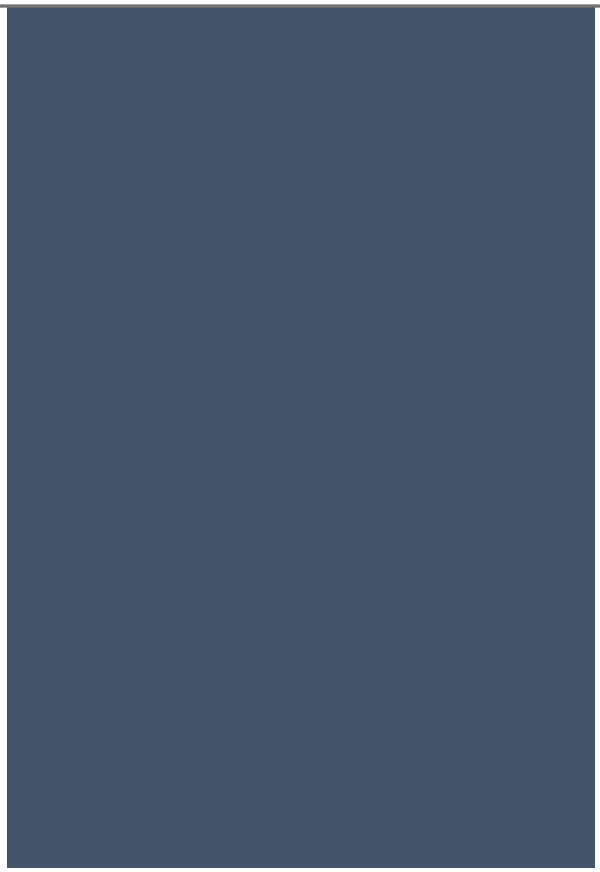

Comparative Law Review

2019

ISSN: 2983 - 8993

COMPARATIVE LAW REVIEW
The Comparative Law Review is a biannual journal published by the
I. A. C. L. under the auspices and the hosting of the University of Perugia Department of Law.
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Comparative Law Review is registered at the Courthouse of Monza (Italy) - Nr. 1988 - May, 10th 2010.

COMPARATIVE LAW REVIEW VOL. 10/1

RETHINKING THE NEXUS OF LAW, SPACE AND JUSTICE: PROTECTING THE PROPERTY INTERESTS OF THE POOR IN THE LATE CAPITALIST CITY

Veronica Pecile

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This paper follows up on an article entitled 'La tutela degli interessi dei poveri nella città tardo-capitalista', part of a volume collecting the proceedings of a conference organised at University of Ferrara, Department of Law in October 2018. Its aim is to offer a theoretical framework as well as an array of legal mechanisms protecting the interests of the urban poor in the late capitalist urban context. After introducing touristification as a widespread mode of value extraction from contemporary cities, the approach of Critical Legal Studies is taken into consideration, as it allows to frame law as a battleground for social conflict and urban space as a scenario in which it is possible to reclaim a common property interest of the have-nots. The following section includes a set of legal mechanisms available in private, public, and hybrid private-public law, which can be used to protect the property interests of the poor. In the conclusion, the potential of urban planning as an arena in which the urban poor's prerogatives can shape policy- and law-making is investigated through the analysis of a case study.

I. INTRODUCTION: TOURISTIFICATION AS PARAMOUNT MODE OF CAPITALIST ACCUMULATION IN CONTEMPORARY CITIES

Among the modes of capitalist accumulation opposed by social struggles in the current conjuncture, touristification stands out for its frequent adoption by local élites as a privileged economic model to be implemented in urban contexts. This process takes place at two levels: from a discursive point of view, a narrative in support of a kind of urban transformation that prioritises the demands of investors and tourists is supported, to the detriment of other users' needs; from an operational point of view, urban scenarios are spatially reorganised in ways that materialise the requests of the real estate and tourism sectors, ultimately leading to the expulsion of the most disadvantaged users to the urban outskirts.[1]

[1] S. Stein, 'Il turismo. Un'ideologia e una strategia di accumulazione', in L. Tozzi (eds), *City Killers – Per una critica del turismo*, Roma: Libria/Campo, 25–32 (2020).

Italian cities were heavily struck by the 2008 economic crisis, which was followed by a widespread promotion of tourism-based urban economies by local élites as a way to cope with the consequences of recession. In these scenarios, the form of living of the urban poor has often become the main object of capitalist accumulation: especially in Southern Italy, the daily practices of the popular classes inhabiting the city centres have been transformed into the core of cities' attractiveness for tourists and real estate investors. Hence, urban poverty has been either removed by historic neighbourhoods – to transform the latter into spaces of consumption and sightseeing – or opportunistically exposed by local élites for the sake of folklorisation – extracting value from the inhabitants' 'authenticity'.[2]
The aim of this paper is to investigate how law can be helpful in protecting the property interests of the poor in the current context of increasingly touristified cities. In the first part, I will turn to Critical Legal Studies as a theoretical background allowing to conceptualise urban space as battleground among different property interests, in which the balance of power relations can be shifted in favour of the urban poor through the adoption of legal arrangements taking into account their prerogatives. In the second part, I will outline an array of legal mechanisms that are available both in private law and in public law to protect the property interests of the urban poor, also suggesting an emerging hybrid legal realm at the crossroads between private and public law. Finally, in the last section I will look at urban planning as a significant arena for social struggles aiming at influencing the law- and policy-making processes shaping urban space.

II. PROTECTING THE URBAN POOR'S PROPERTY INTERESTS: THE APPROACH OF CRITICAL LEGAL STUDIES

The identification and protection of the urban poor's property interests is a useful tactic to oppose touristification and other processes of capital accumulation extracting value from urban contexts. Recent scholarship in legal geography sheds light on the legal tricks adopted by the urban poor to build a 'common' proprietary claim over the urban space able to challenge the hegemony of public-private proprietary claims. In particular, Nicholas Blomley analyses the case of a community of vulnerable subjects in Vancouver which, by virtue of a long-standing custom of collective use of spaces, reclaimed the whole area of a popular neighbourhood – streets, parks, squares – as a political and moral commons, justified and realised through a vocabulary of rights and justice.[3] Indeed, a legal framework capable of protecting the social fabric of popular neighbourhoods from the consequences of touristification should take into account the property interests of the poor as a priority. In other words, legal tools should be deployed in order to grasp the complex modes – exuberating from the strict fences of civil society and its normative practices – through which popular classes use and access urban space. As postcolonial scholarship reminds us, the vast majority of the world population

[2] V. Pecile, 'Gli urban poor ai tempi della turistificazione neoliberale delle città', in L. Coccoli (eds), *La voce dei poveri*, Roma: Ediesse (2021).
[3] N. Blomley, 'Enclosure, Common Right and the Property of the Poor', *Social & Legal Studies*, *17*(3), 311–331 (2008).

does not access the social and economic structures through formal channels; in fact, this large group does not fit into the predetermined parameters of Western civil society, and represents a 'political society' whose non-legal acts often represent the only option for survival.[4]

To imagine these legal tools, the tradition of Critical Legal Studies (CLS) is an extremely helpful point of depart. This intellectual movement developed in the United States in the 1970s and 1980s and grounded its analysis on the heritage of 1930s American legal realism and its critique of law. Challenging the perspective of formalism, predominant at the time, realists questioned the idea that law is an intrinsically consistent system, and shifted the focus on how law is actually deployed – on what judges 'actually do'.[5] This approach highlighted how each legal rule has exceptions and indeterminacies, and that it should be studied by thoroughly taking into account its objectives and effects on society.[6]

Decades later, CLS update realists' intuitions on the indeterminacy of the legal system and deploy them to conduct a critique of the relations between law and power. In particular, 'the Crits' highlight how law is made of tools, hardware, twines and nails, whose application is contingent to specific circumstances, and how it can be exploited to pursue different political projects, implying different allocations of resources in society. The language of law, then, is neither universal nor univocal: it can be used for radically different purposes than capitalist domination and subordination.

In such perspective – which strongly opposes orthodox Marxist approaches dismissive of law – all existing legal institutions can be reframed to allow wealth redistribution and social justice. Property is one of them.[7] The realist thought, and Wesley Newcomb Hohfeld in particular, had already disarticulated the conventional, monolithic notion of ownership into a 'bundle of rights' that can be distributed to a variety of subjects and are tied to different interests on the same thing or space. Property thus becomes 'a complex aggregate of jural relations' and is deprived of any substantive character.[8] What the CLS add to this theoretical move is a strong emphasis on the non-legal (moral, political, social) contents that fundamental legal conceptions such as property are infused with; there is an irreducible non-legal character of law, which forces us to pay attention on the socio-political consequences that jural relations produce. Law thus becomes the 'scene of conflict'[9], once the different stakes at play have been identified.[10]

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[4] P. Chatterjee, *The Politics of the Governed: Popular Politics in Most of the World*. New York: Columbia University Press, 2004.

[5] R. A. Shiner, 'Legal realism', in R. Audi (eds), *The Cambridge Dictionary of Philosophy*, New York: Cambridge University Press (1995).

[6] K. Llewellyn, 'Some Realism about Realism: Responding to Dean Pound', *Harvard Law Review*, *44*(8), 1222–1264 (1931).

[7] M.R. Marella, 'The Law of the Urban Common(s)', *South Atlantic Quarterly*, *118*(4), 877–893 (2019).

[8] W. N. Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning', *Yale Law Journal*, *26*, 710–770 (1917).

[9] P. Schlag, 'How to Do Things with Hohfeld', *Law and Contemporary Problems*, *78*(185), 185–234 (2015).

[10] D. Kennedy, 'The Stakes of Law or Halen and Foucault!', *Legal Studies Forum*, *XV*(4), 328–341 (1991).

The relational approach to property conceived as bundle of rights – in which property title and use can be disentangled, for instance – allows reimagining urban space as a fluid context in which different property interests – related to different possible uses of spaces – entertain a dialectic, at times clashing relation with each other. If we embrace the perspective of CLS, we can go as far as to argue that space and law coincide: our social life is permeated of jural relations in such a way that it is impossible to conceive an 'outside' to law. The latter is not, then, a technique crystallising existing power relations, even though it is often employed to consolidate the status quo; it is rather a 'battleground' in which conflict can be articulated.[11] The underlying presumption is that diverse property interests can insist on the same spaces, and which one prevails is an exquisitely political matter – it has to do with the contingent power relations. The crucial issue, then, is to analyse the different legal regimes from the perspective of the distributional effects they create in society. This line of investigation – in our case, concerning legal arrangements in the urban space – is much more relevant, both theoretically and politically, than other kinds of inquiry that could be carried out at its place: for instance, the one concerning the formality or the informality of legal arrangements adopted in different urban settings. The analysis of the distributional effects – or distributive analysis – rests on the idea that poverty and socioeconomic inequalities are not plagues affecting humanity as unavoidable 'facts', nor just negative externalities generated by the trajectory of late capitalism. Instead, they are the outcome of a specific set of institutional and legal arrangements adopted in specific political and historical conditions that are produced and reproduced globally, and which could be designed in different ways to allow radically different patterns of resources and wealth distribution in society.

III. LEGAL MECHANISMS TO PROTECT THE URBAN POOR'S PROPERTY CLAIMS

If, as CLS argue, 'there is no outside' to law, then it is possible to protect the urban poor's property claims by resorting to already available legal arrangements. What follows is a non-exhaustive list of mechanisms available in existing legal systems that exemplify how social struggles reclaiming the prerogatives of communities on urban spaces could immediately exert a counter-hegemonic use of law to pursue their aims of social justice. The first realm that can be considered is the one of public law arrangements. The Italian movement for the commons active after the 2008 economic crisis has extensively resorted to public law regulations in the attempt of building a collective model of self-government in occupied spaces. This tactic draws on the category of *beni comuni* famously conceived by the Rodotà Commission in 2007, and in particular on the idea that the commons are such because of their function – their use, which allows the exercise of fundamental rights in an intergenerational perspective – and not of their property title – which remains public or private, as established by the

[11] M. Xifaras, 'The Role of the Law in Critical Theory. The case of Property and the Commons (As a Commentary on the first chapter of Negri and Hardt's Commonwealth)', *Critique and Praxis 13/13* (2018), available online: http://blogs.law.columbia.edu/praxis1313/mikhail-xifaras-the-role-of-the-law-in-critical-theory-the-role-of-property-in-the-commons/

Italian Constitution.[12] Regulations for the shared management of the commons have been consistently adopted since 2014 in Italian municipalities, and they have been exerting an ambivalent function reflecting the malleability of law to diverging political projects and ideas of social organisation. In some cases, these regulations have succeeded in turning the political praxis of the movement into open, inclusive forms of self-government, fuelling the creativity of social struggles; in other cases, these instruments have been exploited by local administrations as a disciplinary tool to tame the movement for the commons and its radical critique of property and urban inequalities into bureaucratic frameworks.[13] These two diverging uses of public law regulations highlight how the commons as such do not automatically bear an emancipatory potential. Rather, this political and legal category remains open to different social and political conceptions, up to a point that it is possible to identify a clash between *conservative* and *transformative* commons: the former tend to create enclosed urban spaces and consolidate exclusive, formalised communities, whereas the latter foster the collective use and access to spaces by open, inclusive collectivities.[14]

An example of the former tendency is the Regulation for the participation to the government of the commons adopted in Chieri (in the province of Turin) in 2014, at the peak of the Italian mobilisation for the commons.[15] In this document it is established that communities taking care of spaces are the designated subject for the identification of the commons as such, and they can also be informal in nature. Hence, the belonging to a community of users has an open and non-codified character: it is not necessary for users to unite into any formalised group to be held responsible of the self-government of occupied spaces. [16]

An example of the second tendency is the 'Regulation on the collaboration between citizens and administrations for the care, regeneration and shared management of urban commons' promoted by the Labsus (Laboratory for Subsidiarity) association since 2014 and adopted in about two hundred city administrations at the national level.[17] This initiative has the aim of promoting the principle of horizontal subsidiarity enshrined in Article 118 of the Italian Constitution, and on such basis to build a specific administrative function enacting a shared management of the commons between the municipality and citizens. The definition of commons provided in this regulation echoes the notion of the commons elaborated by the Rodotà Commission, but also considers Article 118 as its legal

[12] Rodotà Commission Bill, *Relazione per la modifica delle norme del codice civile in materia di beni pubblici* (2007), available online: http://www.senato.it/service/PDF/PDFServer/DF/217244.pdf.
[13] V. Pecile, 'Beni comuni e discorso della legalità. Il caso di Palermo', *Sociologia del diritto*, 3, 139–155 (2019).
[14] M.R. Marella, 'The Commons as a Legal Concept', *Law and Critique*, *28*(1), p. 70 (2017).
[15] The Chieri regulation is available online: http://www.euronomade.info/wp-content/uploads/2015/01/regolamento-BENI-COMUNI-CHIERI-emendato-n-105-del-24_11_2014.pdf.
[16] C. Angiolini, 'Possibilità e limiti dei recenti regolamenti comunali in materia di beni comuni', in A. Quarta e M. Spanò (eds), *Beni comuni 2.0. Contro-egemonia e nuove istituzioni*, Milano-Udine: Mimesis, 147–156 (2016).
[17] The prototype of the Labsus regulation is available online: https://www.labsus.org/wp-content/uploads/2017/04/Regolamento-Labsus.Definitivo.pdf.

basis, and appoints public administration as the actor in charge to recognise the commons as such. The risk, here, is that the administration leaves out certain spaces from the list of potential commons for eminently political and discretionary reasons[18]. This legal arrangement thus displays clear disciplinary effects, and is sustained by a legalistic narrative on the commons that reframe citizens as volunteers acting as the State's handmaiden in a context of withdrawing State welfare.[19]

Secondly, the realm of private law offers several solutions allowing to protect the property interests of the urban poor against capitalist dispossession. Available legal mechanisms in this domain include Limited Equity Cooperatives, a tool designed to realise low-income housing solutions and based on the bundle of rights approach. In this configuration, used in North-American contexts, the land is owned by a non-profit entity, whereas the buildings constructed on it are owned by a cooperative entity, whose shares are owned by the residents. The first of these three subjects receives the amounts resulting from the appreciation on cooperative shares, which are then subtracted from the shareholders; such mechanism thus guarantees a continuous affordability of housing units. It has been highlighted how this instrument turns communities into active subjects in the social transformation of the area, and how allocations become functional to realising a social function of property. In the Italian context, a similar experimentation was recently carried out in the town of Pescomaggiore, near L'Aquila, where a property configuration was implemented in which access to housing units for disadvantaged subjects – who lost their households during the 2009 earthquake – was disentangled from ownership as a whole.[20]

Thirdly, legal solutions to protect the property interests of the marginalised of the city can be found in a hybrid realm between public and private law, made available by the on-going expansion of legal scholarship and jurisprudence on the broad issue of the 'rights of nature' and the object as holder of rights. The theoretical and political potential of this emerging field is mainly due to a radical questioning of the subject/object dichotomy: what is traditionally considered as an object in the modern Western legal thought can be turned into a legal person with rights and entitlements.[21] The Ecuadorian and Bolivian Constitutions adopted in 2008 and 2010 have already moved significant steps in this direction, establishing that 'all persons, communities, peoples and nations call upon public agencies to enforce the rights of nature'.[22] In assonance with these texts, US mobilisations have been active to enshrine the rights of nature in local constitutions[23]. Importantly, jurisprudence is also starting to embrace this vision. In 2017, three rivers in India and New Zealand were given legal personhood by Courts' decisions and by virtue of their significance for indigenous communities[24].

[18] C. Angiolini, *op. cit.*
[19] V. Pecile (2019), *op. cit.*
[20] M. R. Marella, *op. cit.*
[21] M. R. Marella, *op. cit.*
[22] Article 71 of the 2008 Constitution of the Republic of Ecuador.
[23] P. Burdon, 'The Rights of Nature: Reconsidered'. *Australian Humanities Review*, *49*, 69–89.
[24] O'Donnell and J. Talbot-Jones, 'Creating legal rights for rivers: lessons from Australia, New Zealand, and India'. *Ecology and Society*, *23*(1), (2016).

The same circular relation between the subject and object is at the core of *partecipanze agrarie*, a pre-modern legal mechanism still enshrined in Italian legislation as a residual form of ownership, which used to be regulated by customary law before being transformed into legal persons.[25]

IV. Conclusion: urban planning as a battleground to rethink the nexus of law, space and justice

This paper suggested some theoretical and empirical tools to undermine the processes of capitalist accumulation through which subjects living at the margins of the city are excluded from urban space. The perspective of Critical Legal Studies as well as the outline of a series of legal arrangements available both in private and public law provided evidence that it is possible, here and now, to foster a dimension of social justice able to rearticulate the relation of law and space in a more just direction. As a conclusion, and in addition to the legal instruments presented in the previous paragraph, it is worth mentioning how urban planning can turn out to be an essential 'battleground' in which the property interests of the urban poor can be reclaimed. The idea suggested here is that in order to oppose the speculative processes carried out by an alliance of public and private actors on the urban space, social movements would benefit from participating to planning, as they could structurally change the policies that perpetuate symbolic violence against the urban poor. Far from representing a merely technical or bureaucratic matter, urban planning is a crucial realm in which the property interests that prevail in determining urban transformations are represented and gain hegemony. Hence, understanding urban planning means to grasp an essential *modus operandi* of contemporary capitalism in urban contexts. Planners play a unique role in urban governance, and position themselves at the heart of the nexus between capital, State and communities.[26] Indeed, their task is to turn social needs into material space.[27] If it is true that real estate's prerogatives tend to prevail in the neoliberal conjuncture, this does not mean that such tendency cannot be subverted. When communities make their voice heard, urban planning becomes a battlefield to structurally rethink the relation between law, space and justice. An evidence of this possibility is the case of New York, where grassroots movements started reclaiming the city also in the arena of urban planning negotiations, in an exasperated context of skyrocketing rents, increasingly enclosed public spaces, and unbearable costs of living for the majority of the population. When the people who 'make' the city can no longer afford to live in it, bringing their stakes into the act of planning can significantly disrupt the processes of gentrification and displacement.[28]

An example of how important it can be for social struggles to enter the realm of urban planning to slow down dispossession and correct urban configurations perpetuating inequality is the one of

[25] M. R. Marella, *op. cit.*
[26] S. Stein, *Capital City: Gentrification and the Real Estate State*. London: Verso Books, 2019.
[27] H. Lefebvre, *The production of space*, Oxford: Blackwell, 1991.
[28][28] S. Stein, *op. cit.*

Palermo. In this city, just as in many other urban contexts of Southern Italy, over the past years the organisation of urban space has been a contested process, conducted by actors bearing clashing visions of the city: the local élite aims at turning the urban economy into a tourism-based one, whereas the movements have been trying to protect the most vulnerable population from the dynamics of exclusion triggered by touristification. While activists mobilise to protect the urban poor, major players of platform capitalism and real estate have been exerting an immense power in determining the value rise of the historic centre and the regularisation of vast areas in the name of urban decorum, ultimately carrying out a neoliberal restructuring of the city's economy and society.[29] Movements have obtained from the administration some measures in favour of the poor's property interests, such as the expansion of public housing in the historic centre, but they have not managed to structurally undermine the modes in which urban space is organised so as to reproduce inequalities and hierarchies among groups. They have succeeded in diminishing the symbolic violence exerted by urban policies against the poor, but they do not have the means to systematically address and uproot its causes.

Since 1992, the urban space of Palermo has been governed according to the 'Piano Particolareggiato Esecutivo del Centro Storico di Palermo', also known as plan Cervellati after the name of Pier Luigi Cervellati, who had also been in charge of Bologna's urban planning. Its aim was to prioritise the care of existing buildings and public spaces in order to fix the effects of the previous plan – adopted in 1962 – that had allowed for decades a systematic plunder of the urban space, known as 'sack of Palermo' (*sacco di Palermo*). The goal was to stop the process of real estate speculation that had covered in concrete the city during the previous years, and that relied on the collusion between sectors of the public administration and the mafia organisation.[30] The Cervellati plan wanted to realise a 'soft gentrification' enabling the lower-middle class to re-inhabit the historic centre and its social fabric. This ambition – to promote the protection of both the artistic and the social heritage of Palermo – is significantly put into question by the ongoing processes of touristification and real estate speculation affecting parts of the historic centre. It is perhaps time to imagine a new urban planning whose negotiation cannot take place without the involvement of activists and inhabitants of popular neighbourhoods. Only tacking the issues of power and resource redistribution it will be possible to imagine a just city.

[29] Signs of this tendency are the urban requalification of the Danisinni popular neighbourhood, conducted through a partnership between the municipality an Air Bnb; and the attempt of regularisation of a flea market in the area of Ballarò which excludes unauthorised subjects from selling, coupled with anti-hawkers measures in the whole historic centre.

[30] For an ethnography of Palermo's public space and an analysis of its symbolic role for the antimafia movement, see J. Schneider and P. Schneider, *Reversible Destiny: Mafia, Antimafia, and the Struggle for Palermo*, Berkeley (CA): University of California Press, 2003.