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The law and the commons

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1. (Serge)

In our contribution, we want to focus on the ways the commons and the law meet. That is to say: *in both directions*. We do not only want to analyze how the law copes (or could cope) with the commons, but also how the commons themselves *produce* law as a common, and how that turns out to be troubling in regards for a number of legal and constitutional principles of Western and Westernized states.

Isabelle and I have been teaming up on these issues in the slipstream of research we did undertake about what she named the "ecology of practices" and wherein, together (her being a scientist and philosopher, me being a legal scientist) we have concentrated upon the articulation of scientific and legal practices (but often and indeed –*écologie oblige*- also political and other practices). That explains why we are here together, and will pass each other the floor a few times.

Our focus on the legal issues – both *de lege lata* and *de lege ferenda* - also explains why we will start by making some distinctions in what has often been called a *new paradigm*, namely the "commons paradigm". Making distinctions is is crucial for lawyers, and that will (or at least : should) become clear as we move on.

David Bollier and Silke Helffrich have indeed written that

> « The commons (…) is a paradigm that embodies its own logic and patterns of behavior, functioning as a different kind of operating system for society»[2].

Hence, the commons are seen as a potential new model for societies' organization and transformation, in opposition mainly, let us call things by their names, to the capitalist world organized exclusively around the complicit figures of the "free individual entrepreneur/owner" and the "State/Leviathan" or sovereign as square owner and supreme arbiter. In contrast "commons" are described as a "new paradigm", a « coalition de coalitions »[3] as Naomi Klein says, or even a "silent revolution"[4].

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[1] This presentation is based upon the following article : S. Gutwirth & I. Stengers, "Le droit à l'épreuve de la résurgence des *commons*", *Chronique : Théorie de droit*, *Revue Juridique de l'Environnement* (RJE), 2016/1, p. 306-343 (also via : http://works.bepress.com/serge_gutwirth/119/). For references and more elaborate argumentations, please consult this article.

[2] D. Bollier & S. Helfrich (eds), *The Wealth of the Commons. A World beyond Market and State*, The commons strategies group/Levellers Press, Amherst, 2012 p. xi.

[3] N. Klein, « Reclaiming the Commons », *New Left Review*, 9, 2001, p. 81.

[4] Cf., D. Bollier, « The Growth of the Commons Paradigm », *in* Ch. Hess & E. Ostrom, *Understanding Knowledge as a Commons: From Theory to Practice*, MIT Press, Cambridge,

We, for our part, tend to speak about a "movement" -definitely *a very important movement*- which brings together not only different forms of resistance against the same enemy, but which also evidences the emergence and exploration of new alternative ways of doing under the same denominator. To be clear, with the enemy we mean capitalism and its consequences: the accelerating worldwide metastasis of *propertization*, *commodification*, *corporatization*, *enclosure*[5] and individualization.

2. (Isabelle)

As Serge emphasized, we fully accept the idea that reclaiming the commons is a movement, with a unity of its own, marked by a strong continuity beyond the diversity of the forms of resistance it implies. This continuity was both emphasized and – we may say – invented by Richard Stallman and the free software movement when they characterized what they were struggling against, as a neo-enclosure enterprise. This was also affirmed by the "Creative Commons" licences. And it becomes still more powerful with the growing legal recognition of the cultural and material rights of indigenous peoples against the pressure of extractive transnational industries, land grabbing and biopiracy.

We could say however that, already in this last case, continuity implies an overlapping of two distinct stories. One of these stories may be told as continuing the past resistance against the expropriation of the old European commons and the destruction all over the (colonized) world of what was, in one way or another, the manner in which most humans have inhabited the land before the invention of modern, exclusive, property rights. The other story has been launched much more recently against the appropriation and commodification of what was long considered as a part of the common patrimony of humankind: knowledge, the free access to which was traditionally part of notions such as "public domain", the fundamental right to information and the res communis.

Against the common enemy, this distinction does not matter too much. It becomes more important however, when we consider the question of "free access", which is central as the knowledge commons are concerned. Such is the case because modernity considers the various existing forms of knowledge as abstract in relation to those who maintain and sustain them, and thus sees them as goods, even if they are immaterial. Hence, "free access" is deemed to be the condition for knowledge to fulfil its vocation as a good – that is, to find those who will appreciate it, be inspired by it … or will appropriate it under "intellectual property law". In contrast, it is antithetical to many indigenous cultures, and to the rights they fight for. For them, autonomy, not free access, is the issue.

From the legal point of view, the coexistence of distinct understandings of commonality is very obvious, already well reflected by well-established distinct laws.

2007, p. 27-40 via *Digital Library of the Commons* http://dlc.dlib.indiana.edu/dlc/handle/10535/4975 .

On the one hand, in many parts of the world – actually in the whole ex-colonial world – multiple forms of legal pluralism have persistently survived, with complicated negotiated entanglements between customary law and conflict resolution on the one hand, and on the other, the secular and abstract legal system, which ignores (per definition) localities and the many forms their bottom-up self-organization took. Both legal anthropology and comparative law have already abundantly shone a light on this particular co-existence.

On the other hand, the free circulation of, and access to immaterial or informational goods has long been considered as obvious and basic, and the public character of scientific knowledge has been accepted as its defining characteristic. The non patentability of knowledge "as such", or the distinction between "discovery" and "invention" do reflect this definition.

Again, it is the common enemy which makes the unity of the movement for reclaiming the commons. The intensity of the pressure of transnational trade organizations turns local customs and autonomies in obstacles to be erased, while what is now called the Knowledge Economy or Knowledge Society results into the ever more exacerbated commodification of knowledge.

However temporality matters here.

It is striking that Garrett Hardin's famous demonstration in "The Tragedy of the Commons" took, and could take, "free access" for granted. De facto, only such a postulate, namely that of users who do not communicate or negotiate, (users caught in a prisoner's dilemma), could give mathematical authority to the conclusion that we need the resource to be taken care of either by private owners, or by the State. But what we wish to emphasize as deeply symptomatic is that Hardin's so-called demonstration was widely seen as quite conclusive.

Today, mainly because of the work of Elinor Ostrom[6], we know that the free access which Hardin took for granted is in fact a classical way of destroying a commons, if not a recipe for doing it. But this is a rather new awareness. For a long time, it was accepted that two attractors dominated the modern landscape, one defined by exclusive property (private or public), the other by free access. Everything else was to be laboriously negotiated, because it was silently assumed to be "non-existent" or even "non existable".

In other words, in the regions (and where is it not?) of the world where the rule of law does claim prevalence, the memory of the old commons, where, in direct contradiction with Hardin, commoners were paying attention to each other's behaviour with respect to the agreed rules, and eventually sanctioning an abusive behaviour, has been erased.

Temporality indeed matters, and this is what we wish to emphasize with the contrast between **resistance** and **resurgence**.

We have chosen to characterize as resistant the reclaiming struggles against the contemporary expropriative attack, when it is widely felt that this attack is

[6] E. Ostrom, *Governing the commons,* Cambridge U.P., 1990

threatening ways of living, working and valuing which are still actively present in the living and practical memory of the people who maintained it, and may organize to defend them.

This is obviously the case of the commonality of vital resources such as water and air, but also the case of the free access and use of knowledge. The free software initiative is a witness, for instance, of the existence and recalcitrance of a community of users who knew very well that the extension of intellectual property rights was threatening its very existence. The same could be said of the less visible movement for "open science". And we would also characterize as resistant the struggle by indigenous peoples for the recognition of their collective ways of living because of their living experience or memory of the symbiotic, mutually constitutive and non-proprietary bonds that tie them to the territories they inhabit (or, more dramatically, did inhabit).

As such, resistance struggles may benefit from legal resources which were developed before the attack. For instance the protection of indigenous peoples may be claimed in terms of human rights, a possibility stemming from a past when the multiplications of such rights was an affirmation of progress. Also Creative Commons, as a very clever legal hack exploiting proprietary rights in an original manner, not as a right to appropriate, but as a right to forbid appropriation by others, benefitted from a sympathetic environment. Resisting the appropriation of what they claimed to be a language was understood as legitimate. As for the patenting of what was considered as knowledge or discovery, and not invention, the matter is still hotly discussed, as when the US Supreme Court decided that "A naturally occurring DNA segment is a product of nature and not a patent eligible merely because it has been isolated".

It is because of its relevance for the possibilities available for jurists involved in the reclaiming the commons movement that we propose not to oppose but indeed to contrast commons associated to resistance struggles and commons that we will characterize differently, as **resurgent**. Such a contrast is not an essentialist, but rather a pragmatic one. It first of all refers to the different social, legal, cultural and economic environments that the said commons have to confront. Present-day neo-liberalism is a hostile, hegemonic environment for <u>any and all</u> commons. But as we have seen, the living memory of its dismantling violence against anything it sees as an obstacle, is still present, all the more so as the attack is going on, for instance with such treaties as the NAFTA, the TAFTA or the CETA. In a way, resistance against free trade and investment hegemony has something in common with resistance against occupation powers, and as such it also creates a bond, which unites the struggle of indigenous peoples and Western activists. Indeed, from a neo-liberal perspective, national or regional legislation protecting work, health or the environment may all be assimilated with outdated customary rights, and should be dismantled or eradicated.

Such experience of extraneous violence may have been that of the British commoners during their long struggle and resistance against enclosures, just as it is still the experience of indigenous peoples. But – and that is crucial for us – in our countries modernization has erased the living memory of these struggles, consigning them to a past never to come back. What Fritjof Capra and Ugo Mattei have

characterized, in their *Ecology of Law*[7], as the deal between two complicit powers, that of the State under the guise of the Leviathan, and that of private owners, soon to be extended to corporations, has framed both our imagination and our development of conflicting strategies. We therefore consider that one of the many possible definitions of modernity is the eradication in our countries of the memory of the very possibility of commoning in the old, non free-access, sense.

What we call resurgence is, as ecologists define it, what follows upon what looked like a successful eradication. For instance one speaks about the resurgence of an epidemic vector, or of a forest after a destruction by a fire. One may also speak about the resurgence of love. It is in the same sense that today we may well be facing the question of the resurgence of commons. To us, then, "resurgent commons" which we see appearing, have not only to struggle for their existence – as all commons do – in a hostile neo-liberal environment. They have also to gain this existence in an environment where "thinking like a commoner" – experiencing oneself as actively participating in a commons – has become an incongruity, something categorically unthinkable. The only legitimate actors are the individualist homo oeconomicus and the concerned, responsible citizen. Both communicate with ideas of universality, rationality and progress. They may stand in opposition – as appropriation and free access do – but both would be prone to reject the claims for self-governance by which Elinor Ostrom characterized the collective functioning of commons. They would take those claims as regressive, antagonist to freedom and corporatist. Such accusation of corporatism today, can be equated to a unanimous death sentence.

Serge will develop the very important point that what we call resurgent commons directly challenge not only the state's exclusive power of legislation and adjudication because they claim to take some rights to judge and sanction in their own hands, but also the privilege of private property because they exclude trespassers. This precisely is a double challenge to legal doctrine which caused us to propose the distinction between resistant and resurgent commons. But I would add that challenging legal doctrine is not for us an end in itself. What may be at stake, beyond resisting the hegemony of neo-liberal commodification and privatization, is the ominous future of this Earth.

As Felix Guattari[8] argued, we should conceive ecological devastation as inseparably triple, the environmental, the mental and the social devastation. It is our deep-set conviction that the binary distribution of power between the sovereign state and the private property owner - between the Leviathan and the homo oeconomicus – played a leading part in this devastation. Resurgence, to us, is not a nostalgic dream to go back to the ways of the so-called indigenous or customary traditions. The resurgence of the destroyed capacity to "think like a commoner", as David Bollier[9] says, may be crucial for the invention of a future worth living.

3. (Serge)

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[7] Fr. Capra & H. Mattei, *The Ecology of Law. Toward a Legal System in Tune with Nature and Community*, Berrett-Kohler Publishers, San Francisco, 2015

[8] F. Guattari, *Les Trois Écologies*, Paris, Galilée, 1989

[9] D. Bollier, *Think like a Commoner. A Short Introduction to the Life of the Commons,* New Society Publishers, Gabriola Island, 2014

In *Le Contrat Naturel,* now 25 years ago, Michel Serres[10] already took seriously what he called the "objective violence" that all owners together -private and public owners- inflict to the whole of the possessed things, that is say to every thing that can be exploited in practice. At the same time, legal scholars started to face and analyze the perplexing existence of an effective "right to destroy" closely linked too the central role of property in our legal organizations. However, now that we face Gaïa's intrusion, as Isabelle has described in her book[11], (e.g. the very objective and all encompassing threat of one of the things upon which the sum of all the proprietors thought to be entitled to exercise a discretionary power), it has become clear that we must start to change our ways of thinking and doing. Jurists not excepted.

Gaïa's intrusion, we should not forget, is certainly not unrelated to the almost unlimited right of extractive industries to acquire and exploit still more natural and human resources (as endorsed by the WTO). The two original myths of the occidental societies, namely the Hobbesian state sovereignty and the Lockean coupling of individual property and general prosperity, have obviously nudged lawyers and legal scholars to endlessly focus on the articulation and (re)articulation of these two sovereignties: "more or less state or more or less private property ?" that seemed to have been the eternal questions.

From this dual perspective and in the face of climate disruption, the only imaginable and available option indeed consists in a drastic last minute awakening of an internationally empowered Leviathan to impose respect for what has been called the "planetary boundaries", the limits not to cross in order to avoid drastic, brutal and unforeseeable modifications of the environment.[12] A top-down, technocratic intervention of a global sovereign, thus, which at best could be hoped to be "enlightened" and respectful of democracy and human rights when steering the planet's system and variables. As if the alternative between the intrusive hand of the state and the invisible hand of the market were really an unavoidable dilemma. As if no other way, no other stories were possible.

In such a context, far from being a protection of the individual against the arbitrary power of the sovereign state, the "sacred and most absolute" right to property turns out to be the consecration of the right of the entrepreneurial person – be it a natural or a legal person – to conduct a business without being accountable for the ecological and/or social damages it causes. Of course, regulatory restrictions that limit excesses do effectively exist, but all in all, the connivance between the Leviathan and the owner-entrepreneur is and remains the vector of growth and development that are blatantly unsustainable. And no, as the history of the Soviet-Union has shown, the full empowerment of the state brings no obvious solution, since it rather cumulates the two figures of modern power, the leviathan and the owner-entrepreneur.

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[10] M. Serres, *Le contrat naturel,* Paris, François Bourin, 1990

[11] I. Stengers, *Au temps des catastrophes. Résister à la barbarie qui vient*, Paris, La Découverte, 2009

[12] Cf. Rockström, J. *et al.*, « A Safe Operating System for Humanity », *Nature,* Vol. 461, 2009, p. 472-475 ; see also W. Steffen *et al.*, « Planetary Boundaries : Guiding Human Development on a Changing Planet », *Science*, 13 February 2015, Vol. 347, Issue 6223.

It is precisely such perspective that the resurgence of the commons matters (e.g. as an alternative between the intrusive hand of the state and the invisible hand of the market. That is why we choose to focus on legal issues raised by such a resurgence.

The said legal issues are directly linked to the *sine qua non* conditions proposed by Elinor Ostrom, namely that for each *commons* the concerned commoners define, firstly, their rights and responsibilities regarding extraction and efforts, secondly, the participative procedures that commit all members, and thirdly, the control and conflict resolution mechanisms, as well as sanctions, that will apply. In other words, each commons installs its own 'governance'. From a legal perspective, it are precisely these auto-organizational features that distinguish the commons from the global common goods (as air, water, light) or the *res communes*, which are deemed to be abundant, and demand a generalized and abstract right to use and access, or, in other words, a principle of general inclusion (to be organized by the state or not). Such an inclusive open access is indeed also what is pursued by proponents of "open" information practices (such as GNU, open source, copyleft, cc, open science, …). And in both cases, reasons and arguments can to be found in the available legal framework because the latter underscores the pursued aims, be it only in principle: such legal framework makes legal "hacks" possible. That, as a matter of fact, is not the case so with regards to resurgent commons, since the legal framework in which they re-emerge is a tributary of their former eradication.

How then, given the current state of law could we, jurists, *de lege lata,* contribute to "compatibilization" between the resurgent commons and the legal state of the art? Can the current law be construed in a more charitable and hospitable way to this end, and this according to the constraints of the legal practice?

Even if (in the tradition of art. 17 *Déclaration des droits de l'homme et du citoyen* and art. 544 *Code Civil*) property is defined as an absolute, sacred and inviolable (natural) right, limitations to that absoluteness are manifold. First of all, owners can voluntarily accept limitations, but next to that, there exist many examples of legal limitations imposed to proprietors in the name of a wide range of reasons of "general interest" or "public necessity", or in order to protect individual rights of others. The mere existence of the notion of "abuse of a property right" is emblematic for such relativity of individual property.

But does that open much doors for the "commons"? No, actually not, because behind the property right of the individual person one will always find the sovereignty of the state, the "owner squared", so to say, the holder of the *dominium eminens*. This explains the strange simultaneous co-existence of an "absolutist property right" and "limits to property": the concession of limits to private property is an expression of the state's exclusive power to decide what property is (and not), and how far it can reach or not. As such, the state's sovereignty is the Property Right behind all other property rights

Does the approach of property as a "bundle of rights" change things to the advantage of the commons? We are not convinced it does. This approach indeed considers that property can be dismembered in 5 different rights (access, withdrawal, alienation, management and exclusion), different rights which can be held by

different users in different capacities. But all in all, such distribution of partial property rights eventually depends either on the will of the private owner, or on a legislative (or judicial) decision imposing such dismemberment for reasons, again, linked to the "general or public interest". In the current state of the law, we do not see a judge accept the limitation of a property right in favor of a group, *because* it is "commoning" with or upon its object (land, buildings or whatever). Even if a building is left uninhabited for years for speculative reasons, the community that might "squat" it in order to turn it into a sort of small scale housing project will not obtain the law's support.

The problem is and remains that commoning does not provide a legal ground, a "moyen" as the French say. To expect judges to accept that the activity of commoning as such generates rights that would be opposable to a owner and his/her property rights, be it and individual, a legal person or the state, is obviously a bridge to far in two senses. Firstly, it would imply to qualify commoning as a sort of legally binding customary development *contra legem* (but as we know: customs are supposed to be "immemorial" …), secondly, it would demand from the judges to attribute rights to dynamic collectivities without legal personality, which seems out of bounds. In other words, even well disposed judges would not be able to carry out such creative interpretations without betraying the constraints of the legal practice of the legal regime of enunciation. The current state of the sources of the law do simply not provide for concepts and qualifications that would make such endeavor possible without overstretching what defines lawyers.

Such a deadlock points us in the direction of the legislator, the most important and often decisive source of the law, and hence, to more political and organizational forms of decision making: what could be done *de lege ferenda* ?

4. (Isabelle)

In their *Green Governance*, David Bollier and Burns Weston[13] call for the definition of a new human right, the right to commoning. It would not be just one more human right to be added to the catalogue, because it would also challenge the State/market hegemony which has historically been trusted to actualize the list of human rights, with a very questionable success. Bollier and Weston write: "For generations, State law has given legal recognition and generous backing to the 'free market'". For them, extending similar support to the commons could unleash tremendous energy and creativity in safeguarding and improving both the satisfaction of human rights and the Earth ecology. They thus call for a State which would play an active role in sanctioning and facilitating the functioning of commons, much as it does now for the functioning of private corporations. However given the present hegemony of the market, the State cannot just be neutral and impartial, as it is commanded to be with regard to the market, not meddling with its so-called self-regulated functioning. On the contrary Weston and Bollier argue that it should actively "sustain, protect and assist" the commons if those must be enabled to flourish in a hostile market-dominated environment.

[13] B. H. Weston & D. Bollier, *Green Governance. Ecological Survival, Human Rights and the Law of the Commons*, Cambridge University Press, 2013

Serge will soon discuss the implication of this role of the State from the point of view of law. I will first use the idea of resurgence to develop the proposal of Bollier and Weston, which amounts to extending everywhere the model of indigenous peoples' of customary rights.

Resurgence implies eradication. As we have seen, Garrett Hardin could and was allowed to just forget about the self-governance of the commons and their active concern for the preservation of the resource. He indeed followed the modern common wisdom which, starting with the primacy of individual self-interest, would indeed define the cooperation and self-restriction implied by commoning as a self-sacrificing, altruistic and thus abnormal, even deviant, behaviour. From this point of view, commoning seems to demand moral virtues, and it is not the role of law to define and prescribe virtuous behaviour. Such a role would correspond to what modernity is proud to have escaped: closed societies dominated by conformity and social control.

But neither indigenous peoples nor old day commoners saw themselves as virtuous. And what Elinor Ostrom characterizes are not virtues but the sine qua non conditions for commons to perdure. Also, we do not know much about the past, about the traditional commons which were eradicated but we should however never trust the killers about their victims – that is, in this case, we should not accept and ratify the destruction of commons as an emancipation from tradition and social control. In fact, learning to accept the claim of indigenous peoples for the respect of their rights, we have also learned from them that traditions may also mean ongoing reinvention, as required by endurance through changing conditions. In any case, when we come to resurgent commons, the question is not that of our understanding of traditions. We come to the devastated ground where the concrete experience of interdependency, counting on each other and being at risk by and with each other has withered – to the point that it may be considered a virtue! Learning how to think like a commoner thus demands a commitment very different from that which came from traditions.

We would propose that if the law did recognize the right to commoning, if the State took upon itself to sustain, protect and assist resurgent commons, it is not as a virtuous enterprise. Thinking like a commoner is not sacrificing one's immediate interest. It is rather thinking <u>with</u> and accepting to being forced to think <u>by</u> interdependency as the very condition for the survival of a commons. The motto "no commons without commoning" is then the motto for what we would call a generative process: a process of generating, in a concrete situation of mutual interdependency, the rules and obligations which are derived from this interdependency. "Commoning" is the process which generates those for whom those rules or obligations are accepted as an obvious shared knowledge – "we abide by them or we all fail together".

Generativity is not something one can decide or master, but what happens when interdependency is no longer lived as a limitation to individual freedom, which one has to accept, but is valued as what one can rely upon. And it is also, what may enable the collective to adventure into the creation of new relations with its environment. A commons then is not a static entity but a learning, experimenting, open one. Coming back to the task to "sustain, protect and assist" the commons, which Bollier and Weston propose that the State institution should endorse, it seems to us that the open learning and transformative process associated with generativity entails a special challenge with regards to the law.

Indeed the fiction which worked so well for corporate entities, granting them juridical personality and recognizing their corresponding rights, may be insufficient, or even counterproductive when dealing with generative, resurgent commons. It could force them to assume a stable definition while what must be sustained, assisted, and protected is rather a learning processual path which has to experiment with its own definitions. In other words resurgent commons are not "scalable": they cannot be attributed a functioning identity abstracted from the learning and transformative path which generates an evolving self-definition. How can the law sustain, protect and assist commons not as scalable entities which would have to conform to a legal definition, but in a way which affirms that it is their generative character which is to be assisted, protected and sustained?

5. (Serge)

Thinking along the lines of Ostrom's characterization of the commons (and more precisely underscoring the fact that commoners need to be able to control and sanction the respect of the collectively elaborated rules) and their "generativity", obliges us to take seriously the "commonisation" of (at least a portion of) the powers to govern, police and adjudicate, which are powers that, according to the contemporary doctrines, are, in principle, exclusively in hands of the sovereign state. Furthermore, in a world where everything that could be appropriated has effectively been appropriated (a movement that still further expands, especially in the realm of IPL and knowledge), the said commoning practices are all the more vulnerable since they are local and non-scalable.

The links such practices weave (and thrive upon) are not just links amongst persons, but they also intricate places, non-humans things, neighborhoods, stories, rhythms and yes, legal relationships. A decision e.g. by a land owner to use a parcel or a building in a more lucrative way than to rent it to a collective, even after years of practice (e.g. of collective vegetable gardening), represents a death sentence for any such commons. The prerogatives granted by ownership stand against (or always "trump") the legal endorsement of commoning.

In other words: today there exists no right that can or could meet the needs of a collective that is characterized by "generative commoning", neither is it thinkable to consider the commoning practice as the source of the emergence and institution of an entitlement that would protect the commoners as a collective against the claims of other right holders (such as owners/proprietors), not even in terms of proportionality. So, what should be done in legal terms in order to protect and stimulate the culture of the collective intelligence that learns to detect and take into account, the consequences the consequence of one's activity for the others, for the commons?

This issue is indeed all the more difficult, since it is in frontal tension with the predominant market culture in which such aspects are "externalized": every person is deemed to compete for his/her own interests, without scruples or attention for consequences. Today, we know this has very tangibly endangered our and the planet's future. The commons demand a law that takes seriously the way they weave practices, sensibilities, modes of cooperation, vernacular habits and interdependence into a,

local and self-sustainable, thus dynamic, whole. *For the law as we know it, that is certainly a challenge: the commons demand an inductive, topical and "becoming" law, rather than the one we know, which is abstract, axiomatic, deductive*. The "law of the commons" would rather have case-law and customs, than legislation and "doctrine" as sources, since they generate their own law responding to the practical constraints of the interdependence of those who are engaged in their becoming. And furthermore, since all the commons are local and are part of an own ecology, these constraints cannot be generalized, in a way similar e.g. to "labour law". The commons proceed in a "bottom-up" way

As Isabelle already said: "generativity" is crucial, and that is particularly the case when the "law of the commons" is at issue: *what* the law should sustain, assist and protect is the capacity of the commons develop, reconsider, adapt and impose their own rules. That is all the more crucial, since that capacity characterizes their mode of existence. The implication is that today's commons should thus NOT be treated in the same way as the addressees of what is known as "second generation" human rights of socio-economic and cultural rights.

There is a Chinese proverb that says that the fool pulls at the young plant, while the wise one just weeds around it. In the same way the role of the law should not be to "pull" the commons towards an abstract ideal or to impose them to meet a pre-designed project. No, the law should create an environment wherein the commons can establish and maintain their generativity, wherein the commoners can learn what this generativity demands and what it enables them to do.

In fact, such is not unseen. Originally, the task of the "juge de paix" was not so much to impose the legislation, than to restore "peace" in the neighborhood, that is to say: to restore a livable situation for all parties, through conciliation and problem solving, bearing upon local mores and customs. The criterion of success of his/her intervention was not retrospective (have the conditions of the law been met and respected, have they been imposed?) but pragmatic (has the local "peace" been restored?). The same can be said about customary law, which is characterized by the fact that it is understood, shared, accepted and, yes, generated by the communities it concerned. For Capra and Mattei, law then *is* a commons, as it requires to be devised and applied in symbiosis with its collective/community.

"Generativity", then, is not a "thing" but a mode. And *the generative mode* responds to what the situation demands: it is not "extractive" (as the law we know) but it engages us into a permanent composing with the eco-systems we are part of even if they do not stop changing and altering. In other words, jurists that intervene in order to defend the commons or arbitrate their conflicts, should not act from the classical perspective which amounts to sanctioning and imposing an abstract principle, but they should contribute to the deployment of the problematic situation and its conflicting reasons.

For sure, such an embracing of the commons by jurists is not a small challenge, since it requires them to reconsider nothing less than the « rule of law ». If the law is yielded by the process of commoning, if it has become a commons, its « role » has obviously taken over from its « rule ». Thinking the « role of law » for the commons is a difficult test for jurist

6. (Isabelle)

Our proposal had for its main goal to activate the imagination of jurists. It situates us in the same historical moment as the movement for reclaiming the commons. Today we know that what we have called progress, modernization and development threatens the very durability of life on this earth. Today we face the fearful prospect that the so-called free market will further impose the extraction of any remaining resources and the ongoing reaping of the wealth of our worlds, while the States have given up any legal power to impose limitations upon it. And finally, today the human rights, the definition of which was taken as a crowning achievement, are dismantled by so-called economic necessities.

The imagination we call for is a way to take seriously what is coming, even if it challenges our deep-set conviction that the path we associated with progress will eventually prevail. Whatever the future, we know that our children are bound to live in a socially and ecologically devastated earth, that is, in the ruins of what we called progress, in the ruins of what claimed to defend us against precariousness – the rule of law for instance. It might be that the stake of lives worth living in the ruins demands that this idea of precariousness be not cursed but socialized, that is, associated it with what we have called generativity.

Resurgent commons matter when the prospect is living in the ruins. Learning to accept needing others, partnering with others, accepting being at risk with and by others, is not only what is demanded by a precarious situation, but it is also an open, generative one. This is why commons are plural, a many partnered coalition without one unifying definition, without a one identity which could be abstracted and used as the condition for a legal entitlement. On the contrary, the question of what and who a commons includes, of how it "consists", that is, holds together, and of how it relates with its environment, are all, open generative questions, depending on the generation of ways of paying attention, of taking into account, of commoning. That is what the forceful "no commons without commoning" means.

Taking seriously the precariousness of living in the ruins is a challenge for legal thought, the pride of which was its capacity to produce legal certainty, which means extracting from diverse, uncertain conflictual situations, the means to settle what is demanded by the rule of law. But it is <u>not</u> a challenge only for law. As Bruno Latour has shown in *The Making of Law*, the arts of abstraction may well radically diverge in science and in law, but they are both related to practices of extraction, of separation between what is entitled to matter and what must be ignored.[14]

It may well be that what learning to live in the ruins demands is precisely what Donna Haraway calls: "Staying with the trouble[15]", namely an awakening from the modern dream which tells us that trouble may, and should, be resolved and that, to that end, we just have to extract from what troubles us what will allow us to follow the rules. It then demands the motto which Haraway and others took from Virginia

[14] Br. Latour, *La Fabrique du droit. Une ethnographie du Conseil d'État*, Paris, La Découverte, 2002.
[15] D. Haraway, *Staying with the Trouble. Making Kin in the Chthulucene*, Durham and London, Duke University Press, 2016.

Woolf, “Think we must”[16]

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[1] V. Woolf, *Three Guineas*, London, Vintage Classics, 2016