Chapter 3.
Private and Social Property

(Draft – Please do not circulate without author's permission)

"Other ways of owning"

We lack categories to expand the notion of social property. Often the alternative seems stuck between national and private forms of property. However, there are social practices in which an alternative theory in action shows us other trajectories of proprietary relations.

The *Code Napoléon* (1804), which has served as a model for countless civil codes in many countries, not only in Europe, provides a definition of private property that has become classic: "Property is the right of enjoying and disposing of things in the most absolute manner (*La propriété est le droit de jouir et disposer des choses de la manière la plus absolue*)" (Art. 544). It was Jean-Étienne-Marie Portalis, the author of Article 544 of the Civil Code, who defined the right to private property by inventing a Roman origin, such as *ius utendi et abutendi* (right to use and abuse).[1] This Latin expression does not exist in Roman law. It is a modern invention that Portalis took from a work by Robert Joseph Pothier.[2] This reinvention of Roman law allowed the projection of modern concepts onto the past, giving them an almost meta-historical character. The French Revolution and the *Code Civil* sanctioned this demarcation: "Property belongs to the citizen, empire to the sovereign."[3] If in medieval Europe, the term *dominium* associated ownership with authoritative spheres, be they guilds or houses,[4] the process of demarcation dichotomized *dominium* into public power monopolized by the state and individual private property. The peak of this process can be symbolically represented by the date of August 4, 1789, with the abolition of the feudal system, which not only transformed private property into an unlimited and inalienable right, but at the same

[1] See Shael Herman, "The Uses and Abuses of Roman Law Texts," *The American Journal of Comparative Law* 29, no. 4 (1981): 671-690; Thomas Rüfner, "The Roman Conception of Ownership and the Medieval Doctrine of Dominium" in John W. Cairns and Paul J. du Plessis (eds.), *The Creation of the Ius Commune* Edinburgh: Edinburgh University Press, 2010, 127-142.
[2] Robert Joseph Pothier, *Traité du droit de domaine de propriété*, Paris: Debure, 1772, p. 6.
[3] Blaufarb, *The Great Demarcation*, p. 208.
[4] Otto Brunner, Land and Lordship: Structures of Governance in Medieval Austria, Philadelphia: University of Pennsylvania Press, 1992.

time, by destroying any intermediate political authority, depoliticized the social and concentrated power in the hands of the state. This is how revolution shapes society.

The novelty in the modern definition of property is its character of absoluteness. This new concept was consolidated between the 18th and 19th centuries. German legal scholars worked on the definition of this concept by merging elements of the French civil code and Roman law. In the modern reading of Roman law, Georg Friedrich Puchta defined the right to property as "total power on the thing"[5] and Ludwig Arndts defined property as "complete power over a material object."[6] Many other influential scholars could be cited. All these works refer to a modernized Roman law, often invented from scratch.

The creative use of Roman law, the modern invention of concepts dressed up in Latin, are not philological errors, but they exemplify how ideology works. Roman law is not the ancestor of modern Western law. However, the reference to Roman law produces a historical expansion of modern concepts. It is in this way that typically modern political and economic concepts are "naturalized" until they appear eternal.[7] But as we have already seen, even this eternalization and naturalization of historical-political concepts should be read as a polemical and reactive form to the challenge launched by numerous social movements. The aim of this chapter is to show the compresence and tensions between different legal layers related to property regimes. These tensions demonstrate both the unstable and contingent character of dominant property forms and possible alternatives rooted in other social practices.

In 1787, Arthur Browne described the context of the agrarian rebellions by the whiteboys, so named for their practice of wearing white smocks: "Property in Ireland resembled the thin soil of volcanic countries spread lightly over subterranean fires."[8] The commons, their tradition, practice, and memory emerge from historical strata that have been covered by a new legal regime of property forms. However, "at moments of high intensity, as

---

[5] Georg Friedrich Puchta, *Vorlesungen über das heutige römische Recht*, Leipzig, 1849, Bd. 1, 287. See GG, p. 78
[6] Ludwig Arndts, *Lehrbuch der Pandekten*, Munchen 1859, p. 191.
[7] In the 19th Century, private property was not only represented as the goal of the process of civilization, "a new idea that gradually grew out of the common, collective rights of all over land" (Paul Viollet, "Caractère collectif des premières propriétés immobilières," in *Bibliotheque de l'Ecole des Chartes*, 33, 1872, p. 481), but was also projected into the past up to the "first ancestors of the Indo-European race" (Emile Belot, "Nantucket. Etude sur les diverses sortes de propriétés," in *Annuaire de la Faculté des Lettres de Lyon*, 2, 1884, pp. 130-1). See Paolo Grossi, *An Alternative to Private Property*: *Collective Property in the Juridical Consciousness of the Nineteenth Century*, Chicago: Chicago University Press, 1981, p. 72 and p. 106.
[8] Kevin Whelan, *The Tree of Liberty. Radicalism, Catholicism, and the Construction of Irish Identity 1760*-1830, Cork: Cork University Press, 1996, p. 56. See also Peter Linebaugh, "Red Round Globe Hot Burning."

in the 1760s and 1790s" in Ireland, "that brilliant but brittle surface cracked and through the interstices poured a scalding surge of angry energy, erupting from a pent-up reservoir of memory and threatening to erode the existing political landscape."[9] This chapter is about that "reservoir of memory" and its energy.

The modern concepts of private property and the state take shape in the clash between the strata described by Browne. When the surface cracks, angry energy erupts from a pent-up reservoir of memory and threatens to erode the existing social and political order. At this point, a host of theorists, historians, and guards of the existing order get to work to restore stability to the order of the most superficial layer. In this clash, legal and economic practices belonging to different strata are defined as anachronistic, irrational or premodern; at the same time, the economic, social, and political categories of the dominant superficial layer are protected within a metahistorical casing. In this war, even God and reason become polemical concepts. For example, while the Diggers cited the Bible and referred to the "light of reason" to claim the use of earth as a common storehouse for all, Locke stated that God had given men "reason" to make use of the world and determine property. While Locke affirmed the rationality of the right to "subdue the earth,"[10] Winstanley defined the practice of individuals who seek to grab and sell for private profit the Earth or its fruits as "unrational."[11] What is rational for Locke is irrational for the Diggers, and the other way around. It is not an academic diatribe; it is a war between life forms and incompatible legal and economic systems. It is in this clash that the modern concept of rationality celebrated by the modern Western canon took shape. This concept, like every political and legal concept, is not neutral, but polemical itself.

Not only do concepts and categories of the dominant layer take shape in this clash, but images of alternative strata and trajectories also emerge from the same clash. From this perspective, despite all the limitations that can be ascribed to his ethnological approach, Lewis Henry Morgan's Ancient Society (1877) was still able to ask crucial questions. Morgan wrote: "Since the advent of civilization, the outgrowth of property has been so immense; its forms so

---

[9] Whelan, *The Tree of Liberty*, p. 4.

[10] Locke, *Second Treatise*, par 32, p. 113: "So God and his reason commanded man to subdue the earth, i.e. to improve it for the benefit of life; and in doing that he expended something that was his own, namely his labour. A man who in obedience to this command of God subdued, tilled and sowed any part of the earth's surface thereby joined to that land something that was his property, something that no-one else had any title to or could rightfully take from him."

[11] Winstanley, *The Law of Freedom*, in Sabine, *The Works of Gerrard Winstanley*, p. 533 and 594-5.

diversified, its uses so expanding and its management so intelligent in the interests of its owners, that it has become, on the part of the people, an unmanageable power. The human mind stands bewildered in the presence of its own creation. The time will come, nevertheless, when human intelligence will rise to the mastery over property, and define the relations of the state to the property it protects, as well as the obligations and the limits of the rights of its owners. […] A mere property career is not, the final destiny of mankind, if progress is to be the law of the future as it has been of the past. […] Democracy in government, brotherhood in society, equality in rights and privileges and universal education, foreshadow the next higher plane of society to which experience, intelligence and knowledge are steadily tending. It will be a revival, in a higher form, of the liberty, equality and fraternity of the ancient gentes."[12] Morgan still possessed the intellectual strength to question modern property and claim that it is not "the final destiny of mankind." These statements, contained in the final pages of *Ancient Society*, provide the perspective from which to read the entire book, as Marx understood in his ethnological notes.[13] Similarly, the analyses of the different forms of property contained in Emile de Laveleye's *Primitive Property* (1874) must be read from the perspective of what he wrote in the final pages of his book, i.e., in the light of an "equalizing movement, which agitates modern society so profoundly."[14] These tensions open up fields of possibility for politics and theoretical inquiry. From these tensions there arise both the historical analysis of other forms of possession, what alternatives the present can disclose, and the ideology that saturates the present with historical categories elevated to metahistorical principles.

In the concept of private property, prejudices and ideologies of all kinds are condensed. An example is the more recent story of the tragedy of the commons, according to which the behavior of "each herdsman [who] seeks to maximize his gain" and to put in the commons as many sheep as possible, has been defined as "rational."[15] From this point of view, in the absence of private property, a "rational being" would see no point in refraining from adding more sheep, to the point of ruining the pasture. Underlying the assumption of the tragedy there are two fundamental errors: the first is to assume that the commons are not

---

[12] L.H. Morgan, *Ancient Society, Or Researches in the Lines of Human Progress from Savagery through Barbarism to Civilization*, MacMillan & Company, London 1877, p. 552.
[13] Marx, *Ethnological Notebooks*, cit., p. 139.
[14] Emile De Laveleye, *Primitive Property*, London: MacMillan and Co., 1878, p. 353. Grossi ***
[15] Garrett Hardin, "The Tragedy of the Commons" *Science, Vol. 162,* Issue 3859, 1968, p. 1244.

social structures regulated by obligations, community institutions of self-government, traditions, and customs. In other words, it is the complete lack of the sense of the past. The principle of co-obligation is contained in the same etymology as the term commons: *cum-munus*, where the prefix means "with" and *munus* expresses service, duties, and obligations. The practice of the commons suspends the full right to dispose of and alienate property, because users relate to common resources as usufructuaries who take care of them. The commoners, even if they decided unanimously, could not claim the right to destroy the resources available to recklessly extract raw materials and exploit the land to be cultivated. To do so, they would have to violate their obligations towards customs and traditions, and therefore towards generations past and those to come. Therefore, they would cease to be commoners.

The second error consists in the projection of possessive individualism onto a metahistorical form. Both errors are the expression of a theory that eliminates historical depth to provide a flat and universal image of the present. It is ideology in the worst sense of the term. This chapter aims to dismantle this ideology from the perspective of alternative proprietary practices and trajectories to that of the dominant modernity. To do this, a different theoretical and historiographical working method is needed. It is not a question of contrasting the tragedy of the commons with the equally ideological comedy of a happy ending. In place of this, it is a question of working with the compresence and tension between different historical-temporal strata. From this perspective, the story of the tragedy of the commons shows that what has been defined as "rational," i.e., the rapacious and predatory behaviors of possessive individuals, is a weapon in a historical struggle which took form by defining as "irrational" the behaviors of the commoners, to which it is counterposed. That story, once again, shows how ideology works to absolutize the superficial historical strata.

Rethinking the commons does not mean adopting an anthropological, community assumption instead of an individualistic, possessive one. Even if it were accepted that individuals aim to maximize their gain to the point of ruining common land, the commons are generally characterized by mechanisms of rotation and distribution of the lands which ensure that the land is taken care of; not out of goodness but for the simple reason that devastating a plot of land -- besides being irrational because devastated land could also be the fate of the devastator -- is prevented by common forms of regulation and punishment. The analysis of

concrete historical forms of common possession shows that the superiority of private ownership over other property regimes is a modern myth; that the violent introduction of individual land titles from above, without considering pre-existing customary rights, has created devastation and regression; that the link between private property and productivity is false; and that communal land tenure is not an obstacle to development.[16]

In this chapter I focus mainly on the structuring of modern private property relations and the multiple past and present alternatives. From the point of view of the dominant temporality, these alternatives survive in the present as anachronisms. But what these anachronisms show is the compresence of different temporal layers in tension between each other. It would be an easy and wrong solution to affirm that what these different temporal layers have in common is a common opposition to modern Western private property relations. Rather, it is a question of delving into these past and present forms not to find their common grammar, but to bring out a theoretical and categorical arsenal alternative to that of the dominant modernity. In other words, it is a present-day task that guides the hand in this work of excavation and adjusts the gaze. It is a question of avoiding the unconscious ideology that always accompanies the work of conceptualization. We must resist the temptation to subsume different forms of possession into the convenient umbrella concept of "commons." Provisionally, it is better to stick with a more comprehensive term, such as the one used by Carlo Cattaneo to describe legal forms of ownership in the Alps on the border between Italy and Switzerland in the mid-19th century: "another way of owning." [17]

---

[16] It is a myth that yields on enclosed (private) land was significantly higher than on open (communal) fields. Historical facts collected at that time "do not support the conclusion that enclosures or capitalist farming caused the growth in English grain yields. That was just landlord ideology in the eighteenth century:" see Robert C. Allen and Cormac Ó Gráda, "On the road again with Arthur Young: English, Irish, and French agriculture during the industrial revolution," *The Journal of Economic History*, Vol. 48, no. 1 (1988): 93–116. See also David A. Atwood, "Land registration in Africa: The impact on agricultural production" in *World Development*, Vol. 18, Issue 5, 1990, pp. 659–71. Atwood calls into question the conventional view that "traditional" systems of African land rights impeded agricultural development, whereas land titling would have encouraged land transfers to more productive farmers; Sjaastad and Bromley question the prejudice that a "nation with little wealth must be in want of land privatization." Instead, they show that "number of countries where traditional property regimes have not been shown to be failures." See Espen Sjaastad and Daniel W. Bromley, "The prejudices of property rights: On individualism, specificity, and security in property regimes" in *Development Policy Review*, Vol. 18, No. 4, 2000, pp. 365–89; Michael Kopsidis, Katja Bruisch & Daniel W. Bromley, "Where is the backward Russian peasant? Evidence against the superiority of private farming, 1883–1913" in *The Journal of Peasant Studies*, Vol. 42, No. 2, 2015, pp. 425-447.

[17] Carlo Cattaneo defined the existing forms of "common property" in these terms: "These are not abuses, they are not privileges, they are not usurpations; it is another way of owning, another legislation, another social order, which, unnoticed, has descended from very remote centuries to us. Throughout the region adjacent to the Alps, the dominion of two laws, two societies, two different and opposite principles endures simultaneously." Carlo Cattaneo,

Forms of Obligations

In Russia, in 1917, in one of the numerous protocols of the peasant villages, one could read that "land belongs to the peasant commune (*mir*), to the working community. This land cannot be sold, cannot be an object of buying and selling […] land cannot belong to anyone."[18] The sacred, and therefore non-appropriable, character of these resources was very much present in Russian peasant awareness: "The land we share is our mother […] selling land created by the Heavenly Creator is a barbaric absurdity. The principal error here lies in the crude and monstrous assertion that the land […] could be anyone's private property. This is just as much of violence as slavery."[19]

Another population that feels the same way about land are the 'Are'are of Malaita in the Solomon Islands. In their view, land is "not simply soil, but rather an entity always fused with the ancestors, under whose joint authority the living are placed."[20] In this context, we understand the constant opposition of the 'Are'are people to the colonial attempt to introduce private property relations over land. In the 1980s, in a document drawn up by Erehau, leader of the Maasina Ruru movement, we read: "'Are'are people do not own the land. The land owns 'Are'are people. The Land owns men and women; they are there to take care of the land."[21]

Another example. In Andean culture, the land is not thought to be a natural resource at the service of indigenous people, but as their Mother Earth (*Pachamama*), "which is why they give their lives to defend her."[22] The profound relationship they have with land, plants, and animals "makes their suffering when nature is destroyed all the greater."[23] Water and land constitute a single entity that cannot be appropriated because, to use Western categories, it is

---

Sulla bonificazione del piano di Megadino (1853), in *Scritti economici*, Firenze: Le Monnier, 1956, p. 187. He is speaking of forms of management of collective forest and pasture resources which still exist in the Alps.
[18] Mark D. Steinberg, *Voices of Revolution, 1917*, New Haven and London: Yale University Press, 2001, p. 143.
[19] Steinberg, *Voices of Revolution, 1917*, 242.
[20] Daniel de Coppet, "…Land Owns People" in R.H. Barnes, D. de Coppet, M.J. Parkin (Ed.), *Context and Levels. Anthropological Essays on Hierarchy*, Oxford: Jaso, 1985, p. 30.
[21] Daniel de Coppet, "…Land Owns People" in R.H. Barnes, D. de Coppet, M.J. Parkin (Ed.), *Context and Levels. Anthropological Essays on Hierarchy*, Oxford: Jaso, 1985, p. 31.
[22] Hugo Blanco, *We the Indians. The Indigenous Peoples of Peru and the Struggle for Land*, London: Merlin Press, 2018, p. 172.
[23] Blanco, *We the Indians*, p. 172.

not an object that stands before a subject. Even if in an improper way, it could be said that it is another subject with whom one relates. In the indigenous Andean culture, the term used to characterize this nexus of reciprocal relations is "*ayni*," which implies a dialogue and reciprocal bond. In the rural areas of Cochabamba, the attempt to privatize and commercialize water violates all customs and traditional norms. As a Cochabamba woman put it, "If God gave us water, no human being should take it away."[24]

One more example. In the language of Dogrib, a group of indigenous people inhabiting the territory of present-day Canada, "land" is understood in relational terms which include not only land, but also people, animals, trees, rivers, and lakes. From this perspective, "within this system of relations human beings are not the only constituent believed to embody spirit or agency. Ethically, this meant that humans held certain obligations to the land, animals, plants, and lakes in much the same way that we hold obligations to other people. And if these obligations were met, then the land, animals, plants, and lakes would reciprocate and meet their obligations to humans, thus ensuring the survival and well-being of all over time."[25]

The Incan peasant, the 'Are'are people, and the Dogrib do not share ontology or cosmological vision, but they do share property structures *not* founded on private or national ownership of the land. They could probably subscribe to the affirmation of the Russian Christian peasants when they say that making land private property "is just as much of violence as slavery." The meaning of this equivalence of private property with slavery does not lie in the commercialization of something (or someone) living. The Russian peasant did not think in terms of commodification. Private property is rather the suppression of the relational fabric constituted by reciprocity and mutual obligations. The relational vision can also be studied in the European Middle Ages. Its juridical conception was extraneous to the concept of private property and placed at its center not individuals with their rights, but the thing, the *res*, with the multiple relations of use and limitations connected to it. This

[24] Linda Farthing & Ben Kohl, "Bolivia's New Wave of Protest," *NACLA Report on the Americas*, 34:5 (2001), 8-11.

[25] Glen Sean Coulthard, *Red Skin, White Mask. Rejecting the Colonial Recognition*, Minneapolis MN, University of Minnesota Press, 2014, p. 61. See also Allice Legat, *Walking the Land, Feeding the Fire: Knowledge and Stewardship among the Tlicho Dene*, Tucson: University of Arizona Press, 2012; Vine Deloria Jr, *God Is Red. A Native View of Religion*, Golden, Colorado: Fulcrum Publishing, 2003, pp. 271-286.

conception and practice of ownership has been defined as *rei-centric*,[26] thus differentiating it from the modern Western practice characterized by the primacy of the sovereign subject over things. The *rei-centric* conception gives priority to the collective fabric that embraces individuals and groups. If the modern Western proprietary subject is characterized by an expansive tendency of dominion of the self, its body, and the external world, then medieval individuals are humble, and feel themselves as parts of a larger cosmic order.

In a fusion of theological and legal arguments, the point of view of the European Middle Ages can be represented by what can be read in *Summa Parisiensis* (1160): "By divine right everything is common. In fact, in goods we are usufructuaries of the world and only God the owner, precisely because natural things are common, such as land, water and such things over which someone has usufruct by natural right, but not ownership."[27] If we pay attention to the affinity between the Andean peasant, the Russian peasant, and the medieval conception of respect for land and water, it is evident that it is not just a question of differentiating between ontological conceptions based on a matrix of relations rather than on the sovereign subject. Those forms of life are based on specific property relationships, legal and political practices. Calling these forms "ontologies" is part of what I have called saturation of the present.

! :D

Ontological discourse is just another, completely ideological way of not talking about property and legal systems. For this reason, be it said as an aside, embracing alternative ontologies does not change anything for the dominant legal and economic relationships, which are constantly reproduced in an infinite multiplicity of daily practices: when we buy property, a train ticket, when we pay taxes or rent, and even when we refuse to do so.

The difference between legal conceptions can be portrayed in these terms: there are reciprocal relations of obligation based on local authorities, customs, and traditions on the one hand, and a structure based on individual rights guaranteed by the state, on the other. These systems of legality are incompatible. The Maori leader Hone Heke had a clear idea when he

---

[26] Paolo Grossi, *L'inaugurazione della proprietà moderna*, Napoli: Guida, 1980, pp. 21-22; Paolo Grossi, *A History of European Law*, Malen MA: Wiley Blackwell, 2010, p. 2.

[27] *The Summa Parisiensis on the Decretum Gratiani*, ed. by Terence P. McLaughlin, Toronto: PIMS, 1952, Distinctio VIII: "[…] jure divino omnia esse communia […] In rebus enim mundi nos usufructuarii et solus Deus proprietarius, scilicet quod naturalia sunt communia ut terra, aqua et hujusmodi in quibus aliquis habet usumfructum jure naturali, sed non proprietatem."

wrote to the governor, "We do not understand your thinking, and you do not understand ours. God has given this land to us. It cannot be cut into strips like whale blubber."[28]

Getting back to European soil, the difference can be schematized by referring to two apparently similar terms: *libertas* and modern liberty. Their relationship is not one of derivation, but of inversion. If the modern concept of liberty is an expansive force of the subject, characterized by a limitless appropriative tendency, *libertas* is denoted by reciprocal relations, limitations, and obligations based on relationships of authority. Both have to be understood in the relation between rights and obligations,[29] but the former gives priority to subjective rights, the latter to obligations.

The point is not to link all forms of common ownership by contrasting them with the modern Western notion of private property. What I argue is different. Absolutizing this contrast would only mean symmetrically reversing the opposition that characterizes the origin of the modern Western conception of ownership, which had been legitimized by opposing it to the medieval past and non-Western forms of common ownership. Rather, there are countless experiments with forms of possession, of which the modern Western concept of property is only one. What I question is, on the one hand, the polemic and colonial structure in which private property has established and absolutized itself; on the other, that the very historical and geographical vastness of the forms of common possession shows how the modern concept of private property is a historical episode of recent date, born in a specific geographic context which has only spread through colonial violence. Today, the limitless expansive tendency of capitalist production encounters concrete limits in the scarcity of resources, in the aridity of the land, in extractivism as a form of competition in the global market, and in climate change. The list of these phenomena could go on, but what is important to emphasize is that each of these is associated with an implemented form of exploitation of soil and human labor. These phenomena affect our everyday life more and more. However, one must keep in mind that the sense of urgency that characterizes our contemporary times is part of the problem. If a change of course is needed, this does not require a new ontological theory or radical legislative

[28] Felice Vaggioli, *History of New Zealand and Its Inhabitants*, Denedin, NZ: University of Otago Press, 2000, p. 128.

[29] The relationship between right and obligation is not an opposition, but, as my friend Anne Norton reminded me in one of our many conversations in Princeton, they refer to each other like the concave and the convex. I thank Anne, both for calling my attention to this reciprocal implication of right and obligation, and for making my stay in Princeton enjoyable and stimulating despite the many restrictions due to the pandemic.

interventions on a national or even global level, but a different legal and ownership structure based on democratic practices in which users form a web of mutual obligations.

Today, the modern Western mind is allergic, if not hostile, to forms of obligations. It is easily forgotten that the modern Western conception of free will and the primacy of the subject over the thing took five centuries of cultural, legal, economic, political, and social violence to establish itself—the same violence that was needed to raze common ownership and local self-government. The modern anthropological vision of an individual freed from the constraints of the existing order and free to assert himself has its intellectual roots in the opposition between the Thomistic system, which contemplated man in relation to the order of creation, and the Franciscan conception which instead placed emphasis on the will and the *facultas dominandi* of the individual. From here the will becomes dominion over oneself (*dominium sui*) and over external reality (*dominium rerum*).[30] The pauperistic conception of the Franciscans, distinguishing between use and possession of the thing, laid the foundations for a dualistic conception that separates the world of subjects from the world of things. The latter tends to become a passive term, while man becomes the image of God as the *dominus supremo*.[31]

The clash that led to modern forms of property is not only a clash between theological conceptions. It is but also a clash between legal systems. Since the outcome of this long war was not teleologically predetermined, digging into historical material allows us: a) to block the tendency to project modern concepts onto the past, b) to extract alternative categories to those of the dominant modernity, c) to show the permanence of other political, economic, and legal trajectories. These trajectories have not remained unchanged but have interacted in a conflictual manner with the dominant forms. When they re-emerge, they do so in a new way, which allows us to glimpse their past as open to outcomes other than those that have become dominant in Western modernity.

Property is (not) sacred

[30] Paolo Grossi, "Usus Facti. La nozione di proprietà nella inaugurazione dell'età nuova" in *Quaderni Fiorentini*, Vol. 1, N. 1, 1972, pp. 287-355 verifica.
[31] Paolo Grossi, *Il dominio e le cose. Percezioni medievali e moderne dei diritti reali*, Milano: Giuffré, 1992, pp. 127-152.

Different conceptions and practices of property can be better illuminated from the point of view of what, today, we would call property infringement. Even in this case it is possible to show contrasting trajectories. As we know, John Locke states that it is "lawful for a man to kill a thief." He justifies it by saying that "I have no reason to suppose, that he, who would take away my liberty, would not, when he had me in his power, take away every thing else. And therefore it is lawful for me to treat him as one who has put himself into a state of war with me, i.e. kill him if I can."[32] Locke safeguards the concept of property, this modern creation, by encapsulating it in the state of nature. This is not a real condition that pre-exists the civil state, but it is a constant dimension that guides and legitimizes individual actions in cases in which political power does not or is unable to do so. In Locke's argument, the concept of property is raised so high as to also constitute a limit for the legislative power, which "can never be supposed to extend farther than the common good; but is obliged to secure every one's property."[33] If not, it itself falls into a state of war, becomes tyrannical, and resistance and the use of force against it are justified. This is not the place to discuss the tangle of contradictions that characterizes the Lockean appeal to resistance.[34] I am interested in observing Locke's attack against specific customs and usages that defined property relations. What Locke intends to justify is property as the *exclusion* of the common right of other men to use common land. It is here that labor, mixing with the common thing, comes to define not only a title to property, but also a new paradigm counterposed to the commons. When Locke writes that "the grass my horse has bit; the turfs my servant has cut; and the ore I have digged in any place, where I have a right to them in common with others; become my property,"[35] his intention is to dismantle use-rights as inherent in the users and to provide a new theory of individual use rights against the web of user's rights and reciprocal obligations.[36]

---

[32] John Locke, *Two Treatises of Government*, New Haven and London: Yale University Press 2003, par 18, p. 107-8. Locke continues: "Thus a thief, whom I cannot harm, but by appeal to the law, for having stolen all that I am worth, I may kill, when he sets on me to rob me but of my horse or coat; because the law, which was made for my preservation, where it cannot interpose to secure my life from present force, which, if lost, is capable of no reparation, permits me my own defence, and the right of war, a liberty to kill the aggressor, because the aggressor allows not time to appeal to our common judge, nor the decision of the law, for remedy in a case where the mischief may be irreparable" (Locke, *Two Treatises of Government*, par 19, p. 108).

[33] Locke *Two Treatises of Government*, par 131, p. 156.

[34] Discussed further on in chapter 4 on the imperative mandate.

[35] Locke *Two Treatises of Government*, par 28, p. 112.

[36] See also E.P. Thompson, *Customs in Common*, London: Penguin Books, 1993, pp. 160-1: "The law pretended that, somewhere in the year dot, the commons were granted by benevolent Saxon or Norman landowners, so that uses were less of right than by grace. The fiction was purely ideological: it guarded against the danger that use-rights

Locke's reasoning can be followed from the perspective of a threat to an order based on property. The criminal, states Locke, "renounced reason, the common rule and measure God hath given to mankind," and "declared war against all mankind."[37] It follows that the criminal who violates property also violates the holy trinity of *reason, God,* and *mankind*, and "may be destroyed as a lion or a tiger."[38] From the same assumptions it follows that those who do not operate in accordance with the modern property regime are to be considered as "wild savage beasts." [39] What is considered here as a violation of property corresponds above all to a practice of common use rights that is incompatible with the emerging legal system and the paradigm of property as "despotic dominion" over "external things of the worlds, in total exclusion of the right of any other individual in the universe."[40] In this clash of legal systems, a new form of rationality, a new experience of space, and a new concept of the world are also configured. Locke's language is symptomatic of these changes. The "wild savage beasts" correspond to the inhabitants of legal structures in which possession is in common. What must be "destroyed as a lion or a tiger" is the practice of common use rights. This is the same colonial logic applied both within England and in the colonies. It is the war of what is defined as conforming to reason against the irrational.[41] The new legal grammar based on absolute right over external things and the exclusion of the right of others has been imposed in a long war against other forms of owning. A war that has been fought through polemical and temporalized concepts that have turned anachronistic practices into something irrational, residual, savage, undisciplined, and lazy.

Now, imagine reading the texts of Locke and the Diggers synoptically. For Locke it is right and lawful to kill a thief, whereas for Winstanley, the "power of the sword doth not only kill and rob; but by his laws, made and upheld by his power, he hedges the weak out of the earth, and either starves them or else forces them through poverty to take from others, and then hangs them for so doing. […] This is the extremity of the curse; and yet this is the law

might be seen as inherent in the users, in which case the successors of Levellers or Diggers might arise and plead their original title."

[37] Locke, *Two Treatises of Government*, par 11, p. 104.

[38] Locke, *Two Treatises of Government*, par 11, p. 104.

[39] Locke, *Two Treatises of Government*, par 11, p. 104.

[40] William Blackstone cited by Thompson, *Customs in Common*, p. 162.

[41] As Laura Brace observed, the "savage" in America and the poor in England are excluded from industriousness and rationality: Laura Brace*, The Politics of Property. Labour, Freedom and Belonging*, Edinburgh: Edindurgh University Press, 2004, p. 35.

that everyone nowadays dotes upon; when the plain truth is the law of property is the shameful nakedness of mankind."[42] In the first paragraph of the chapter "On Property" of the *Second Treatise* (1689), John Locke cites Psalm 115,16: "the earth he [God] has given to mankind."[43] The first line of "The True Levellers Standard Advanced" (1649) reads: "In the beginning of Time, the great Creator Reason, made the Earth to be a Common Treasury, to preserve Beasts, Birds, Fishes, and Man."[44] The human task, we read in the Diggers' text, consists of the "restoration of Israel" through "the work of making the Earth a Common Treasury." [45] Here, the Diggers' manifesto, mentioned numerous passages from the bible.[46] When John Locke, opening the *Second Treatise*, refers to biblical texts, he is implicitly opposing his arguments to those of the Diggers. On the one hand, he cites the Bible, as the Diggers did forty years earlier, to de-legitimize modern forms of common land possession and legitimize the rationality of the principle of individual private property. On the other hand, he is presenting a unilinear temporal development opposed to the temporality of the restoration claimed by the Diggers.

Locke's text does not invent anything. It is the theoretical side of the war against commons which, between the 17th and 18th centuries, evicted millions of commoners from forests and pastures. The polemic goal of Locke can be exemplified in a text signed by 45 True Levellers: *A declaration from the poor oppressed people of England*. "The earth was not made purposely for you, to be Lords of it, and we to be your Slaves, Servants, and Beggers; but it was made to be a common Livelihood to all."[47] If the practice of digging is the practice of restoring the earth as common livelihood, Locke mobilizes theological, legal and political arguments in support of the long war against the commons. What emerges from this confrontation is not an intellectual quarrel between thinkers. I do not mean to argue that Locke took the trouble to refute the writings of Gerrard Winstanley. What I am arguing is that in the 16th and 17th centuries a clash took place between alternative, competing legal

[42] Gerrard Winstanley, *Fire in the Bush*, Sabine, *The Works of Gerrard Winstanley*, p. 492.
[43] Locke, *Two Treatises of Government*, par. 26, p. 111. See also Locke, par. 25, p. 111: "it is very clear, that God, as king David says, Psal. Cv x. 16, 'has given the earth to the children of men;'' given it to mankind in common."
[44] George H. Sabine, *The Works of Gerrard Winstanley*, New York: Cornell University Press, 1941, p. 251.
[45] Sabine, *The Works of Gerrard Winstanley*, p. 260.
[46] Sabine, *The Works of Gerrard Winstanley*, p. 260: "Ezek. 24.26, 27, &c. Jer. 33.7 to 12. Esay. 49.17, 18, &c. Zach. 8. from 4, to 12, Dan. 2.44, 45, Dan. 7.27. Hos. 14.5, 6,7. Joel 2.26, 27. Amos 9. from 8 to the end, Obad. 17.18.21. Mic. 5. from 7 to the end, Hab. 2.6, 7, 8, 13, 14. Gen. 18.18. Rom. 11.15. Zeph. 3. &c. Zech. 14.9."
[47] Sabine, *The Works of Gerrard Winstanley*, pp. 269-277.

systems. Locke and Winstanley expressed that tension and took sides for different outcomes. If the Diggers refer to the restorative temporality of common possession, which is not a past but a present to be defended, Locke states that those common forms of ownership are survivors of savages. In order to justify the right of appropriation of the land, Locke devalues the land, transferring the valorizing potential to human activity. The object is removed from the common natural condition through labor, which adds something that "excludes the common right of other men."[48] Here lies the frontal attack on the right of the commons: "if we will rightly estimate things as they come to our use, and cast up the several expences about them, what in them is purely owing to nature, and what to labour, we shall find, that in most of them ninety-nine hundredths are wholly to be put on the account of labour."[49] Human labor constitutes the title for appropriating nature that in itself, in the Lockean view, is worth one-percent or less.

All of Locke's terms are inverted. Or rather: Locke inverts all terms that made sense for many hundreds of years. It is not Locke who makes this inversion. It operates at the basis of proprietary structures established in the early modern age. There is a tradition that has celebrated this inversion as progress. What I want to highlight is how the polemic nature of modern political and legal concepts is to be read in relation to a long war between life forms and legal systems. The long war against commons and forms of common ownership was fought both with the cannons of colonial violence organized by the state and through the canon of political thinkers which finally became dominant. Every concept employed by Locke, and other representatives of the canon was forged in this clash and bears traces of it. It is up to a new political theory to bring this out.

The pinnacle, in terms of conceptual self-representation of this trajectory, lies in Hegel, who links the modern concept of ownership to the modern definition of the person as infinite free will.[50] According to Hegel, the person, inasmuch as he "has the right to place his will in any thing," removes from that thing its exteriority by imposing on it his will, his ends and his soul.[51] And so follows "the absolute *right of appropriation* that which human beings

[48] Locke, *Two Treatises of Government*, p. 19.
[49] Locke, *Two Treatises of Government*, p. 25.
[50] Hegel, *Philosophy of Right*, §§ 34-35. In relation to property, Hegel also used the term "absolute free will": Hegel, *The Philosophical Propaedeutic*, New York: Basil Blackwell, 1986, p. 26.
[51] Ibid., § 44.

have over all things,"[52] a right that makes the human being the "lord over all of nature."[53] There are no obstacles that the infinite free will is unable to break down and there are no territories that are precluded from its right of appropriation. Nature is transformed into something dead, worthless, and exploitable by infinite free will. *Absolute* private property, *absolute* power over things, *absolute* free will, *absolute* sovereignty, all belong to a unique constellation. It is with this absoluteness that Western modernity goes to war against other legal systems. This is the bare conceptual framework of the modern concept of property. And it is on this proprietary structure that opposing political forces quarrel all the time. On the one hand, state intervention is invoked to regulate the right of ownership over nature and natural resources; on the other hand, the limitation of state intervention is denounced as it is a dangerous disruption of the 'spontaneous' order of the market. These are two sides of the same coin and nothing really new emerges from the boring dispute between liberals and libertarians. Despite their opposition, they assume the same concepts of liberty and property.

To go beyond this debate, other categories are needed. These cannot be created out of thin air by inventing neologisms, rather they must be extracted from social practices and legal traditions that are incompatible with the trajectory of the dominant modernity. From this point of view, current social practices, such as the 2000 water war in Bolivia, and the past can provide a useful categorical arsenal and a counterpoint to the Western modern concept of property.

Omnia sunt communia. From Rights to Obligations

I began the previous section by quoting Locke's justification to kill a thief. Much earlier, Thomas Aquinas provided a good counterpoint: "in the case of need everything is for common (use) (*in necessitate sunt omnia communia*). Subsequently, it is not a sin to take another's property, (because) need has made it common property. […] if the need is so manifest and urgent as to require immediate relief with the things one has at hand (for example when a person is in some imminent danger that cannot be resolved in any other way), then it is lawful for a man to succor his own need by means of taking, either openly or

[52] Ibid., § 44.
[53] Ibid., § 37 Z.

secretly, another's property. This naturally is not theft or robbery (*furti vel rapinae*)."[54] According to natural law (*ius naturale*), which is the law conforming to reason, one who "has in overabundance is meant for the service of the poor," and has precise obligations to provide for the needs of humankind.[55] These obligations arise from the natural order established by Divine Providence. From this order conforming to *reason,* it follows that, in the event that the need is "manifest and urgent," it is permissible for the poor man to take "either openly or secretly another's property." And this, properly speaking, concludes Thomas Aquinas, "is not theft or robbery."

This conception presents itself as very distant from the modern Western conception of private property.[56] To shed some light on this alternative repertoire of legal categories relating to property, it may be helpful to delve deeper into medieval juridical material. In the 12th century, the Italian canon lawyer Huguccio of Pisa had already clearly expressed the problem. In the *Summa Decretum* he wrote that "those who in case of necessity (*per necessitatem*) [appropriate something of another person] they do not commit theft, because they believe or could believe that the owner would have given his permission."[57] Huguccio found an elegant solution capable of reconciling different legal systems. On the one hand, according to natural law, things are communal (*iure naturale omnia sunt communia*); on the other, the *Corpus Iuris Civilis* defines theft as the crime committed by someone who takes the possession of something of another, without the consent of the owner. Huguccio works on the notion of "consent" and interprets it in the light of an "urgent need of hunger"[58] In this case it must be admitted that the owner intends to follow the precept of the sharing of goods in case of need and does not want to be guilty of the death of the poor man. It follows that his consent must be taken as given because it is *rational* and conforms to natural law. What is *irrational* is the misrecognition of the principle according to which the earth was established in communion for all.

---

[54] Thomas Aquinas, *Summa Theologiae*, II, II, 66,7. http://www.logicmuseum.com/wiki/Authors/Thomas_Aquinas/Summa_Theologiae/Part_IIb/Q66

[55] Aquinas, *Summa Theologiae*, II,II, 66. See Marco Bartoli, "Theft in Case of Need: Reflections on the Ethical-Economic Lexicon of the Middle Ages" in *Journal for Markets and Ethics*, Vo. 6, No. 1, 2018, pp. 27-38.

[56] Gilles Couvreur, *Les pauvres ont-ils des droits? Recherches sur le vol en cas d'extrême nécessité*, Rome: Presses de l'Université Grégorienne, 1961; Warren Montag, "The Prisoners of Starvation, or *Necessitas dat legem*" New Formations, Vol. 89/90, 2016 pp. 12-29.

[57] Huguccio Pisanus, *Summa Decretum*, ed. by Oldrich Prerovský et alii, Città del Vaticano: Biblioteca Apostolica Vaticana, 2006, ad C. 12, qu. 2, c. 11, v. ex inopia. Cited in Bartoli, "Theft in Case of Need," p. 36.

[58] Huguccio, *Summa Decretum*, ad C. 12, qu. 2, c. 11, v. ex inopia.

If you read history from the Middle Ages to Locke and beyond through the lens of reverse teleology, it is easy to superimpose the categories of progress or development from one legal system to another. It is also easy to be persuaded of the superiority of the most recent model by showing how it has made a clean sweep of hierarchies, inequalities, and servile relationships, affirming in their place new and more universal principles of freedom and equality. It is easy to be fascinated by the Faustian beauty of infinite free will, which is not only free to limitless possession, but also to overcome and destroy everything that hinders the self-affirmation of the individual.

Modern political theorists and legal scholars have produced the self-representation of modernity by inventing the concept of feudalism as a polemical concept.[59] Reverse teleology is the conceptual framework that underlies the modern conception of history and historical time. It operates in Hegelian philosophy when it shows the necessary evolution of Christianity in the Protestant reform and cuts out and keeps silent about the alternatives to the Reformation. It operates in historiography when it defines the French Revolution's skid off course as "derapage" (François Furet). It continues to operate when it defines fascism as a historical parenthesis (Benedetto Croce). This reverse teleology puts past events in order in accordance with an already known and normatively accepted outcome. From this historical perspective, which is already an implicit philosophy of history, it is always possible to outline a progress from primitive forms of common ownership to more rational property relations. A development from a pluralistic legal system and a content notion of law in the Middle Ages to a monistic and non-content conception of law in modernity. If, on the other hand, attention is paid to the compresence of historical layers and their tensions in the present and in the past, it is possible to see how the legal tradition of common ownership arrives at the German peasant war of 1525, at the formula "omnia sunt communia" voiced by Müntzer, and the natural rights of the parish defended by Thomas Spence in the 19th Century.[60]

If I have referred to the Middle Ages, it is because medieval examples allow us to recall categories useful for understanding proprietary relationships not based on the public/private binary. The medieval notion of *dominium utile* refers to a different conception

[59] Davis, *Periodization & Sovereignty*, p. 7 and 26.
[60] Spence, *Pigs' Meat*, p. 60: "what we cannot live without we have the same property in as our lives."

of property, which is shared according to the different degrees of utility and use. [61] This notion contained a non-anthropocentric and non-individualistic anthropology that, first of all, made reference to a shared property, according to the different degrees of utility and use. Second, the reference to *utilitas* meant a limit and a content to the property relation, that could not be understood as an abstract one. Medieval conceptions are articulated in terms of use, of relations of use with respect to what is common, and of relations between users. In other words, if God is the owner, we are usufructuaries.[62] Hence the centrality of reciprocal obligations and limitations. The duty to take care of what is common, namely land, water, and resources, rather than the right to appropriate them. It could be said that the medieval notion of property could be understood as a system characterized by upward and downward reciprocal obligations, where priority is not given to the individual, but to the complex of relationships between individuals and the thing.[63]

=>

On the basis of the assumption that "things are communal by natural law (*iure naturali omnia sunt communia*)," Huguggio could claim that "all things must be shared with the impoverished in times of need."[64] It is in this context that the right of necessity is outlined (*ius necessitatis*). This must be distinguished from the case of necessity that gives rise to the "right of emergency (*Notrecht*)," which Hegel understood as the right to preserve the personal living existence, even in the event of a conflict "with the rightful property of someone else."[65] The modern reasoning behind the "right of emergency" hinges on the juridical subject who, if in mortal danger, has the right to self-preservation, even if this means violating formal legal rights or the property of others. In some cases, this grammar reaches the present day. An example can be found in Article 54 of the Italian penal code: "Anyone who has been forced to commit an act due to the need to save himself or others from the real danger of serious harm to one's person, a danger not voluntarily caused by him, nor otherwise avoidable, is not

---

[61] Paolo Grossi, *La proprietà e le proprietà nell'officina dello storico*, Napoli: Editoriale Scientifica, 2006, pp. 70-74.
[62] Couvreur, *Les pauvres ont-ils des droits?*, p. 138.
[63] Aron J. Gurevitch, *Categories of Medieval Culture*, London: Routledge & Kegan Paul, 1985, p. 254: "Strictly speaking, the concept of 'private owner' cannot properly be applied either to the medieval landlord or to his vassal." The landowner, continues Gurewitch, was not 'possessor' but 'holder' (*tenens*), and "the rights of the tenants were always limited." Feudal ownership must be understood as interpersonal form, not as a reified form of social relations.
[64] Huguccio, *Summa*, Praefatio Decreti, p. 11. Cited in Bartoli, "Theft in Case of Need," 36
[65] Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right*, ed. Allen W. Wood, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), par. 127.

punishable, provided that the fact is proportionate to the danger." It is on the basis of this article that a sentence issued on May 2, 2016, by the highest Italian Court of Appeal annulled a conviction for theft imposed on an immigrant who had stolen small quantities of food to meet the need for nourishment.[66]

This modern meaning of the *ius necessitatis* is found in Grotius, who mentions this in connection with the right to take what is necessary for one's survival.[67] But the difference is already clear to Grotius: there is no obligation to the poor man, as occurs in the medieval legal system, but a "benevolent exception." Natural rights and laws of nature have been entirely requalified by the modern political apparatus. The former is the liberty to use one owns power for the preservation of one own life, the latter can be found out of reason, "by which a man is forbidden to do, that, which is destructive of his life."[68] In the early modern age, natural rights were redeveloped in terms of the expression of individual subjective freedom, that is, something very different from natural laws based on reciprocal obligations. In medieval texts, *necessitatis* does not suspend existing law. Because such a suspension is impossible. It is the action of the poor man in a state of necessity that gives reality and implementation to the natural law according to which things are communal (*iure naturali omnia sunt communia*). This is not a right to steal. That would still be a modern Western way of expressing the legal structure in terms of the relationship between the right of the poor man and the thing. The relationship is interpersonal and situated in a precise space-time context: the action of the poor man in a state of necessity activates the obligation of the rich man to share with the poor man. From this obligation follows the right of the poor man to take what is necessary. The whole argument focuses on duties and obligations. The rich man has duties and his refusal to assist

---

[66] The Court affirmed that "the condition of the accused and the circumstances in which the possession of the goods took place show that he took possession of that little food to meet an immediate and unavoidable need to feed himself, acting in a state of need." https://www.giurisprudenzapenale.com/2016/05/16/rubare-fame-non-integra-delitto-furto/. This ruling attracted the attention of the US press: Gaia Pianigiani and Sewell Chan, "Can the Homeless and Hungry Steal Food? Maybe, an Italian Court Says" *New York Times*, May 3, 2016.

[67] Hugo Grotius*, De iure belli ac pacis* (1625), Book II, Chapter 2, Section 6, 4, Eng. *The Right of War and Peace*, Indianapolis: Liberty Fund, 2005, pp. 434-5: "Even amongst theologians it is a received opinion, that whoever shall take from another what is absolutely necessary for the preservation of his own life, is not from thence to be accounted guilty of theft (*furtum non committere*): of which rule the reason is, not that which some allege, that the owner of the thing is obliged to give so much to him that needs it, out of charity (*caritatis regula rem egenti dare tenetur*); but on this, that all things must be understood to be assigned to owners with some such benevolent exception, that in such cases one might enter again upon the rights of the primitive community." Among the theologians to whom Grotius refers there is also Thomas, II.II.66.7.

[68] Hobbes, *Leviathan*, p. 86.

the hungry man must be considered murder -- a crime certainly more serious than theft.[69] In the medieval conception, the just life—not life itself-- is considered to be the supreme good,. That is, a just life within a just order. And for this reason, the *ius necessitatis* does not only safeguard the existence of the poor man, but it is the call to a system of reciprocal obligations in order to restore the just order where the existing one leaves the poor man to starve. This order is to be considered, at least temporarily, unjust. If God gave life to the poor man, the rich man cannot take it away by denying him food and provisions. The *ius necessitatis* calls for a deeper legal layer to be restored.

It is to this deeper layer that Thomas Müntzer made reference. The cry "omnia sunt communia" evokes at the same time a historical layer of customs and traditions, the biblical reference to the common use of the Earth, and the necessity to intervene in the present situation. The *ius necessitatis* brings to light this deeper layer of natural rights. The historical-legal context of the peasants' war of 1525 is no longer that of Thomas Aquinas. A new legal system, based on individual property rights and the progressive concentration of power in the hands of the state, seeks to impose itself by synchronizing other legal systems. In this clash, Müntzer evokes the *ius necessitatis*, still implicated in the formula "omnia sunt communia," but it no longer refers only to the poor and the hungry. Rather, it refers to a clash between legal systems. A clash that is generating a new type of poverty and power.

Incompatible legal systems

It is instructive to delve into the clash between legal systems and forms of life. "Law arises not from innovation but from custom." This is how peasants expressed their reaction to legal change in 1525.[70] This statement cannot be understood through the superficial binary categories of innovation and conservation. The declaration of the peasants must be included in a specific battlefield in which a new emerging legal system used Roman law as a tool for the demolition of the feudal system, the authorities of the estates, customs and traditions; for the definition of a new legal order consisting of individuals instead of estates, guilds and corporations; for private property instead of forms of common ownership; and for the

[69] Couvreur, *Les pauvres ont-ils des droits?,* p. 82.
[70] Peter Blickle, *The Revolution of 1525*, Baltimore and London: The Johns Hopkins University Press, 1981, p. 34.

concentration of state political power instead of its dispersion in a plurality of intermediate bodies. This innovation was supported by the forces of the Reformation against the authority of the Catholic Church, by the princes against customs that limited their power, by a nascent bourgeois class that claimed its freedom to produce and sell goods beyond the limits imposed by the authority of the guilds. This innovative process was opposed by part of the nobility in defense of their privileges and authority. Numerous proverbs expressed this perspective: "Keep hold to the old," "Customs does more than experts' lore."[71] But the same process, and the privileges of the nobility, were opposed by peasants and artisans. Another document clarifies their perspective in the battlefield: "Everybody cries 'old customs' nowadays! But we do not say only 'according to old custom.' We say 'according to *right* custom.' A thousand years of doing wrong do not amount to a single hour of doing right."[72] When peasants and artisans referred to old customs, they did not do it to freeze an existing order, but to modify it "according to *right* custom." Their reference to a *just* order to be restored had a twofold origin. On the one hand, many of their petitions could not be supported by documentary proof capable of giving legal validity to a custom. In fact, it was difficult to prove the existence of a custom based on long duration in the *past* in the absence of a *present* document. The new legal and political order privileged not only written law, but also and above all the temporality of the present over the past and historical continuity. Hence the recourse to another authority - that of God and the sacred texts - capable of opposing not only the power of princes and the new legal order. Thus, and this is the second part of the matter, the reference to justice and a transcendent divine order introduced a dynamic element in the understanding and implementation of the law. These are the terms of the conflict. On the one hand, the social forces that supported the new order supported centralization and concentration at the summit of political power, dispersion and disintegration of authorities at the ground level. On the other, peasants and artisans worked with and reconfigured an alternative conception of the law inspired by the preservation of a concord between the law, customs, and the principles of justice that governed the world.

This is a clash that characterized European history in the 16th century. It can be

---

[71] Gerald Strauss, *Law, Resistance, and The State*. The Opposition to Roman Law in Reformation Germany*, Princeton: Princeton University Press,* 1986, p. 105.

[72] Strauss, *Law, Resistance, and The State*, p. 105.

observed closely in France. At the center of François Hotman's work, *Franco-Gallia* (1573), there is the clash between incompatible legal systems. As a first approximation, it is the clash between the aristocracy and the crown.[73] Claiming that the Franks invaded the Gaus as Germans by imposing their right of conquest on the defeated Romans, Hotman defended the Germanic origin of the freedoms and authorities of intermediate bodies and the aristocracy as limits to the new absolutist claims of monarchical power, which instead relied on Roman law. The clash was between legal systems: on the one hand, the concentration of monarchical power of Roman origin; on the other, the aristocratic counterpowers of Germanic origin. The latter, in Hotman's work, were the heirs to the victors of the conquest of the Gaus, while the monarchy and Roman law represented the defeated past.

This clash of legal systems can be dated as early as the beginning of the 14th century, when the nobility reacted to Philippe IV's plan to form centralized, royal institutions with the Estate's authorization to meet whenever they wished without new royal authorization, and to make use of force and defend communities from royal seizures.[74] It is in this clash that Roman law penetrated into the South of France. A new reading of Roman law provided by the school of Bologna produced the maxim, which was already widespread in the 14th century, "rex in regno suo est imperator superiorem non recognoscens," with which the jurists claimed for the sovereign the same rights that Roman Law attributed to the emperor. In this clash, the aristocrats' defense of their own authorities and counterpowers took the form of an attack on Roman law and Romanity in general. Hotman, in another text, *Antitribonian* (1567), attacked the editor of Justinian's *Digest* and affirmed the inadequacy of Roman law to regulate the French juridical order. To emphasize the extraneousness of Roman law, Hotman resorts to an interesting colonial parallel: the French juridical order, articulated in "seigneurial rights, direct justice," would be as extraneous to Roman law as the lands of the New World inhabited by the savages of America (*sauvages de l'Amerique*) would be to a foreigner who has just set foot there.[75] In drawing this parallel, Hotman captured a kernel of truth in a shell of fiction: the modern resuscitation of Roman Law operated in both the internal colonization of Europe and

---

[73] It is the story told by Michel Foucault in *Society must be Defended*, New York: Picador, 2003, pp. 115-140.
[74] Justine Firnhaber-Baker, *The Jacquerie of 1358. A French Peasants' Revolt*, Oxford: Oxford University Press, 2021, p. 35.
[75] François Hotman, *Antitribonian*, Paris: Ieremie Perier, 1603, p. 36: https://gallica.bnf.fr/ark:/12148/bpt6k6253054j/f61.item.texteImage

its colonial expansion.

The anti-Romanistic attack in anti-absolutist circles took different forms. In the 16th century, Guillame de Postel came to reject the Latin origin of the French language.[76] Montesquieu gave geographical characteristics to the contrast between legal systems, contrasting the virtuous, modern peoples of the north -- "our Fathers, the ancient Germans"[77]-- with those of the south, affected by Sirocco which produces a universal weightiness and slowness.[78] This opposition between north and south mirrors that between *Pays de droit coutumier* of the north and *Pays de droit écrit* in southern France, where Roman Law was stronger.

However, this picture of warring legal systems would not be complete without the peasant and artisan revolts that dotted late medieval France. Urban rebellions and jacqueries were not a tool of the monarchy against the nobility. Understanding that monarchy and popular rebellion worked "hand in glove"[79] means not seeing the field of possibilities opened up by those insurgencies. Many revolts were triggered by an increase in taxes levied by the nobles against customary fixed rates. At the same time, many of those revolts, as in the case of the provost of the Parisian merchants Étienne Marcel, opposed royal power by claiming the authority of local and communal structures, the right of the Estates to meet whenever they wished, and a "confederation of good cities."[80] Reducing these conflicts to a clash over the strengthening of the king's power at the expense of the power of the nobles, as Foucault does, prevents one from seeing another deeper level of tension, that between legal systems where artisans and peasants defended customary systems in which relationships of personal dependence coexisted alongside freedom, obligations, and local self-government. From this perspective, it should come as no surprise that many of these revolts spoke a language closer to that of the nobles than to that of the king. But this proximity ought not to confuse us. The popular uprisings challenged *both* the royal concentration of power and the nobles' privileges, and opened up a third legal and political possibility. This third possible trajectory is incompatible with both the royal and the aristocratic poles of opposition.

---

[76] On this see Roberto M. Dainotto, *Europe (in Theory)*, Durham and London: Duke University Press, 2007, p. 78.
[77] Charles de Montesquieu, *The Spirit of the Laws,* Cambridge: Cambridge University Press, 1989, p. 243.
[78] Dainotto, *Europe (in Theory)*, p. 73.
[79] Foucault, *Society must be Defended*, p. 231
[80] Firnhaber-Baker, *The Jacquerie*, p. 35. F.T. Perrenes, *Étienne Marcel prévot des Marchands (1354-1358)*, Imprimerie Nationale, Paris, 1874 p. 345

Historically, those who have ventured down this trajectory have paid a high price. The victors' archives describe the insurgents as a "band of brigands," "savaged madness" spirited by "diabolical instinct," and "heretics."[81] These are the terms used in the documents of the time. The political theory of the victors mimicked their language by defining as "savage beasts"[82] those who, by defending another legal system or operating according to other, older customs, violated the new proprietary order. These "savage beasts" were not the nobles whose cause Hotman advocated, but the popular strata who defended and reconfigured other political and social trajectories.

The new conception of the law, embraced by a new political and social class in the internal and external colonization of European soil, found in the reinvention of Roman law a powerful tool for consolidating new property relations *against* customs and common possession of the land, for concentrating power *against* the authority of the estates. This bellicose process of affirming a new legal system found an early theoretical formalization in the Hobbesian maxim *auctoritas non veritas facit legem*. It found a constitutional formalization in the outcome of the French Revolution. But this same process, having severed the link with tradition, needed new strategies of legitimation that were built through the rewriting of the past. Thus, modern historiography was born. It was itself a polemical instrument functional to legitimizing the nation-state. This is how history was born: as a discipline to form an army of guards for the existing order through the control of the past. Those who control the past also control the present. And the future.

The modern use of Roman law

The reinvention of Roman law, which from the 17th century would be known as *usus modernus pandectarum*, the modern use of the Digest, was immediately a tool to counter the decentralization of the Holy Roman Empire with a new unity and sovereignty in the hands of the king as exempt from the emperor's *dominium mundi*. It is on the basis of this new Roman law that the fundamental grammar of the new property relations, of a new conception of the

[81] Samuel K. Cohn, *Popular Protest in Late Medieval Europe: Italy, France and Flanders, Selected Sources Translated and Annotated*: Manchester: Manchester University Press, 2004, p. 99, 101.
[82] Locke, *Two Treatises of Government*, par 11, p. 104.

legal subject, and a new family law is forged. The reinvention of Roman law accompanies the entire genesis of Western modernity and is the basis of the legal structures of modern colonialism.

Many terms, absent in Roman law, were created between the 18th and 19th centuries to justify European colonial policies.[83] It was during the 19th century that the term *res nullius* came to designate things that are open to occupation. A similar trajectory takes place for other terms. In the context of the occupation of Africa, the concept of *territorium nullius* was created which, unlike *res nullius*, referred both to local forms of local ownership (*dominium*) and to the presence or absence of territorial sovereignty (*imperium*). In this way, the concept of European sovereignty was projected onto other legal contexts in which 'barbarian or semi-barbarian peoples' could have forms of ownership; however, being devoid of state-European type territorial sovereignty, they were susceptible to occupation. At this point, for thinkers such as John Stuart Mill or statesmen such as the French Prime Minister Jules Ferry, local populations could be defined as an "inferior race" and colonization could be qualified as a "duty to civilize."[84]

The history of the term *terra nullius,* which only became shorthand for the doctrine of occupation in the 20th century,[85] is similar. This term, too, apparently extracted from the arsenal of Roman law, "is not a notion from classical Roman Law."[86] In Roman law, occupation (*occupatio*) included abandoned things taken during a war (*res hostilis*), or wild animals, birds, and fish (*in nullius bonis*), but "land itself was not included."[87] It was during the conquest of the new world that Europeans developed rules on the attribution of newly discovered lands -- a legal operation for which the medieval categories and local customary

---

[83] For instance, not only does the term *res nullius* not exist in Roman law, but neither does *terra nullius*. Andrew Fitzmaurice, *Sovereignty, Property, and Empire, 1500-2000*, New York: Cambridge University Press, 2017, p. 51: "The term 'res nullius' is absent, however, in the Roman law discussions of occupation."

[84] Fitzmaurice, *Sovereignty, Property, and Empire*, p. 275.

[85] The term *terra nullius* was still absent in the 18th and 19th centuries, while in 1888 the Institut de Droit International began discussing *territorium nullius*: "All regions which do not find themselves effectively under the sovereignty or the Protectorate of one of the States which form the community of the law of nations, no matter whether this region is inhabited or not, will be considered as *territorium nullius*." See Andrew Fritzmaurice, "The Geneaology of *Terra Nullius"* in *Australian Historical Studies*, Vol. 38, 2007, p. 10-11. In this way the modern colonial doctrine of international law reified the modern Western concept of sovereignty as a condition for not being colonized.

[86] Randal Lesaffer, "Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription" in *European Journal of International Law,* Vol. 16, No. 1, 2005, p. 40.

[87] Lesaffer, "Argument from Roman Law," p. 49.

laws were inappropriate. The transformation of the new lands into objects of conquest and occupation required a redefinition of the available legal paraphernalia: the concept of occupation, redefined on the basis of terms coming from different legal contexts, was extended to wasteland, which is such in that it is uncultivated, populated by nomadic hunters without imperium or jurisdiction. It was a reinvention of Roman law that took shape in, and from, the clash with other legal structures.

These colonial legal operations gave rise to the modern concept of *terra nullius* which comes to denote the lack of law and sovereignty together, even if the land is inhabited. The projection of Western proprietary and political forms onto other legal contexts has allowed for a colonial temporalization of the entire planet. The embryos of this temporalization are already present in Locke's attack on the common forms of land ownership. He wrote: "[t]he wild Indians --in north America-- don't have fences or boundaries, and are still joint tenants of their territory."[88] As if the geographical reference to distant America were not enough, Locke adds an anthropological qualification –"wild Indians"— and a temporal one, i.e. the term "still" indicates that those forms of common possession are an anachronism and the commoners are comparable to "wild Indians." Locke ranks "the civilized part of mankind, who have made and multiplied positive laws to determine property," at the apex of the historical timeline and the "wild Indians" who own the land in common in some infancy of history.[89] This is the work of temporalized and temporalizing concepts. A new conception of historical time allowed a twofold operation to be carried out. On the one hand, it allowed certain political and social forms to be defined as anachronistic; on the other, it allowed them to be temporalized, so that pre-state political forms, forms of common property, and populations deemed 'primitive' could be made inferior, dominated, and synchronized in the name of the progress of civilization.

To deal with the ideology inherent in reverse teleology, we need a historical method capable of decolonizing the categories of dominant historiography and, in this way, of doing justice to the past and the present. I am not arguing that Roman law did not know property law or that the Roman social structure was not characterized by exclusions of various kinds.

[88] Locke, *Second Treatise*, par. 26, p. 111.
[89] Locke, *Second Treatise*, par 30, p. 112-113.

Ancient Roman law contemplated a plurality of relations with the thing (*res*)[90] and property law was defined by a multiplicity of limitations and balances between the individual, the community, and the *res*. But property relations in Roman law are something very different from the right to dispose of one's property at will. As already seen, the notion of property as *ius utendi et abutendi* is a recent invention in European history. Roman law, i.e., Roman legal texts, must be understood in the context of Roman society, that is, a set of extra-legal institutions clustered around the narrowness of the law.[91] The silence of Roman law on right ritual and right conduct does not indicate their absence. Only in the modern age has this silence been transformed into lack, and this has in turn been transformed into active vacuity, i.e., a constructed vacuity through the dissolution and destruction of customs and existing legal traditions. Thus arises the modern use of Roman law weaponized against pre-existing legal structures rooted in the social.

It was only with the modern depoliticization and atomization of the social that the legal texts began to operate as tracks and traffic lights in an otherwise chaotic society of competing isolated individuals. This society, founded on the destruction of the pluralist juridical order of the Middle Ages, produces new binary oppositions through which it tries to give itself some precarious stability. Medieval society was not without exclusions, but these operated in a different, more fluid way than modern binary oppositions. An example may help. From medieval texts we learn that women were excluded from public office, but in practice, widowed women could become members of a guild. In some places, women were members and played prominent roles in the fraternities -- sometimes they were among the founders and co-authors of their regulations. There were even some cases, albeit exceptional, in which women voted. In rural areas, spinsters and widows attended village assemblies.[92]

---

[90] Things like wine, bread, a house could belong to individuals (*res in patrimonio*); things like harbors could belong to the Roman people (*res publicae*); things like tombs and city gates were under divine law (*res divini iuris*). Things like air, water, the sea and coastlines were common property of all people (*res communes omnium*). These types of things were under the ownership of neither the State nor the people. Anyone could make use of them. To these distinctions, we must also add the distinction between physical things (*res corporals*) and intangible things (*res incorporales*), whereby the former category includes things like food, clothing, or land, while the latter has to do with inheritance, usufruct, and obligation. The Roman *res* was not an object, but a process that involved a qualification of whatever may have been the subject of controversy. See Yan Thomas, *La valeur des choses. Le droit romain hors la religion*, Ehess: Paris 2002.

[91] James Q. Whitman, "Long Live the Hatred of Roman Law!" *Rechtsgeschichte*, N. 2, 2003, pp. 40-57. ***

[92] Shulamith Shahar, *The Fourth Estate. A History of Women in the Middles Ages*, London and New York: Routledge, 1983.

The participation only of widows in the assemblies is explained because in the Middle Ages it was the household and not the single individual that counted as a unit. Only when the authoritative unity of the household was shattered into single private individuals were the lines of exclusion also redrawn around the new configurations of public/private and male/female. In the Middle Ages, the lines of exclusion zigzagged around a plurality of units, houses, and guilds.[93] From here we understand the presence of a multiplicity of exceptions characteristic of medieval pluralism. If the function of the lines of exclusion of the modern state is to give stability to the social, then the medieval lines revolved around an already constituted and articulated plurality of units. It is not a matter of choosing between legal systems, but of making visible the tension that makes real alternatives to the present conceivable.

What I maintain, through these examples, is that there is no transition from the pluralist legal structure of the Middle Ages to the modern one. There is a war between incompatible legal systems. The reinvention of Roman law, the modern concept of individual freedom, formal equality, the notion of national sovereignty, private property, and modern constitutions have all operated as legal and theoretical weapons in this long war. From this perspective, the numerous insurgencies that have dotted all of modern history can be read as episodes in this long war between different legal systems. In this war, all the elements involved influence and mutate each other. The temporal trajectories in tension with each other should not be understood as distinct elements located at the extremes of a tension, but as open processes that are configured *within* the tension. When colonial violence collides with other legal systems and seeks to synchronize them by imposing a new political, legal, and proprietary system, it is not only the colonized systems that change, but also those of colonization. This is in no way a matter of romanticizing the past or looking back on it with nostalgia. Instead, it is about looking at the past from the perspective of the insurgents, like the Communards of 1871 when they resurrected "the communal idea pursued since the12th century."[94] During the Paris Commune, instead of expropriating ownership, the Communards worked on a redefinition of property relations in relation to use. Artists defined

[93] "The artisanal world of the Old Regime could not exclude women effectively or systematically." See Judith G. Coffin, "Gender and the Guild Order: The Garment Trades in Eighteenth-Century Paris." *The Journal of Economic History* 54, no. 4 (1994), p. 780.
[94] "Manifeste du Comité des Vingt Arrondissements", in *Le Cri du Peuple*, 27 March 1871.

theaters as means of popular education and asked "to transform the system of private ownership and privilege into a system of co-operative associations wholly in the hands of the performers."[95] The issue concerned the use of theatres, the work of the actors, what must be staged, how it must be staged, and the quality of the reciprocal relations between owners, performers, and the public. Restoring proper use was a matter of *democracy*. The terms commons and property are not in opposition and are not mutually exclusive. Rather, the term commons should be understood as a democratic practice based on the *relations of use* between objects and a plurality of users who, in addition to having rights, have reciprocal obligations. In this framework, property is not ownership, but the expression of the *proper* use relation in a community of users. Quarrels and conflicts continue to take place, but they concern the qualification of what is *proper use* instead of ownership. In the case of water, but also of land and forests, the community includes the entire world. And not only the present generations, but also those to come and those in the past, who have handed over to the living what they have to take care of. The network of obligations extends spatially and temporally, to include, past, present, and future. Marx had grasped these implications when he wrote that in a different proprietary system, "private ownership of the globe by single individuals will appear quite as absurd as private ownership of one man by another. Even a whole society, a nation, or all simultaneously existing societies taken together, are not the owners of the globe. They are only its temporary possessors, its usufructuaries (*Nutznießer*), and, like *boni patres familias*, they must hand it down to succeeding generations in an improved condition."[96] What needs to be emphasized is that the nature of ownership does not change by changing the owner, who may be an individual, a household, a community, or the state. The owner, whoever it may be, remains the subject who has title and right to the object possessed. Putting use relations at the center means giving priority to the *res* and to the relations between users and *res*. It means reasoning in terms of reciprocal obligations that requalify the notion of property. It is in this way that the modern absolute right of the subject over things gives way to the *proper use* of what is common. It is the democratic practice that makes it possible to undo the demarcation that has divided the *dominium* into a monopoly of the public power of

[95] 19 May 1871, in Bourgin and Henriot (ed. by), *Procès-Verbaux de la Commune de 1871*, Vol. 2, Paris 1945, pp. 426, Eng. in Edwards, *The Communards*, p. 152.
[96] Karl Marx*, Capital, Volume 3*, in *MECW*, Vol. 37, 1998, p. 763.

the state, on the one hand, and absolute individual private property on the other.