

Right to the City or Urban Commoning? Thoughts on the Generative Transformation of Property Law

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Abstract

The economic and political transformations determined by the rise of neoliberalism are usually studied at a state dimension, while the urban one is quite ignored. Nevertheless, the government of the city has been influenced by global and national recent changes and all the municipal sectors have been touched by the austerity's recipe. The decrease of urban public spaces, their privatizations as well as gentrification transform city planning that is often unable to elaborate alternative solutions against the overexploitation of the urban territory and the increase of inequalities caused by economic crisis. In a city, after all, it is impossible to hide inequalities and injustices.

In the last years, cities have often been the theater of political struggles against the privatization of public spaces, evictions and the dissolution of the urban welfare. In many cases, the demonstrators have occupied parks or abandoned buildings (theatre, condominiums...), and used them to find a temporary solution to their different needs (housing, social space, new forms of work, urban gardens...).

They denounce the great number of public or private empty spaces (for instance, the abandoned infrastructures left by the process of de-industrialization) and their neglect. According to the right to the city they claim, the inhabitants have to produce urban spaces starting from their own needs: empty spaces become an opportunity, the urban care is a collective task. This approach shares the logic of the commons, which reclaims a new paradigm based on inclusion, participation and social and ecological use of resources: according to many scholars, also urban spaces are commons.

After a description of this wide context, the article explores the connection between commons and the right to the city.

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Introduction

If they study the topic at all, property law scholars usually only study the economic and political transformations created by the rise of neoliberalism at a State level (that of the Civil Code and of legislation), often ignoring both the global and the local dimensions. In particular, they ignore transformations at the urban level, leaving it to scholars of administrative law whose approach very often tends to be quite narrow and positivistic. Nevertheless, global changes have affected the government of the city and the very nature of property and the European austerity policy has stricken the autonomy of national and local rulers. The contraction of urban public spaces and their privatization as well as gentrification transform city planning and weaken the power of municipal authorities. Most often, such authorities are unable to resist overexploitation of the urban territory enabled by extractive property law and cannot tackle the growing inequality caused by global capitalistic transformations. This phenomenon reflects the current ratio of power between the public sector (very weak) and the private sector (very strong) with the former at the mercy of the latter. In a city, the consequences of this dramatic imbalance of power which defeats all the assumptions of Western liberal constitutionalism are extremely easy to detect. After all, in the urban context where, for the first time in history, most humans live, it is impossible to hide inequality and injustice.

In the recent past, cities have often been the theater of political struggles against the privatization of public spaces, evictions, and the dissolution of the urban welfare. In many cases, the demonstrators have occupied parks or abandoned buildings (including theatres and condominiums, among others), and used them to find a temporary solution to their different needs (housing, social space, new forms of work, urban gardens, etc). Social movements denounce the great number of public or private empty spaces — for instance, the derelict infrastructures left by the process of de-industrialization — and their neglect. According to ‘the right to the city’, they claim, the law should enable inhabitants to ‘generate’ urban spaces starting from their own needs: empty spaces become an opportunity, and urban care a collective ‘generative’ task. This approach, now shared by a broad international network of scholars and activists, assumes the logic of the commons, which reclaims a new paradigm based on inclusion,

participation, and social and ecological use of resources. According to many scholars, urban spaces are also commons.

This short essay intends to explore the connection between commons and the right to the city in the Italian experience, developing a broader idea of civic participation than that realized in different contexts by the existent process of participated city planning. In the last two years, the ‘right to the city’ that the commons movement has unveiled has induced many Italian municipalities to adopt some original models of urban regulation. According to these ‘commons sharing regulations’ now approved in dozens of cities throughout Italy, citizens can take care of urban spaces such as flowerbeds, urban gardens, or empty buildings, entering into a sharing agreement (*patto di condivisione*) with the municipality. The enactment of such regulations recognizes a much more horizontal relationship between the administrative authority and ordinary citizens. It is the enacted result of years of cultural and political struggles for the commons, and while often quite moderate in its political inspiration, has the potential to change the very notion of governance of the urban territory. If applied on both private and public land of significant residential value, it can contribute to a reduction of the land rent, giving a more immediate solution to collective needs and facilitating civic engagement from which political alternatives can grow.

I. The Neoliberal Crisis of the Cities

In recent years, many legal scholars and many social movements have discussed the relevance and the real meaning of the right to the city, theorized in the sixties by Henri Lefebvre,¹ reactivated a decade later by Manuel Castells,² and examined today by David Harvey and his radical geography.³ Social movements claim the right to the city to protest against the unfair distribution

¹ H. Lefebvre, *Le droit à la ville* (Paris: Anthropos, 1968).

² M. Castells, *The Urban Question: A Marxist Approach* (Cambridge, MA: The MIT Press, 1977).

³ D. Harvey, *Rebel Cities: From the Right to the City to the Urban Revolution* (London-New York: Verso, 2012).

of wealth and power:⁴ particularly after 2008, when the economic and financial crisis exploded, they have claimed the public use of urban spaces and demanded more participation in the decision-making processes that concern city planning.

Until the nineteen eighties, Italian legal scholars studied urban development and in particular the contents of the Fundamental Planning Act;⁵ they discussed the measure of compensation for expropriation, the nature of the limits to property, and the significance of the social function of private property (Art 42 Italian Constitution).⁶ In this context, legal scholars verified the possibility of applying the classic idea of property (based on individualism and absolutism) in the urban framework, where the limits to the powers of the owner are very clear and undeniable.⁷ In fact, the development of the city involves the structure and the effects of private property, since planning activities limit the powers of the owner. In particular, an important issue addressed by that wave of scholarship was the nature of development rights (ie the power to build) as a way to control the growth of the city and to assure equality between owners and non-owners. Property law scholars then did not simply consider city planning as a part of administrative law and they discussed how to control land rent-seeking, while today such a radical critique of the structure of private ownership is all but taboo.⁸ For more than two decades, coinciding with the hegemony of neoliberal thought, Italian property law scholars simply revamped the paradigm of ownership as exclusion from a zone of individual sovereignty to be reconciled with other similar zones to which other owners were entitled.

⁴ The examples come from New York, with its Occupy Wall Street Movement, Barcelona with Indignados, Istanbul with the struggles in Gezi Park, Hong Kong.

⁵ The legge no 1150 was passed in 1942 and modified many times, but a general reform has never been made and every attempt at doing it has failed.

⁶ The last complete Italian studies about property and urban development are A. Gambaro, *Jus aedificandi e nozione civilistica della proprietà* (Milano: Giuffrè, 1975) and Id, *Proprietà privata e disciplina urbanistica* (Bologna: Zanichelli, 1977).

⁷ Urban property is said 'conformed', because the owner has to respect many limits, as for instance a defined distance between buildings, aesthetic standards, height limits, etc.

⁸ A. Quarta, 'La polvere sotto il tappeto. Rendita fondiaria e accesso ai beni comuni dopo trent'anni di silenzio' *Rivista critica del diritto privato*, 253-272 (2013).

At the end of the seventies through the following two decades, the return to dominance of the individualistic and absolute idea of private property coincided with the political choice to liberalize the market and to privatize many public services and public assets. The Thatcher government in the UK began this neoliberal turn, which quickly became the dominant paradigm in economics and politics throughout continental Europe. In particular, in the early nineties, the Italian government decided to privatize many public companies and to sell many public assets.⁹ Property law scholars were called upon to provide a robust theory of property rights to cope with the new broad area that privatization opened to private law and to ordinary jurisdiction as opposed to that of administrative law. The most 'natural' move given the intellectual climate of the time was to look to robust theory in the US legal system where the role and scope of property rights were very significant and where administrative law could not count on a different circuit of courts such as the one typical of the civil law tradition.

These political and economic decisions have revealed or perhaps even determined the weakness of the State and the public sector against private corporations and, in general, against market forces.¹⁰ The neoliberal rhetoric in general and its translation into the Italian system in particular would introduce the idea that the State is just like any other market actor, which as such must compete on the market which is the natural playing field. Nevertheless, bureaucracy and corruption make the State a poor market competitor, so that it would be desirable if it could abandon the market in favor of other more efficient private competitors. Such prestigious and influential public law scholars and policy-makers as Cassese, Amato and Bassanini have thus theorized the so-called 'regulatory state' as the only solution capable of reforming the Italian system.¹¹ Under this

⁹ E. Barucci and F. Pierobon, *Le privatizzazioni in Italia* (Roma: Carocci, 2007).

¹⁰ U. Mattei, E. Reviglio and S. Rodotà eds, *Invertire la rotta: idee per una riforma della proprietà pubblica* (Bologna: Il Mulino, 2007).

¹¹ S. Cassese, 'Stato e mercato dopo privatizzazioni e deregulation' *Rivista trimestrale di diritto pubblico*, 378-387 (1991); Id, *La nuova costituzione economica* (Roma-Bari: Laterza, 5th ed, 2012); G. Amato, 'Il mercato nella Costituzione' *Quaderni Costituzionali*, 7-19 (1992); for a general perspective about the regulatory state, see D. Oliver, R. Rawlings and T. Prosser eds, *The Regulatory State: Constitutional Implications* (Oxford: Oxford University Press, 2010); G. Majone and A. La Spina,

theory, the State should only draft the rules of the game and check, through independent authorities, that the private market actors respect them. These ideas have been the Trojan horse for the final dissolution of the public sector in favor of corporate interests, done with the full consent of the most acclaimed in academia. Dissolving the public sector through privatization thus became the desirable policy and lawyers, busy in their preaching for the regulatory State, simply ceased to do their job, which was to make sure that sufficient guarantees of due process were in place to avoid arbitrary exercise of power. Unfortunately, governments usually ignore the interests of citizens when they decide to privatize services and to sell public assets since the transfer of property from the public into private hands is not accompanied by the same due process guarantees as the expropriation of private property in the public interest.

For historical reasons shared by all countries in the liberal constitutional tradition, the rules we find in the Italian Civil Code (borrowed from the French Napoleonic Code) to protect public property have not been useful to limit privatization, even if they consider some goods as inalienable.¹² In the Italian intellectual climate of the early ninetieth, with ‘technical governments’ struggling to enter into the Euro zone (1999), the issues of the distribution of resources and justice gave way to efficiency and privatization, which also marked the return of a strong idea of private property. The theory of property rights of Demsetz¹³ and of many scholars within the economic analysis of law contributed to spreading the neoliberal model in the civil law tradition and Italy was not immune from this trend.¹⁴ In this new (old) logic, property is an institution that reduces transaction costs and internalizes negative externalities. It has not, nor should it have, any redistributive function.

Throughout the neoliberal era, significant events have marked Italian urban development: in three different times – the first in 1985

Lo Stato regolatore (Bologna: Il Mulino, 2000). For a critique U. Mattei, *Contro riforme* (Torino: Einaudi, 2013).

¹² U. Mattei, E. Reviglio and S. Rodotà eds, *I beni pubblici. Dal governo democratico dell'economia alla riforma del codice civile* (Roma: Scienze e Lettere editore commerciale, 2010).

¹³ H. Demsetz, ‘Toward a Theory of Property Rights’ 57(2) *The American Economic Review*, 347-359 (1967).

– the legislature has legalized buildings previously in violation for the main purpose of obtaining liquidity while pleasing powerful developers. Compensation for expropriation of private property returned to the fair market value criterion, mostly under pressure from the equally ‘neoliberal’ European Court of Human Rights.¹⁵ New legislation invented a ‘negotiated procedure’ between public and private actors to work out legal deals on the location of buildings, their scope, the amount of necessary infrastructure and similar crucial issues. It is easy to see how in the aforementioned new balance of power between the private and the public, city planning has completely lost its public soul.

Neoliberal scholars considered this a desirable evolution of the new ‘regulatory state’, setting the rules of a market in which private actors could actually compete. In this vein, they celebrated negotiated city planning as the decline of the authoritarian role of the public administration, but, blinded by their ideology, they did not consider that private corporations had seized our cities, taking advantage of the public economic weakness during the negotiation. In many situations, the most important economic opportunity for municipalities comes from modifying the city plan with zoning variations and changes of allowed uses that favor private subjects to build. In fact, private developers pay some infrastructure costs to build and cash-strapped municipalities can use this liquidity for their ordinary spending.

In this way, municipalities use the money paid for infrastructure costs or as legalization fees for previous abuses as instruments of fiscal policy, forgetting their role of policy planning which requires a long-term vision, some degree of independence, and some capacity to actually enforce the law against strong vested interests.¹⁶ This is not

¹⁴ U. Mattei and R. Pardolesi, ‘Law and Economics in Civil Law Countries: a Comparative Approach’ 11 *International Review of Law and Economics*, 265-275 (1991).

¹⁵ U. Mattei, *La proprietà* (Torino: Utet, 2015), Chapter X; A. Gambaro and U. Morello, ‘Proprietà e possesso’, in Id eds, *Trattato dei diritti reali* (Milano: Giuffrè, 2011), I; G. Ramaccioni, *La tutela multilivello del diritto di proprietà: profili strutturali e funzionali nella vicenda della occupazione acquisitiva* (Torino: Giappichelli, 2013).

¹⁶ F. Adobati and V. Ferri, ‘Oneri di urbanizzazione, crescita urbana e debito pubblico di domani’, in VVAA, *Abitare l’Italia. Territori, economie, diseguaglianze*.

just a technical problem of classifying the nature of legal tools available to the municipality or the legally correct uses of the resources they can generate. This evolution has a concrete impact on city development, as the conditions of suburbs demonstrate: large residential buildings and shopping malls develop instead of public services (such as libraries or youth centers) or green spaces, despite the importance of the latter to integrate the inhabitants who live distant from the city center.

Thus from a legal perspective, city planning is suffering a double decline: on the one hand, it is losing connection with the idea of a landscape to be approached with an ecological sensibility;¹⁷ on the other hand, for the reasons previously summarized, city planning is often sacrificed in the interests of the building industry or of the large distribution.

The economic and financial crisis has exacerbated the situation, as local authorities are suffering extensive cuts of national resources transferred from the central government. The effects of neoliberal policies over cities include privatization of local public services such as water distribution, garbage collection, and transportation, now standard practice of municipalities.¹⁸ By so doing they have reduced many services previously available at subsidized prices, which has especially afflicted the most vulnerable populations, such as the elderly. In this way, the municipal welfare system, which since the early part of the twentieth century in Italy has guaranteed some social cohesion and solidarity, is progressively disappearing. The ensuing trend is to address the needs of weaker citizens by transferring public resources to private actors (often for-profit corporations) or to deploy a variety of partnerships with banks and charitable foundations that most often are very poor substitutes for

Atti della XIV Conferenza SIU (2011), available at <http://siu.bedita.net/atelier-5> (last visited 12 October 2015).

¹⁷ U. Mattei, *La proprietà* n 15 above; P. Maddalena, *Il territorio bene comune degli italiani: proprietà collettiva, proprietà privata e interesse pubblico* (Roma: Donzelli, 2014); S. Settis, *Il paesaggio come bene comune* (Napoli: La scuola di Pitagora, 2013); Id, *Paesaggio, Costituzione, cemento: la battaglia per l'ambiente contro il degrado civile* (Torino: Einaudi, 2012).

¹⁸ VVAA, *Servizi pubblici locali: innovazione e beni comuni* (Milano: Franco Angeli, 2015).

direct municipality engagement.¹⁹ Often public services provided through private actors not only are more expensive for the users and of poorer quality but they end up being more costly for the public treasury given the high costs of procurement procedures and monitoring and the complete lack of a long-term strategy with consequent declines in investments.

To this grim scenario one must add the growth of evictions and of closures of small business activities, created by the untenable growth of proprietary rent extraction in the absence of public housing projects due to lack of available public funds (which are mostly used to service sovereign debt). The rise of protests and occupations to solve this social catastrophe seems inevitable, as does the degree of police brutality to cope with it. Many municipalities go bankrupt (an unthinkable idea before neoliberalism, which is when public authorities started to be considered as any other market actor); most are highly indebted.²⁰ This vicious circle is exacerbated by cities' constant search for private investors through the organization of major events (for example, the Olympic Games) or the building of major infrastructures (for example, the high-speed train from Turin to Lyon).

Cities are looking for new identities to survive to the death of Fordism and the closure of factories, which are radically changing the local economy as well as the urban landscape. Many abandoned and neglected industrial plants exist and cry for some generative use. Many derelict public buildings are equally necessitating care and deserve a destiny different from transformation into more shopping malls. All of the public and private goods draw a map carved out by empty spaces, now simply wasted, while they could provide much-needed social services such as shelter for refugees or homeless people or places of social aggregation. These empty spaces could moreover host alternative economies of a variety of kinds as has already happened in many instances before.²¹

¹⁹ S. Busso, E. Gargiulo and M. Manocchi, 'Multiwelfare. Le trasformazioni dei welfare territoriali nella società dell'immigrazione' *FIERI – Rapporti di Ricerca*, 1-110 (2013).

²⁰ P. Berdini, *Le città fallite: i grandi comuni italiani e la crisi del welfare urbano* (Roma: Donzelli, 2014).

²¹ P. Pedrocchi, F. Pupillo and I. Cristea, 'I vuoti urbani e le infrastrutture

II. The Right to the City and Its Institutional Denial

Is it a smart strategy to argue in terms of right to the city? Can we, as lawyers, articulate some technical translation of such a right capable of making it enforceable?

We have described how municipalities have transformed abandoned industrial plants into residential zones, changing the rules on intended use often to the advantage of the very same owners and managers which still own the plant but have abandoned it to transfer production to the global south. If the ownership of abandoned buildings is public (for example, a vacant military complex) the cash-strapped public sector often tries to sell it to a private developer often at an extremely undervalued price. When such buyers are not available, municipalities themselves create private law-governed special purpose vehicles (SPV) that borrow money from banks to buy the buildings, allowing the municipality to all but 'pretend' it has actually sold them when in fact it has just borrowed more money to make its books look better. This kind of financial creativity falls short of 'cooking' the accounting books. Once again, financial needs guide the urban development. City dwellers are excluded from any decision-making.

For example, in Pisa in 2012 an abandoned factory was occupied and transformed into a thriving commons with a library, a tailor, a school for migrants, a nursery school, a bicycle mechanic, a farmers market, a restaurant and a gym.²² For a few months, the *Colorificio Toscano* thrived, with hundreds of low-income people bettering their lives and finding a purpose, before being brutally evicted by the police. The Mayor of Pisa and the corporate owner of the empty factory planned to transform the area into residential buildings, sharing rent-seeking purposes. The classic coalition of the public and the private against the commons quashed the experience of the *Colorificio Toscano*.

dismesse. Un'occasione per la classificazione dei beni demaniali sul territorio' *TRIA – Rivista Internazionale di Cultura Urbanistica*, 111-121 (2011).

²² A. Quarta and T. Ferrando, 'Italian Property Outlaws: From the Theory of the Commons to the Praxis of Occupation' 15(3) *Global Jurist*, 261-290 (2015); VVAA, *Rebelpainting. Beni comuni e spazi sociali: una creazione collettiva* (Pisa: Rebeldia, 2012).

To take another example, in 2013 in Torino, a large portion of a beautiful royal complex which had been abandoned for decades, *la Cavallerizza Reale*, was occupied to protest against the unacceptable lack of care for the building and the planned privatization of the complex. During the occupation it surfaced that the municipality had already sold the complex to an SPV which it wholly owned one hundred percent and that the city had already cashed some eleven million euros borrowed from a major bank enabling it to put this further debt service out of the books and making it look much better than its grim reality of quasi-bankruptcy. The occupation is continuing to provide citizens with access to a beautiful park and some cultural or political entertainment, but the substantial privatization of the area (for a luxury hotel and boutiques) is just a matter of closing the deal with some 'private investors'.

There are no legal remedies against such scandals. There is no such thing, legally speaking, as a right to the city. There is no way to bring these issues to the courts according to Italian law. The *Colorificio Toscano* in Pisa was private property and the right of property includes the criminally sanctioned power to exclude anybody from the premises. Non-use while waiting for the best moment to sell is a classic stick in the property bundle.²³ To be sure, there are, here and there, provisions of the Civil Code that can be interpreted to limit the unfair or arbitrary power of exclusion from the proprietary sticks.²⁴ Municipalities do have some power to act in case of nuisances created by non-use or perhaps, with a direct application of the Constitution, even in general against antisocial uses of ownership.²⁵ Unfortunately, such interpretations require some willingness to take risks. They also require mayors less cozy with corporate interests than the one of Pisa. Who else would have standing to claim a right to the city? The answer is simple: no one.

The *Cavallerizza Reale* was a public property and the municipality owns it. It is free to privatize it, and this choice is

²³ O. Liivak and E.M. Penalver, 'The Right Not to Use in Property and Patent Law' *Cornell Law Faculty Publications*, 1437-1494 (2013), available at <http://scholarship.law.cornell.edu/facpub/639> (last visited 12 October 2015).

²⁴ A. Quarta, 'Cose Derelitte' *Rivista di diritto civile*, 776-799 (2014).

²⁵ U. Mattei, 'Una primavera di movimento per la «funzione sociale della proprietà»' *Rivista critica del diritto privato*, 531-550 (2013).

political, mostly in the hands of the mayor, and is not justiciable. This is a fundamental constitutional trait of the Western legal tradition that limits due process protection to private property and not to public property whose management is assumed to be an intimate part of political discretion. Municipalities, as any other owner, are free to create an SPV and to transfer to it the public property for sale. The municipality-owned but independent SPV is free to mortgage out the property to the bank.

Proprietary freedom and sovereign political discretion share the same logic: concentration of power and exclusion. Who would have standing to challenge this? Who can claim enforcement of his right to the city? The answer is simple: no one.

If there is no technical content in the notion of right to the city, it might be possible that there are some strategic political reasons to use this right. We submit that this might not be the case. Indeed, the logic of rights might well be part of the problem rather than part of the solution to the progressive transformation of commons into capital which has characterized the evolution of the Western legal tradition and of its most successful product, bourgeois liberal constitutionalism.²⁶ Indeed the logic of rights is borrowed from that of property and is a powerful device to individualize and atomize society. The logic of rights implicitly opposes that of duties and thus erases any social duty owed by the stronger toward the weaker or toward community.

As extensively argued elsewhere, the fundamental institutions of the modern (bourgeois) compromise between private property and state sovereignty are grounded in the idea of individualized power (of the owner or of the chief executive) to be exercised excluding anyone who is not within the chain of command. This is the very structure of power that the inclusive and collective logic of the commons struggles to overcome and must resist. Historically, the right of resistance was an eighteenth-century transformation of a previous collective duty to resist theorized by French Huguenot jurists, and held by the people through their magistrates against an unfaithful ruler.²⁷ The transformation of a collective duty to resist into an

²⁶ F. Capra and U. Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Oakland, CA: Berrett-Koehler Publishers, 2015).

²⁷ E. Meiksins Wood, *Liberty and Property: A Social History of Western*

individual right of resistance has been the strategy to make this right irrelevant since the only legitimate way to exercise the right has been individual litigation in the courts of law. It is easy to see how the language of an individual right to the city can dangerously substitute the notion of a 'collective duty to make the city', by actively and effectively reclaiming it.

Further, the very structure of rights is enshrined in the Cartesian logic of an opposition between the subject (*res cogitans*) and an object (*res extensa*). This mechanistic opposition has generated the positivistic vision of a separation between a domain of facts (that can be scientifically described) and a domain of values (that are the domain of personal arbitrary choices).²⁸ This vision, dominant in the current Western understanding of the reality, is a mechanistic trap that is not only epistemologically outdated but also politically disempowering. A right to the city separates the domain of the subject (the individual citizen owning the right) from the object (the city as some sort of furniture of the earth). Nothing is more dangerous politically than objectifying the city. The city cannot be seen as an object but rather as the complex and dynamic interplay of plural subjectivities that make it while inhabiting it. Its epistemology cannot be positivistic but rather fully phenomenological, just like that of the commons.²⁹ All these caveats should be taken into consideration when suggesting the existence of a right to the city.

III. Collectively Claiming the City as a Common

Recently, citizens have criticized the neoliberal style in managing public assets and services as sources of rent extraction. In 2011, twenty-seven million Italians (an absolute majority of those entitled to vote) stopped the privatization of the water supply system and of other municipal services of economic relevance (transportation,

Political Thought from the Renaissance to the Enlightenment (London-New York: Verso, 2012).

²⁸ F. Capra, *The Turning Point: Science, Society, and the Rising Culture* (London: Flamingo-Fontana, 8th ed, 1990).

²⁹ U. Mattei, *Beni comuni. Un manifesto* (Roma-Bari: Laterza, 2011).

garbage collection) by a nationwide referendum.³⁰ Encouraged by this major political success, social movements denounced the existence of abandoned public buildings as an injustice, often deciding to occupy vacant spaces and to take care of the buildings themselves.³¹ Legally, occupation is a criminal offense,³² but many scholars argue now that in these cases of proprietary disobedience it is 'generative' and the Constitution protects it. In fact, squatters or occupants of theaters always open the occupied building to collectivity and offer services to the neighborhood thus securing the social function of these assets (Art 42 Constitution). These movements usually claim the right to the city by regenerating spaces and asking (through conflict and dissent) the municipal authorities for more participation in the urban decision-making processes. In this way, cities are obtaining a new political subjectivity when creatively resisting austerity measures and becoming interesting laboratories in which people can experiment new political coalitions and new legal solutions.

Two main practices deserve some further attention: one, 'temporary use', is a bottom-up approach granting to squatters a temporary use and thus recognizing the importance of their civic activism. The other, the 'municipal regulation of the commons', perhaps can be described as a top-down solution. It is nevertheless quite an enlightened response to civic activism that would be a mistake to simply dismiss as paternalistic. In any case, we use these two examples to describe how city planning can be organized as a dynamic activity, while the traditional legal tool of the city plan still deploys a static approach that favors private investors over city dwellers.

1. Temporary Use and the Insurgence of Urban Commons

Squatters generally give a second life to the occupied abandoned

³⁰ U. Mattei and A. Quarta, *L'acqua e il suo diritto* (Roma: Ediesse, 2014); U. Mattei, 'Protecting the Commons: Water, Culture, and Nature: The Commons Movement in the Italian Struggle against Neoliberal Governance' 112 *South Atlantic Quarterly*, 366-376 (2013).

³¹ S. Bailey and U. Mattei, 'Social Movements as Constituent Power: The Italian Struggle for the Commons' 20 *Indiana Journal of Global Legal Studies*, 965-1013 (2013).

³² A. Quarta and T. Ferrando, n 22 above.

building, as occurred for instance in Berlin at the beginning of the nineties: after the wall fell, artists, architects and activists occupied vacant buildings and demanded the municipality consider projects of temporary use as a strategy of urban regeneration.³³

Temporary uses provide the possibility to modify the neoliberal city planning urbanism, starting from a study of the way in which value can be generated by producing public spaces.³⁴ The regeneration of empty buildings benefits all the stakeholders: the public or private owner benefits from a reduction in maintenance costs; the neighborhood enjoys the positive externalities produced by regeneration, while the temporary users can find a place in which they can work or live. In this way, 'temporary' is not a synonym for 'exceptional', because the new use is chosen with a bottom-up approach which involves the neighborhood where buildings exist and may become durable.

At the same time, the regeneration contributes to an ecological development of the city and assures to temporary users an active role in the city planning.

At the moment, Italy does not have a national legal framework about temporary use. True, the transformation of industrial areas is the subject of a bill³⁵ but this approaches the issue just as an economic problem, without considering an approach linked to urban development. In spite of the absence of national regulation, some local authorities have recognized temporary uses for the period between the old and the new function of an abandoned area or building. In 2012, for instance, the Municipality of Milan approved a plan to regenerate abandoned or underutilized buildings. The purpose is to loan them for use to non-profit organizations, start-up companies or socio-cultural projects that pay a social rent.³⁶

Temporary users can actively change the city, because they *use* urban spaces while, according to a neoliberal approach, citizens

³³ D.S. Silverman, 'The Temporary Use and Economic Development' 66 *Planning & Environmental Law: Issues and decisions that impact the built and natural environments*, 8-10 (2014).

³⁴ D. Patti and L. Polyak, 'From practice to policy: frameworks for temporary use' 8 *Urban Research & Practice*, 122-134 (2015).

³⁵ Disegno di Legge 24 March 2015 no 1836 'Misure per favorire la riconversione e la riqualificazione delle aree industriali dismesse'.

³⁶ Delibera Giunta Comunale Milano 30 March 2012 no 669.

should just *consume* in urban spaces.³⁷ In this perspective, there is also the possibility to fill the gaps of participated city planning,³⁸ an institutional solution that falls short from generating a shared control of urban development. In fact, citizens' participation consists in the collection of their opinions before starting a particular building, infrastructural or urbanistic project. Municipalities usually call experts to listen to citizens and collect their opinions; however, at this point, the project is almost definitive and complete, so that experts can just make it more acceptable or they can try to mediate between the planner and the citizens if people resist the project. Because of such a participatory scheme in these cases, citizens' participation is passive and it often is useless, a sort of democratic fig leaf to cover unpopular projects. In fact, after the experts' intervention the project is unlikely to change, even if citizens ask to stop or cancel it.

To the contrary, an idea of an 'instantaneous city' is behind temporary use: a place of subjectivity in which inhabitants have some possibilities to transform and organize urban spaces by themselves. It is thus a much more genuine and advanced form of participation. This is why the very notion of a right to the city, in spite of its returning scholarly popularity, needs to get in tune with that of the city as a common. Very often, the rhetoric of rights, with its load of possessive individualism, is at odds with notions of duties of care and community.

According to Lefebvre's theory, 'urbanity' is the result of a productive process created by the inhabitants of a city. The reuse of abandoned buildings and the struggle against privatization are just two examples of those activities that produce the city and new public spaces. If this is the chosen perspective, it should not be difficult to harmonize the right to the city with the discourse on the commons.³⁹ In fact, throughout the last five years, many Italian social movements

³⁷ F. La Cecla, *Contro l'urbanistica* (Torino: Einaudi, 2015).

³⁸ D. Ciaffi and A. Mela, *Urbanistica partecipata: modelli ed esperienze* (Roma: Carocci, 2011).

³⁹ U. Mattei, 'Protecting the Commons' n 30 above; Id, *Beni comuni* n 29 above; M.R. Marella, *Oltre il Pubblico e il Privato* (Verona: Ombre Corte, 2012); S. Rodotà, *Il terribile diritto. Studi sulla proprietà e i beni comuni* (Bologna: Il Mulino, 3th ed, 2013); Id, *Il diritto di avere diritti* (Roma: Laterza, 2014).

have used the category of the commons to denounce the unjust abandonment of buildings by occupying them.

After the already mentioned great success of the referendum in 2011, the language of the commons has been utilized to frame and support a large variety of struggles, including claims against the privatization abandonment of environmental resources and cultural goods (whether public or private), as well as to defend workers and their rights. As a consequence of this apparently inextricable complexity, Maria Rosaria Marella has recently tried to provide a simplified taxonomy of the commons by combining the different interpretations and the variety of utilities they produce.⁴⁰ Today, the notion of commons – which goes beyond the public/private opposition – includes material goods (water, but also natural resources linked with the environment or with the historical, cultural or artistic patrimony of the country) and immaterial resources (such as intellectual creations and traditional knowledge, which cannot be crystallized because they are in continuous transformation).

However, the notion of commons cannot be detached from its political essence, considering its transformative potential. For this reason, it can be used to frame and legitimize claims to obtain the fulfillment of social rights (health, university, culture), and to publicly discuss the ways in which urban space is organized. From this perspective, we can thus consider the city as a commons, looking for a new political argument against expanding urbanization, destruction of green areas, and dismantlement of cultural specificities of certain neighborhoods operated by gentrification. In this field ‘thinking like a commoner’⁴¹ means that the city is the first place where people can try to collectively live and transform it, claiming a public use of its places. A consequence of a commoner’s claims is that urban development needs inclusive rules and a real participatory government.

The life of the commons is dynamic, so today this category is different and broader than that defined by the Rodotà Commission⁴²

⁴⁰ M.R. Marella, n 39 above.

⁴¹ D. Bollier, *Think Like a Commoner: A Short Introduction to the Life of the Commons* (Gabriola Island: New Society Publisher, 2014).

⁴² This Commission was created by the Minister of Justice in 2007 with the mandate to propose a reform of the existing regime of public goods, contained in

eight years ago before its politicization through the referendum of 2011.⁴³ In Italy today the commons are not merely an important generative legal concept beyond private property and public property. They are the complex institutional outcome of continuous pressures and social struggles, including those generated by the occupations as expression by the collective who re-appropriate enclosed and abandoned spaces.

2. City Regulations of the Commons: An Alternative to Occupations?

Municipalities can react to occupations and to the claims of the right to the city in three different ways.⁴⁴ They can ignore the phenomenon. They can repress it through the police. They can co-opt the experience by adopting acts receptive to the claims of the protesters. The first two reactions generally prevail in Italy. Nevertheless, the idea that citizens can take care of urban spaces solicits municipalities to find a legal framework to encourage inhabitants who want to collaborate with the public administration without taking an antagonistic position (that is: not occupying). Across Europe, this legal framework has different forms: for instance, many municipalities discourage through taxation the abandonment of property and provide for special registers to record empty buildings. In Italy, quite interestingly a new wave of city regulations deploys the language of the commons to limit the anti-social consequences of the owner exercising the right not to use his

Arts 822 through 830 of the Italian Civil Code. The Commission introduced the category of the commons, beside the categories of the public goods and of the private goods belonging to the public. Commons were defined as goods that produce utilities that are functional to the fulfillment of fundamental human rights and the free development of any human being. These goods belong to the natural and cultural patrimony of the country such as rivers, streams, lakes, air, forests, flora, and fauna, but also to all those goods considered of archaeological, cultural, and environmental relevance. See U. Mattei, E. Reviglio and S. Rodotà eds, *I beni pubblici* n 12 above.

⁴³ In 2011, a referendum stopped the privatization of the water supply system introduced by the Italian Government; the slogan of the referendum campaign used the idea that water is a commons. See U. Mattei and A. Quarta, n 30 above.

⁴⁴ L. Rossini, 'Teorie globali per azioni locali: i processi autonomi di riappropriazione dello spazio' *Folio*, 19-20 (2014).

property, and to abandon it.⁴⁵ In most cities, however, a registry of vacant properties does not exist and the exact quantity of abandoned properties is unknown. Consequently, private property continues to be carefully protected by municipal authorities embracing the dominant neoliberal creed. While a few private law scholars are now struggling to deploy the commons to re-open the debate on the abuses of property rights in light of the appalling conditions of the homeless and the poor, for the time being we can only register a few significant developments involving public property owned by municipalities.

In the last couple of years many Italian municipalities have adopted particular city regulations on the shared care of urban commons.⁴⁶ In 2013, the Municipality of Bologna, following the suggestion of two public law scholars Gregorio Arena and Christian Iaione,⁴⁷ ruled for the first time in favor of citizens' cooperation for the care and the regeneration of the urban commons (Art 1, para 1). This act defines urban commons as tangible, intangible, and digital goods that citizens and the Municipality consider functional to recognize individual and collective welfare, through participatory and deliberative procedures. Citizens and Municipality share responsibility for the care or the regeneration of these goods in order to improve their collective enjoyment. Citizens can take part in this process individually or through social associations, formal or informal. They identify the building, the square, the street or the flowerbed for which they want to care (public spaces or private spaces or subject to public use), then present a cooperation proposal to the Municipality or respond to a public call when the initiative to propose some asset for commoning is taken by the municipality.

In a second phase citizens and the municipality sign an agreement (*patto di cooperazione*), outlining the ways in which they want to care for urban commons, the powers and liabilities, the division of expenses, the insurance, and the strategy to involve other

⁴⁵ A. Quarta, 'Cose Derelitte' n 24 above.

⁴⁶ Much information about regulations is available at www.labsus.org, laboratory of subsidiarity led by G. Arena (last visited 20 October 2015).

⁴⁷ G. Arena and C. Iaione eds, *L'Italia dei beni comuni* (Roma: Carocci, 2012); G. Arena, *Cittadini attivi: un altro modo di pensare l'Italia* (Roma-Bari: Laterza, 2011).

inhabitants as well as the agreement's duration. The municipality regularly lists all the available spaces and evaluates proposals, merging them together should they be too numerous. In the Bologna model, the solution of any dispute is referred to a particular conciliation committee. The municipality can recognize certain fiscal benefits for participating citizens and provide the equipment needed by citizens to carry out their care activities.

Many other Italian cities have adapted the Bologna act to their own local needs. Among the variety of experiments, in November 2014, the Municipality of Chieri, a thirty-seven thousand-person city in the Turin Metropolitan area, approved the most original version directly borrowing from the experience of the 'cultural occupations' of the *Teatro Valle* in Rome and of the *Asilo Filangieri* in Naples. In the Chieri model, the 'community' or 'commoning unit', rather than the volunteer citizen, can identify the commons (through any means including occupation) and is the real protagonist of the process. The commoning unit, understood to be in a fully horizontal relationship with the municipal authority, enjoys full power in the management of the recognized common. By signing the agreement, the municipality no longer exercises any power over the urban commons and leaves full freedom to the community. This element is very important in order to distinguish the volunteering of the individual citizen from the commoning of a collective movement which can also produce a pluralistic political subjectivity. The regulations of Chieri acknowledge the possible transfer of the urban commons to the community, using particular solutions that assure a collective management. The Chieri model thus sets the conditions to transform the commoning rights into a private law institution, such as a foundation or a community land trust⁴⁸ or a trust in the interest of future generations. Through this strategy, which can be referred to as a counterhegemonic use of private law, the commoning unit will be able to legally protect its management of the urban commons including in the case in which a new municipal administration decides to privatize the entrusted urban common in the future. Paradoxically, the due process guarantees of private property

⁴⁸ About Community Land Trust, see A. Di Robilant, 'Property and Democratic Deliberation, The *Numerus Clausus* Principle and Democratic Experimentalism in Property Law' 62 *American Journal of Comparative Law*, 367-416 (2014).

expropriation can be put to the service of the commons if the governance of the collective entity (foundation or trust) is organized in a way coherent with the criteria of openness, inclusion, and participation. The commons can thus become a form of 'generative' property protected against expropriation and privatization through the ordinary means of civil justice. Another important innovation of the Chieri model is the 'jury of the commons' – composed of five citizens selected through a draw which are in charge of resolving potential conflicts especially on the interpretation of what is or what is not a common.

These regulations are one of the many manifestations of the discourse on the commons that implies two different strategic alternatives: in fact, legal scholars interested in commons can use the existing rules and fill them with a new 'generative' meaning, or try completely new proposals, which however require a quite a mighty political force to be put in place.⁴⁹ The experience with the Rodotà Commission which, despite generating major scholarly attention and producing significant case law developments,⁵⁰ never succeeded to be actually discussed in Parliament, may suggest that the first more humble and local strategy can better serve the interest of the commons. Municipal regulations, in spite of the quite condescending attitude of some of the 'harder' social movements before them, have the potential to transform cities and produce a redistributive effect if two elements are respected. The first element requires the involvement of citizens in the process leading to the approval of the regulation. This is fundamental especially when a local social movement is active on the territory and struggles for some legal recognition of its claims. An active role of social movements is desirable, especially because these regulations are a concrete proposal to get a minimum legal framework to reuse public spaces, in a context of suffocating bureaucratic procedures such as that of Italian municipal bureaucracies.

The second crucial aspect is to consider how innovative the cooperation agreements can be since they can dictate basic care

⁴⁹ U. Mattei, *Il benicomunismo e i suoi nemici* (Torino: Einaudi, 2015).

⁵⁰ The Italian Corte di Cassazione 14 February 2011 no 3665, *Giustizia civile*, 595 (2011) has for the first time used the concept of common to indicate the particular condition of some natural resources.

measures like painting or cutting grass, all the way to allowing an open community to manage an abandoned industrial area. In this latter case, the community could produce new forms of work and welfare from below, achieving a redistributive effect. The critics of such regulations should consider this aspect.

Naturally, it is only the bottom-up activation of affected communities that can counter the paternalistic approach that characterized many of these regulations, making them yet another legal instrument to criticize the role of property in the city and the distribution of resources. City regulations of the commons must contain basic guidelines to facilitate community self-organization and the political action of the administrations that enact them should be monitored for the honesty of the devolution of power that such regulations allow. Only if they serve as tools of diffusion of power can they produce the generative effect typical of the commons.⁵¹ Outside of this 'devolutionary' political nature, municipal regulations of the commons are reduced to simple tools by which local government obeys the current austerity machine by means of exploitation of the participation of citizens in good faith. They would fall short from working in the direction of producing a deep transformation of this system.

IV. Final Remarks

In conclusion, many urban dwellers display a desire to participate in city planning in an active way. This is a lesson we can learn both from the occupy movement and the regulations about the care of urban commons. The reuse of spaces and buildings is a bottom-up alternative to a key concept of the Italian city planning vocabulary that is the 'area use zoning' (*destinazione d'uso*). In fact, while zoning is a static concept which can be modified only by obtaining an administrative act, the concept of reuse is dynamic, factual and shared. Reuse is a form of urban commoning, ecologically desirable and generative of new opportunities.

In understanding and overcoming the neoliberal urban planning that has hijacked zoning regulations, the 'static-dynamic' dichotomy

⁵¹ U. Mattei, *Il benicomunismo* n 49 above.

in the determination of urban spaces is a promising instrument. A municipality needs a long period to create its urban plan, so when the moment of execution comes the city – in its social aspects and considering inhabitants' needs – may have radically changed. In this sense, the zoning plan draws a static vision of the city that legal scholars might help to balance with its dynamic reality of urban transformation. Giving voice to inhabitants' interests by temporary uses can fill this gap in timing (from the plan to its actual execution) and information (what are the shared needs of the dwellers). With innovative legal tools coherent with the vision of the commons, municipalities can also balance the interests of city dwellers and private investors. In the discussed neoliberal balance of power only the latter can influence municipalities to modify the zoning plan for an urban variation, while ordinary citizens – as we said – are de facto disempowered. Temporary uses present a characteristic that is typical of the commons since it unites physical aspects (the material regeneration) with social and political profiles (participation and forms of self-government that a community adopts to manage the commons). It is a generative process, because inhabitants travel a shared learning path to manage the commons, with a positive empowerment effect on the whole community.

Through reuse and commoning, cities can adaptively change thanks to the daily practices of their inhabitants.⁵² Reuse translates an ecological sensitivity in a time when the majority of the world population lives in urban areas rather than the countryside. Yet, states cannot continue urban sprawl as they have in the past without endangering the very subsistence of human civilization on the planet. European states must pursue the EU goal of net zero land expansion by 2050.⁵³

Cities cannot continue to grow in extension like sponges, leaving islands of urban emptiness within their tissue. Municipalities should encourage the spontaneous regeneration of vacant buildings and most importantly recognize commoning occupations because of their generative capacity outside of a formalistic and hypocritical opposition between legality and illegality.

⁵² F. La Cecla, n 37 above.

⁵³ P. Bonora, *Fermiamo il consumo di suolo: il territorio tra speculazione, incuria e degrado* (Bologna: Il Mulino, 2015).