovereignty and private property the same *fiduciary* character whereby individual's (principal) possession of both rights was only delegated, not alienated, to the collective body (agent). Thus, private property under both the American and the French republican political economy was understood as a collective or social value, which must be restricted in order to ensure basic liberties and political values for all.

2. FROM NATURAL RIGHTS TO “BUNDLE OF RIGHTS”

The philosophy of natural rights and the different expressions of political economy of the commons were eclipsed by the emergence of proto-capitalist markets during the nineteenth century. Along with the new utilitarianism, the idea of common property was progressively abandoned. It was in 1765 when William Blackstone went back to the ancient understanding, defining property as “the sole and despotic dominion which one man claims and exercises over the external things in the world, in total exclusion of the right of any other individual in the universe.”¹³ This idea of the *unlimited and exclusive dominium* over external things remains as the most widely accepted definition of property. Moreover, it is tremendously influential in present-day liberalism thanks to Friedrich Hayek (1973: 107) who understood property as those “ranges of objects over which only particular individuals are allowed to dispose and from the control of which all others are excluded”. Does this mean that, as soon as contemporary markets were consolidated, property rights were reduced to this “sole and despotic dominion”? It should be noted that this idea of “individual exclusiveness” does not reflect the current juridical forms of property rights either.

It was during the 1980s that the work of Elinor Ostrom and the Bloomington School discredited this assumption. Jurists and economists within such a school of juridical realism adopted a conception of property as a *bundle of rights* (Johnson, 2007; Merrill and Smith, 2001; Schlager and Ostrom, 1992; Coriat, 2013). This approach introduced an innovative way of conceiving property, in which the set of property rights decompose and recombine themselves according to distinct contexts and power relationships. In opposition of Blackstone's and Hayek's assumption, the *bundle of rights* theory defends the idea that property rights are fragmented among the different agents involving certain resource. As Table 1 shows, property rights are spread out among four agents entitled with distinct rights.

¹³ Blackstone (1897[1765], Vol. II, Chap. I: 167).

Table 1. Bundle of Rights Associated with Positions

	Owner	Proprietor	Claimant	Authorized User
Access and Withdrawal	X	X	X	X
Management	X	X	X	
Exclusion	X	X		
Alienation	X			

Source: Schlager and Ostrom (1992: 252).

As it is shown, although the *owner* covers all rights, it does not mean an absolute right, since his entitlements are always limited or restricted by the other agents' rights. The table shows the complexity of present-day property rights, and makes it possible to explore how property regimes are composed and decomposed in accordance with the internal political distribution of agents' rights. In this sense, as Ostrom (2000: 342) explains, common property is understood as that pertaining to a group of individuals who are

considered to share communal property rights when they have formed an organization that exercises at least the collective-choice rights of management and exclusion in relationship to some defined resource system and the resource units produced by that system. (...) all communal groups have established some means of governing themselves in relationship to a resource.

Hence, as suggested above, the notion of commons should be seen as having two different dimensions; first, as goods associated with a particular regime of rights (usually linked as two types, that of the owners who have the right of alienation, and that of the proprietors and users who do not) and, second, as socio-political dynamics of collective action as a *means of governing in relation to a resource*. Considered from this double angle, commons are also an expression of political reciprocity, which is to say that they entail a sort of fiduciary relationship between *agent* and *principal*, between *owners* and *proprietors* which could also be understood as a network of multiple political and economic checks and controls of the community over their agent, that is, the government or individual proprietors.

3. COMMON PROPERTY AND DISTRIBUTIVE JUSTICE

The next step is to inquire into the role of this common property in the debate about distributive justice. Does it have any relation with the distributive justice? In *A Theory of Justice* (1971) John Rawls stated that the discussion about justice was really about

the basic structure of societies. Thus justice is closely related with how constitutions, markets and private property shape life chances. In addition, inequalities are the result of these structures and institutions subjected to our choices and control which “favour certain starting places over others” (Chambers, 2012: 20). Among other important institutions (i.e. political constitutions or governments), the political configuration of property (its nature, scope, and its regime of rights) will ultimately determine the fairness of a particular scheme of distributive justice. Therefore, to inquire into a particular type of property rights is to inquire into the regime of distributive justice where some agents are “favoured over others.”

As noted above, a higher or lower ranking of inequalities depends on a particular set of decisions affecting the disposition of social institutions among which, property and markets become the most important. It has been said that there are agents “favoured” in comparison with others so, when thinking about a fair regime of distributive justice one should be concerned about how to prevent the growing inequalities within economic institutions from affecting the political ones. So that, it is pertinent to inquire what would be the main features of a scheme of distribution based on common property, and what advantages would it present in comparison with a regime predominantly based on private property. The former regime is called pre-distributive, drawing attention to the role of social mechanisms in preventing adverse events from occurring at an early stage. In contrast, the latter could be dubbed post-distributive because its policies are carried out *ex-post*.

3.1. Defining a Post-Distributive Regime

The distributive regimes adopted by the majority of western economies have undergone great changes since the end of the Second World War. That historical conjuncture gave a “social and democratic” character to welfare regimes, where Rawls’ difference principle seems to be the normative justification: economic inequalities can be justified “if they are to be to the greatest benefit of the least-advantaged members of the society” (2001: 43). Rawls’ maximin principle was thus adopted as the normative foundation of distributive justice based on a taxes and benefits mechanism. The distributive policies were achieved by incorporating all economic actors (work, business, and capital) within a progressive tax design and by guaranteeing transfers and benefits in the form of – partial – universalistic social policies. However, insofar as neo-liberal workfare-oriented policies have become prominent, the collective character of welfare state has been replaced by a schema of increased targeting and conditionality in allocating benefits (Verbist *et al.*, 2012).

In broad terms, collective-oriented social policies are being replaced by more individualistic capital transfer benefits. The state's main redistributive role is consequently being reoriented, from a wider and more egalitarian distribution of access to the "labour" resource, to a wider distribution of capital assets promoting individuals' opportunities to compete in the market by themselves. The president of Bundesbank, Jens Weidmann (2014), portrayed this transformation stating that the purpose of the labour market should be to protect the worker *instead* of the workplace.¹⁴

These post-distributive regimes show some important limitations. If markets are currently understood as the main institutions through which re-distributive policies are designed and applied, it should also be noted that "Welfare-state capitalism (...) permits very large inequalities in the ownership of real property" (Rawls, 2001: 137). Consequently, the *ex-post* state's mechanisms of re-distribution are activated only when market output in form of property has already been unequally (re)produced and distributed.¹⁵ Hence it can be observed how post-distributive regimes are first concerned to deal with widespread social equality through re-distribution of the market's outputs and rewards (either as social policies or as capital assets).¹⁶ Rather than being concerned about *causes* – those conditions that have previously generated and meted out "large inequalities in the ownership" – the current role of the welfare state's distribution seems to be coping with *consequences*.

As a result, a second limitation of this regime emerges. Since welfare state capitalism promotes the increasing concentration of private property, "the control of the economy and much of political life rests in few hands" (Rawls, 2001: 138). The classical literature offers many examples of the causal relationship between the concentration of wealth and the oligarchic control of politics, however it was James Meade (1964: 39) who detailed the menaces of this correlation in a more contemporary language:

A man with much property has great bargaining strength and a great sense of security, independence, and freedom and he enjoys these things not only vis-à-vis his propertyless fellow citizens but also vis-à-vis the public

¹⁴ It is very interesting to consider the differences between Weidmann's claim and the International Labour Organization's well-known principle ratified in the first annex of the *Declaration of Philadelphia* of 1944, declaring that "labour is not a commodity" (ILO, 1944).

¹⁵ It is true that in the historical welfare states regimes public education and healthcare assistance had pre-distributive function. Nevertheless, by examining the current trends and their process of commodification, they are abandoning their pre-distributive character.

¹⁶ See ILO (2014, Chap. 7).

authorities. He can snap his fingers at those on whom he must rely for an income; for he can always live for a time on his capital. The propertyless man must continuously and without interruption acquire his income by working for an employer or by qualifying to receive it from a public authority. An unequal distribution of property means an unequal distribution of power and status even if it is prevented from causing too unequal a distribution of income.

Needless to say, the concentration of both property and political influence Meade talks about is contrary to the widespread access to property rights, so that the *fiduciary* relation involving private and public property would be progressively eroded. From a juridical angle, a sort of historical constitutionalization of some fiduciary relationship concerning public and private properties can be observed. As long ago as 1225, *The Charter of the Forest* became one of the first expressions of such a relationship between principal and agent. Thus understood, it represents the Lockean juridical *declaration* of citizens' (or principal) collective rights in restraining the property rights of use and, more important, of alienation of landlords and the crown (the agent). However, a brief look at more contemporary times also reveals multiple examples of private property rights being submitted to the sovereign's law.¹⁷

However, during recent years a "deconstitutionalization" of such rights has been taking place. Large private interests are currently purchasing the public assets of welfare states. Natural resources, productive assets, public debts and infrastructures are now undergoing privatization. As a result of this commodification of former public properties, the ownership rights of the sovereign – the citizens – are now jeopardized. What is happening is that, as the *trustee* is now more *independent* from the collective capacity for accountability and control, the redistribution of market outputs becomes much more difficult to equalize from the very start. Consequently, post-distributive policies are becoming more expensive and less effective in terms of reducing inequalities and poverty. At this point, it is worth thinking about the extent to which an economy with wider sectors of common property would be able to deal with both problems.

3.2. Towards a Regime of Pre-Distributive Justice

The pre-distributive regime is distinctive because its social distribution of wealth and capital is performed *ex-ante*, or before unequal market outputs have been generated and allocated. The idea "is not simply to assist those who lose out through accident or misfortune (although this must be done), but to put all citizens in a position to

¹⁷ Domènech (2004: 427). For a historical reconstruction of America's republican and collective character of different types of property institutions, see: Simon (1991).

manage their own affairs and take part in social cooperation on a footing of mutual respect under appropriately equal conditions” (Rawls, 2001: 139). Accordingly, in this regime the institutions and mechanisms for redistributing wealth and productive resources are designed for, and applied in the structural circumstances (the causes) of the distribution itself, and not responding to the results (or consequences) of a formerly unequal and unfair distribution. A pre-distributive regime, thus, is concerned with those material and institutional conditions in which fair distribution has been carried out from the beginning. In this sense, and taking into account Meade’s concern (1975: 75) that “good and bad endowments of fortune are likely to reinforce each other”, a pre-distributive regime should be seen as a preventive device rather than as an attempt to remedy growing inequalities.

There are other features of common property related with a fairer pre-distributive model. Firstly, the use of commons property would mean an expanding process of dicommodification of certain productive resources (i.e. natural goods or scientific knowledge). As current economic trends are reinforcing a sort of second enclosure movement (Boyle 2003), common properties could contribute towards mitigating the kinds of processes of dispossession and enclosures that are now threatening new forms of common property and the mechanisms of collective control over public and private property. By excluding some resources from markets, or by establishing certain market boundaries, it could be a way of democratizing their management and allocation. This achieved, a more thoroughgoing democratic control over such “commodities” would probably reinforce fairer and more equal distribution of their outputs, which would then tend to consolidate the pre-distributive character of such an economy.

Secondly, by excluding some of these resources from markets, common property would also contribute towards dicommodifying the labour force (Wright, 2006) by eroding the relationship of dependency between wages and existence, or income and citizenship. In this regard, such a capacity of common or social properties would “operate as restraints on the commodification and capitalization of relationships (...). They thus encourage the owner to view her interest as a stake in a particular long-term relationship” (Simon, 1991: 1341). Needless to say, the labour market has become the fundamental mechanism by which certain rights are conceded and social benefits allocated so that, to a great extent, citizenship is constructed through its economic and political inclusion into labour market. In other words, social reciprocity only makes sense when it occurs within, or as a result of participation in the labour market structure. Needless to say, social reciprocity could be a fair mechanism in a context of full employment, wage equalization and fair social benefits in return. Nevertheless, given the increasing influence of the participation in the labour market as a condition for entitlement to certain social benefits, and the unfair and unequal distribution of the resource of work, the present design of

reciprocity is more likely to be a mechanism that perpetuates and reproduces current social inequalities (between *migrant* and *national* work force, *breadwinner* and *housewife*, or in a nutshell, between *insiders* and *outsiders*).

There is a third kind of advantage that common property would foster. As it has been pointed out, less inclusive political institutions and more powerful economic agents would tend to erode common property and the fiduciary relationship it entails, so that the principal becomes less capable of controlling and subordinating its trustee or agent. If we understand economic inequalities as the result of power imbalances within both economic and political institutions, it follows that the bargaining power of waged people and the propertyless is now decreasing. On the other hand, the expansion of different pools of common property could reinforce what Philip Pettit calls the eyeball test that particular social position in which one is able “to look one another in the eyes without reason for fear or deference” (Pettit, 2014: 82). So, if common resources were better distributed and able to dicommodify important market sectors, then they could be seen as a pool of resources partially sustaining the material existence of citizens. As Pettit also suggests (2006:139), “If the property system or distribution has the contingent effect of allowing domination, then that makes a case for institutional adjustment”.

Common resources could become this useful “institutional arrangement” to restrict the asymmetrical power relationships which have come to prevail in civil life and, in particular, in the productive sphere as a result of property concentration. In short, common property, by guaranteeing a partial material existence, could contribute to increase the bargaining power of less-favoured individuals so that asymmetrical relationships and arbitrary interference by some people in the others’ lives would tend to decrease. Some authors have seen this kind of material support and the consequent boost to bargaining power as a tool to guarantee one’s right to say *no* (Casassas, 2013; Widerquist, 2013) or to secure the possibility of *exit* (Hirschman, 1970), and thus contributing in democratizing markets and productive private spheres of civil life.

According to this dicommodification and democratisation capacity, there is a last feature of common property. Larger common property pools could contribute towards securing the already suggested preventive capacity of redistributive regimes. Since common property would tend to “widespread ownership of productive property and limit the concentration of property over time”, it would also entail “some sort of once and for all redistribution of property holding, accompanied by institutional reforms (...) to keep the redistributed property from becoming reconcentrated” (Krouse and MacPherson, 1988: 99, 103). Characterized by a particular configuration of the *bundle of rights* including different agents with their associated rights, common resources (either material or immaterial) will consequently promote relatively large degrees of

juridical, spatial and temporal dispersion of property. Productive and reproductive resources, and therefore their outputs and benefits, are widespread *ex-ante* so the state's distribution mechanism does not need to be employed each time but beforehand. Thus, common property could mitigate rising social expenditures by bringing about fairer distribution from the start and thus contributing to implement a more efficient social policy agenda.

4. DISCUSSION

As this paper attempts to explain, distributive justice based on use of the commons is highly relevant because of two factors. First, a more democratic and participative political life would require a more democratic and participative economic regime. In this sense, common property, by setting up a particular bundle of rights entailing multiple agents into the management and control of resources through the reinforcement of political fiduciary relationships, could contribute towards democratizing economic activity and, consequently, the political sphere. The basic idea is that the property of most resources and assets would be better understood as a particular constellation of collective rights. For the historical perspective explained above, private property would then become a private appropriation of a resource by means of a public *fideicommissum*, shaped by a fiduciary relationship between the principal (the sovereign, the people who retains the right of alienation) and the agent (the state and the markets who manage the resource). To a great extent, therefore, the private owner would be merely a trustee of public or sovereign property.

Second, as Ostrom suggests common property is linked with governmental and political practices or, as Peter Linebaugh (2010) suggests, there is no commons without "commoning". Moreover, a glance at the history of collective property and the normative arguments in favour of restrictions over individual property rights shows that common property has been understood not just as a mere economic end, but also as a means of achieving certain normative political aspirations. Accordingly, common property should be analysed from two different angles, namely from both juridical and political perspectives. The assumption that a pre-distributive regime based on common property is superior to a post-distributive model does not spring from a desire to find out a contemporary natural rights theory. Rather, it is based on the fact that for former regime, the common property fosters and entails practices of participation and political control and mechanisms of economic distribution, which by definition, are lacking in the latter regime.

REFERENCES

- APPLEBY, Joyce and BALL, Terrence. (eds.). (1999). *Jefferson: Political Writings*. Cambridge: Cambridge University Press.
- BLACKSTONE, William. (1897[1765]). *Commentaries on the Laws of England*. Philadelphia: St. Paul, West Publishing Co.
- BOYLE, James. (2003). "The Second Enclosure Movement and the Construction of the Public Domain". *Law and Contemporary Problems*, 66, pp. 33–74.
- CASASSAS, David. (2013). "Adam Smith's Republican Moment: Lessons for Today's Emancipatory Thought", *Economic Thought*, 2 (2), pp. 1–19.
- CHAMBERS, Simone. (2012). "Justice or Legitimacy, Barricades or Public Reason? The Politics of Property-Owning Democracy", in: O'NEILL, Martin and WILLIAMSON, Ted. (eds.). (2012). *Property-Owning Democracy. Rawls and Beyond*. Oxford: Wiley-Blackwell.
- CORIAT, Benjamin. (2013). "Le retour des communs. Sources et origines d'un programme de recherche". *Revue de la Régulation*, 14, p. 1–21. Retrieved on June 4 2015, in: <http://regulation.revues.org/10463>.
- DE AQUINAS, Thomas. (1999[1250?]). *Summa Theologiae*. Madrid: Biblioteca de Autores Cristianos.
- DOMÈNECH, Antoni. (2004). *El eclipse de la fraternidad. Una revisión republicana de la tradición socialista*. Barcelona: Crítica.
- EIZENBERG, Efrat. (2012). "Actually Existing Commons: Three Moments of Space of Community Gardens in New York City". *Antipode*, 44 (3), p. 764–782.
- VERBIST, Gerlinde; FÖRSTER, F. Michael; and VAALAVUO, Maria. (2012). "The Impact of Publicly Provided Services on the Distribution of Resources: Review of New Results and Methods". *OECD Social, Employment and Migration Working Papers*, No. 130, OECD Publishing. OECD Publishing.
- HARDIN, Garrett. (1968). "The Tragedy of Commons". *Science*, 62, p. 1243–1248.
- HAYEK, Friedrich. (1982[1973]). *Law, Legislation and Liberty. A New Statement of the Liberal Principles of Justice and Political Economy*. London: Routledge.
- HESS, Charlotte. (2008). "Mapping the New Commons". 12th Biennial Conference of the International Association for the Study of the Commons. July 2008. Cheltenham, UK.
- HIRSCHMAN, O, Albert. (1970). *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States*. Cambridge, Mass.: Harvard University Press.
- ILO. (1944). "Declaration Concerning the Aims and Purposes of the International Labour Organization (Declaration of Philadelphia)". Philadelphia: ILO.
- ILO. (2014). "World of work report 2014: Developing with Jobs". Geneva: ILO.
- JOHNSON, Denise. (2007). "Reflexion on the Bundle of Rights". *Vermont Law Review*, 32, p. 247–272.

- KROUSE, Richard, and MCPHERSON, Michael. (1988). "Capitalism, Property-Owning Democracy, and the Welfare State" in: GUTMAN, Amy. (ed). (1988). *Democracy and the Welfare State*. Princeton: Princeton University Press.
- LAÍN, Bru. (2015). "Bienes comunes, nuevos cercamientos y economía política popular". *Política & Sociedad*, 52 (1), p. 99–124.
- LINEBAUGH, Peter. (2010). "Enclosures from the Bottom up". *Radical History Review*, 108, p. 11–27.
- LOCKE, John. (2003[1690]). *Two Treatises of Government and A Letter Concerning Toleration*. SHAPIRO, Ian. (ed.). New Haven & London: Yale University Press.
- MACGILVRAY, Erik. (2011). *The Invention of Market Freedom*. Cambridge: Cambridge University Press.
- MEADE, James. (1964). *Efficiency, Equality and the Ownership of Property*. London: George Allen & Unwin, Ltd.
- MEADE, James. (1975). *The Intelligent Radical's Guide to Economic Policy*. London: George Allen & Unwin, Ltd.
- MERRILL, Thomas, and SMITH, Henry. (2001). "What Happened to Property in Law and Economics?". *The Yale Law Journal*, 111 (2), p. 357–398.
- OSTROM, Elinor. (1990). *Governing the Commons: The Evolution of Institutions for Collective Action*. Cambridge: Cambridge University Press.
- OSTROM, Elinor. (2000). "Private and Common Property Rights" in: *Encyclopedia of Law and Economics, II, Civil Law and Economics*. BOUCKAERT, Boudewijn and DE GEEST, Gerrit. (eds.). (2000). Cheltenham, England: Edward Elgar.
- TIERNEY, Brian. (2004). "The Idea of Natural Rights, Origins and Persistence". *Northwestern Journal of International Human Rights*, 2 (1). Retrieved on July 8 2015, <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1005&context=njihr>.
- TUCK, Richard. (1979). *Natural Rights Theories. Their Origin and Development*. Cambridge: Cambridge University Press.
- PETTIT, Philip. (2006). "Freedom in the Market". *Politics, Philosophy and Economics*, 5 (2), p. 131–149.
- PETTIT, Philip. (2014). *Just Freedom: A Moral Compass for a Complex World*. New York: W. W. Norton & Company, Inc.
- RAWLS, John. (1971). *A Theory of Justice*. Cambridge, Mass.: Harvard University Press.
- RAWLS, John. (2001). *A Theory of Justice: A Restatement*. KELLY, Erin. (ed.). Cambridge, Mass.: Harvard University Press.
- ROBESPIERRE, Maximilien. (1886). *OEuvres de Robespierre*. VERMOREL, Auguste. (ed.) Paris: F. Cournol, Libraire-Éditeur.
- SCHLAGER, Edella and Ostrom, Elinor. (1992). "Property-Rights Regimes and Natural Resources: A Conceptual Analysis". *Land Economics*, 68 (3), p. 249–262.

- SIMON, William. (1991). "Social-Republican Property". *University of California Law Review*, 38, p. 1335–1415.
- SMYTH, Albert Henry. (ed.). (1905-7). *The Writings of Benjamin Franklin*. 10 Vols. New York: Macmillan.
- WEIDMANN, Jens. (2014). Interview in El Confidencial, November 24 2014. Retrieved on July 20 2015, in: http://www.elconfidencial.com/economia/2014-11-24/el-presidente-del-bundesbank-pide-el-contrato-unico-y-menor-proteccion-al-desempleo_504765/.
- WINTERS, Jeffrey A. and PAGE, Benjamin. (2009). "Oligarchy in the United States?" *Perspectives on Politics*, 7 (4), p, 731–751.
- WIDERQUIST, Karl. (2013). *Independence, Propertylessness, and Basic Income: A Theory of Freedom as the Power to Say No*. New York: Palgrave, Macmillan.
- WRIGHT, Erik Olin. (2006). "Basic Income as a Socialist Project". *Basic Income Studies*, 1 (1), p. 1–11.