

The Common Good in Common Goods: The Decommmodification of Fundamental Resources through Law



GÖTEBORGS UNIVERSITET
HANDELSHÖGSKOLAN

Akademisk avhandling

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av

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This dissertation will be presented at Gothenburg University and publicly examined at the Conference Centre Wallenberg, Medicinaregatan 20 A - Europa Gothenburg, on the 9th of June 2020, at 10:00 for the degree of Doctor of Laws. The examination will be conducted in English.

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Abstract

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This dissertation is divided into three parts. Part I analyzes the Commons as a post-capitalist strategy accomplished through law by developing an alternative social theory of the market as a social institution. The social theory developed situates the actual, historical and potential, future roles of the commons within larger context of epochal shifts in historically-specific social relations critiquing the mainstream view of methodological individualism. Within this frame, it develops an analysis for re-embedding the market through commons as “commons property institutions,” a property institution where multiple entitlement holders hold the entitlement to use, with none having the entitlement to exclude others within the commons community, and none having the entitlement to transfer at market rate outside of the community. The project of re-embedding the market through commons property institutions (CPIs) unites the work of Elinor Ostrom (building on John R. Commons & Wesley N. Hohfeld) on the commons, and the legal foundations of the economy more generally, with the social institutional analysis of the market of Karl Polanyi, Robert Brenner and Ellen M. Wood, and the legal institutional analysis of the market of the American Legal Realists (Robert Hale & Morris Cohen). CPIs throughout are presented as one possibility in a spectrum of institutional options, beyond market and state, available for experimentation in non-market, collective, democratic forms of organizing the allocation, production and distribution of specific fundamental resources through law. In Part II, the social and legal institutional analysis of the market developed in Part I is then analyzed in view of the central schools of legal theory: legal formalism, the positive social sciences, legal realism (American and Scandinavian), Law and Economics, Critical Legal Studies and Alternative Legal Dogmatics (Finnish/Swedish). A “theory transparent” approach to law is promoted that integrates: theory (legal theory, socio-legal theory, and social theory), purpose and values into the analysis of law and fact. This “theory transparent approach” is then used to construct and explain the critical left project at the center of this dissertation which asks: how can commons property institutions (CPIs) best support the purpose of the *decommodification & democratization* of fundamental resources through law? Part III analyzes this question in the context of one fundamental resource, housing, and comparatively evaluates different non-market, collective and democratic forms of housing like the housing cooperative and community land trust (CLT). This section is aimed at offering a practical tool kit for citizens, activists, and jurists (focused on the US context) to decommodify and democratize housing through CPIs by disaggregating and recombining different elements of associational law and property law in constructing optimal CPIs towards those ends, and a specific proposal for how to scale, entrench, and generalize limited equity for all (not only for those of low and moderate income) through the CLT model.

Keywords: commons, common goods, shareable goods, legal theory, social theory, socio-legal theory, property theory, critical legal theory, critical approaches to law, post-capitalist approaches to law, post-marxist approaches to law, post-liberal approaches to law, legal foundations of the market, embedding the market, strategic decommodification, decommodification, democratization of the economy, equitable access to resources, social property relations, housing policy, housing law, third-sector housing, shared limited equity, community land trusts, housing cooperatives, baugruppen, bostadsrätt, resource specific analysis, economic analysis of resources, neoliberalism.

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