



produced with support from Duleep Matthai Nature Conservation Trust (DMNCT)

Commons and Governance

Ikshaku Bezboroa, Lawyer and Consultant, Dakshin Foundation

This module is part of a series of learning modules centred around commons, created and published for internal circulation among the researchers of Dakshin Foundation. Information contained in these modules is collated from publications of various scholars. While these are not exactly ‘commons for dummies’, we have tried our best to simplify the concepts :)

Roots of commons governance

The legal history of commons-governance is closely intertwined with formal legal systems, but also with under-documented and oral traditions, customs and social norms. Understanding the history of commons governance helps one understand how commons can be implemented in the contemporary. The following concepts lie at the root of commons-based jurisprudence.

Customs

Commons-based law has often been counter-intuitive to the basic tenets of formal law. Commons-based law is fundamentally changing and more responsive, while formal law is premised on relatively strict and literal application. Unlike formal law, commons-based law is closely reliant on custom. The thing about custom is that it lives in the informal, oral and social spaces. It is a shared narrative that connects a community to wisdom from earlier generations. For instance, the thoughts of those who rely on custom are less about who owns title deeds, and more about how the land will be tilled, harvested and rotated.

Documentation of commons-based law

Despite these differences, we find that custom and commons law are often nested within formal systems. State law has often provided space for commons based systems. For instance, as far back as 535 A.D, Emperor Justinian legally recognised the idea of ‘res communis’ by stating that by the law of nature, the air, waters, seas, shores, rivers, ports

and fish belong to all men and is therefore common to all. The Magna Carta and the Charter of the Forest are some examples of foundational documents in commons legal history that emerged in England. Both emerged in a climate where monarchs were increasingly staking claim to larger and larger plots of forest lands and even rivers for their own personal use. Common folks who lived on, foraged, harvested and navigated the land could no longer do so as areas were enclosed off. This led to agitation and civic-warfare, resulting in the Magna Carta which enshrined some individual rights, introduced protections from arbitrary punishment and also, due process and trial by jury. The Charter of the Forest recognised the rights of commoners to access and use royal lands and forests (Bollier 2014: 74-96).

Public Trust doctrine

Later legal developments created the ‘public trust doctrine’ which is a variation of the ‘res communis’ idea. The doctrine maintains that certain cultural and natural resources are reserved for public use, and that everyone can therefore access and use these. However, it implies that the State owns these public resources and must therefore maintain and protect these. The original reason for the Public Trust doctrine came from the idea that the government would be the public guardian of valuable natural resources which cannot regenerate themselves or be substituted by man-made products. The government here has a fiduciary duty of care and responsibility to ensure that the general public gets access to these resources in a moderated manner. The idea was enshrined in the American Constitution with the

intention that these should serve for the welfare of the nation, for succeeding generations, rather than for the use of a few individuals for a short period of time (Gannet 1909: 109).

This doctrine is therefore useful to the extent of understanding the relationship of the State with common resources. It is also an important starting point to explore the sustainable management of resources

Locke’s Labour Theory

Another foundational concept that was used to stake a claim on resources is the labour theory of property. Philosopher John Locke wrote in his Second Treatise of Government, that “every man has a property in his own person” and this extends to property in “the work of his hands”. He acknowledged that land (and other item in natures) exists in a natural state and belong to everyone in common (Locke 1690: Sect. 39). He said that by exerting labour upon any of these, the resource becomes the property of that individual. Libertarian theorists have subsequently interpreted this to justify the right to take these resources out of their natural context.

In fact, (as was the case with the public trust doctrine) Locke also assumed the existence of a higher authority or moderator in his narrative. In the scheme of extracting resources from nature, justice has to be a goal. Even the right to acquire property is therefore subject to limitations. By Locke’s own statement, appropriation is acceptable only to the point that, “enough, and as good” is left for the rest of humankind.

Though they seem to prefer a capitalist treatment of resources, the doctrines expounded above actually create a case for welfare economics. Scholarship has shown that if there is to be a regulating authority, and if social justice is a goal, the conventional model of private property is turned on its head. The State no longer has to allow self-maximising behaviour without restraints. National autonomy no longer trumps sustainability or the common interest. In fact, the labour theory then encourages making welfare judgments that reflect social concerns regarding poverty and income distribution (Judge 2002: 331-338).

Characteristics of goods and resources

In the process of coming up with patterns for governing the commons, it is first important to understand how goods and resources ought to be viewed. This chapter explores

the concepts of ‘excludability’ and ‘rivalry’ which have traditionally been used to distinguish goods. The traditional modelling of goods and resources in society sees things in categories. Conventionally, goods were understood to fall in fixed categories depending on certain characteristics.

	Excludable	Non-excludable
Rivalrous	Private goods food, clothing, cars, parking spaces	Common-pool resources fish stocks, timber, coal
Non-rivalrous	Club goods cinemas, private parks, satellite television	Public goods free-to-air television, air, national defence

Primarily, these characteristics are ‘excludability’ and ‘rivalry’ (Helfrich 2014).

According to the traditional understanding, goods were primarily either private goods or public goods. However, the understanding of goods has developed, and brought within its fold new kinds of resources such as data, radio-waves, and currencies.

Excludability

Now, a commons approach includes all kinds of goods; whether they were inherited, produced collectively or individually. They are owned by groups of people. It may seem, therefore, that commons-thinking encourages treating goods as non-excludable. However, this is not absolute. For instance, water is traditionally considered non-excludable because everyone has the right to access it and can physically do so. However, the reality is that companies exclude and bottle it, privatising natural springs or increasing dependence on water-trucks. So, then it becomes excludable.

Now, imagine that a local community living on a river-bank develops norms and behaviours that commonises the river. The river-resources would be collectively accessible, and also impose responsibility on people to maintain it. Fishing rights could also have regulations on when and how much fishing is allowed

Rivalry

Even the characteristic of ‘rivalry’ has changed. A rivalrous thing is one which becomes less after usage. For some things, use by one person limits the use for other persons. For example, more than one person cannot eat the same apple at the same time. In a macro-scale, one man plucking apples from an apple orchard usually leaves less apples for

others to pluck. This is what one calls a ‘rivalrous’ resource. Commons experts, however, have re-conceptualised this classical notion of ‘rivalry; in the form of ‘subtractability’. That means that commons-goods can be both rivalrous and non-rivalrous. The usage of an apple orchard, or fisheries pond or timber by one person does not actually altogether prevent the entire usage of those resources by other persons. In reality, only some aspect of it is actually lost. Going back to the water example; the pumping of one underground aquifer by a company doesn’t prevent others from accessing that aquifer, yet it reduces their opportunities for doing so.

As one can imagine, neither apples nor water nor fisheries exist strictly in categories of excludability or rivalry. It is argued that by opening up access to these resources to all, innovative ways of co-operating and sharing are devised by the users. Water can be replenished, apple orchards maintained, and fisheries repopulated. In fact, through technology, things once considered limited or exhaustible are also now easily replicable or replenish-able. The degree of rivalry therefore, reduces.

COMMONS VIS-À-VIS EXISTING SYSTEMS

Having established the conceptual moorings of the

governance and characteristics of things, we can now examine commons with respect to existing property regimes.

Common Goods vs Public Goods

Goods are often distinguished into categories of public and private. Items bought at a market, services rendered by businesses and items inherited by family members are commonly recognised as private. Public goods on the other hand include public education, parks, roads, court-halls, sanitation facilities, etc.

Yet, it is not so easy to pit public and common goods at opposite ends. Their natures are quite incomparable. ‘Public goods’ are resources that are open to public consumption. It is felt that because public goods are subtractable (i.e. usage by one reduces the amount left for others), lawlessness and over usage is inevitable unless strictly controlled.

Contrary to the defined nature of public goods, common goods are identifiable specifically by their emphasis on cooperative practices. The trope of lawlessness and chaos is turned on its head when it comes to commons-based goods. Commons are in fact characterised by normalised or rule-based community behaviour. There is no master inventory of commons. There are no commons without ‘commoners’ and ‘commoning practices’.

PUBLIC GOOD	COMMON GOOD
Non-rivalrous: goods which may be consumed by one without reducing another person’s simultaneous enjoyment of it. For example, water in a pond or a television show. Even though these do get over, they can be enjoyed simultaneously by many people.	Both rivalrous and non-rivalrous: Includes rivalrous goods such as the water from a well, the harvest from a particular tree; but also non-rival goods like the air we breathe or the internet.
Non-excludable: goods which can be accessed by anyone, without preventing others from accessing it. For example, a public pavement or a cinema hall.	Mixed system: May exist in mixed-systems of excludable and non-excludable goods; but not purely excludable.
State ownership and control	Managed mutually by members of a society in a collaborative manner
Overuse is the expected consequence	Sustainable management is the expected consequence
Top-down rules of management and regulation	Members of the public or localised government have direct participation management and regulation

Commons Systems vs Market Systems

The following table highlights some of the distinctions between the profit-based paradigm and the commons-paradigm (Helfrich 2014)¹.

	The For-Profit Paradigm	The Commons Paradigm
Distribution of resources	Scarcity is artificially created through enclosing or by excluding access	For rivalrous resources, there is enough for all through sharing. For non-rivalrous resources, there is abundance.
Purpose	Resource allocation that maximises profits for some	Strengthening social relations is crucial for ensuring fair shares and sustainable use of resources.
Idea of the individual	Individuals maximize benefits for themselves (Homo economicus).	Humans are primarily cooperative social beings.
Human relationships to nature and other humans	Separation <ul style="list-style-type: none"> · Either/or · Individualism vs. collectivism · Human society vs. Nature 	Inter-relationality Individuals and their collectives are nested within each other and mutually reinforcing.
Agents of change	Powerful political lobbies, interest groups and institutionalized politics focused on government.	Diverse communities working as distributed networks, with solutions coming from the commons-councils.
Focus Dominant question	Market exchange and growth (GDP) achieved through individual initiative, innovation and “efficiency.”	Access to resources, common wealth, sustainable livelihoods and complementarity of enterprise.
Dominant question	What can be sold and bought?	What do I / we need to live?
GOVERNANCE		
Decision making	Hierarchical, top-down; command & control	Horizontal, decentralized, bottom-up. Self-organization, monitoring and adjustment of resource use.
Decision principle	Majority rules	Consensus.
SOCIAL RELATIONSHIP		
Power relation tendency	Centralization & monopoly	Decentralization & collaboration.
Property relations	Exclusive private property. “I can do what I want with what is mine.”	Collectively used possession. “I am co-responsible for what I co-use.”
Access to rival resources (land, water, forest)	Limited access; rules defined by owner.	Limited access; rules defined by users.

Access to non- rival resources (ideas, code...)	Limited access; scarcity is artificially created through law and technology.	Unlimited access; open access is the default norm.
Usage rights	Granted by owner (or not). Focus on: individual rights.	Co-decided by co-producing users. Focus on: fairness, access for all.
Social practice	Prevail at the expense of others; competition dominates.	Commoning; cooperation dominates
KNOWLEDGE PRODUCTION		
Dominant ideology	Corporate ideology and values integrated into education and knowledge production.	Peer-to-peer, networking and collaboration allows diversity of viewpoints.
Knowledge as a resource	Knowledge regarded as scarce asset to be bought and sold.	Knowledge regarded as plentiful resource for the common good of society.
Technologies	Proprietary technologies.	Free and open source technologies.
Who controls it?	Highly specialized knowledge and expertise are privileged.	Knowledge is subject to social and democratic control.
IMPLICATIONS FOR ...		
Resources	Depletion/exploitation. Enclosure.	Conservation / maintenance. Reproduction & expansion.
Society	It becomes a choice between excluding by focusing on individual appropriation, or prioritizing collective interests.	Personal growth is an inherent condition for the development of others, and vice-versa.
Relationships	Isolationism and exclusion.	Emancipation through convivial connections.

COMMONS WITHIN EXISTING SYSTEMS

Reclaiming neoliberal values in service of commons thinking

In the dominant neoliberal world view, common areas have been enclosed, divisions of labour have been established between producers and consumers, and a top-down hierarchical structure of governance created to oversee this system (Quilligan 2014).

Self-organising communities have still taken collective action to oversee and preserve their local resources for themselves and future generations. Alternative communities across the world have, simply through the creation of their own rules and behaviours, undermined the negative effects of this privatised model.

Some of the neoliberal values which are emphasised are listed below.

- 1) Spontaneity of individual action
- 2) Self-regulation and freedom to form collaborations
- 3) Freedom to act in a market

The classic values above represent the conventional wisdom of neoliberalism in its original sense. Even though proponents of market economies have used these same principles to encourage a system of privatisation, commoners have found ways around that.

- 1) Spontaneity of individual action

Commoners have understood that in fact autonomy is better assured through a co-operative local production of value and governance. Spontaneous individual actions towards relying on locally maintained commons helps avoid the control of industries over employment, for instance. Choosing to participate in a commonly formed council, directs the kind of choices commoners can make about the political pressure that is harnessed.

- 2) Self-regulation and collaborations

When individuals living in a community have a stake in the common goods they depend upon, the models of resource-management change.

- i. People take responsibility to sustain their own resources
- ii. They value the patterns of relationships between

resources and users

- 3) Freedom to act in a market

To take the phenomenon of globalisation, for instance, it is seen that the intergovernmental-private sector nexus pushes certain goods across borders. The reality is that basic economic and cultural resources are often sold as 'global goods', and that automatically excludes some people. This is exacerbated when these 'global goods' become necessities and the State fails to provide them. Sometimes, the State colludes with private companies.

The story of the 'Samanwita' project in rural Orissa is a case in point. In the 1980s, an idea was floated by a nexus of NGOs, a private company, State Banks and the government to inseminate local bulls at a particular village with a "superior" strain of semen from Jersey bulls. The intended purpose was to create a range of cross-bred that would produce much more milk. The government even incentivised the locals in the village, with employment promises, to rely on a particular plant to feed the bulls. Local bulls were castrated to make way. However, the experiment was a complete disaster because the cross-breeding yielded only eight cross-bred cows. In the meantime, the entire local bull population was decimated, and the fodder-plants did not grow, causing complete ruin to the area (Sainath 1996). The people of the village had never been consulted else it would have been found that there was no need for a milk project in a previously milk-surplus area. By participating in local production and making individual choices to avoid depending on external forces, such disasters may have been exacerbated. Yet, villagers were compelled by the appeal of profit and employment to line up for the project.

Multi-regime complex systems

Property rights by themselves imply

- 1) there is an external or state mandated system of hierarchies
- 2) the priorities are wealth-generation and preferential allocation.

If we closely analyse the system of capitalism, we can see that it is dependent upon a social environment as well as an ecological environment. The social environment essentially comprises the individuals, households, guilds, corporations and nation-states that capitalism relies on for legitimacy and labour. The ecological environment comprises the air, waters and lands which form the commodities of the system. Both environments are being exhausted and increasingly agitated. While social struggles for better

wages, hours and basic resources threaten capitalism from one angle, a depleted and polluted environment undermines its legitimacy from another angle. Social and ecological problems badly need to be addressed. While it may be infeasible to altogether wish away capitalism, it is probably more realistic to advocate for a more complex system that addresses these pressing concerns.

Semi-commons, nesting and subsidiarity

1) Nesting: The notion that there may be multiple-tiered governance systems governing an ecosystem, and it is not possible for any one system to exist in isolation (Marshall 2008). Commons exist in domains usually ignored by capitalism such as the household and the community centre. Often, it exists deep within seemingly explicit capitalistic models. That is because commons thinking is not a completely alien approach to capital movements, but rather a means of taking stewardship and staking claim over non-commodified resources. Therefore, it can exist at grassroots levels of social reproduction within capitalist systems. Examples of nested commons include shared lunches among co-workers, social events organised by residential-apartment associations and peer-networks on the internet.

2) Semi-commons: a property regime where one attribute of a resource is privately owned, and another exists in common ownership. Commons also exists analogously with private-property regimes; also known as semi-commons. A familiar example is that of a medieval open field, where people have exclusive rights over strips of land, but also share these lands with others for cattle-grazing purposes during the fallow season.

3) The subsidiarity principle: The delegating of authority is most efficiently done to the smallest jurisdictional unit that can handle it. Given that commoning practices emerge even within capitalist systems, the principle of 'subsidiarity' provides a useful starting point to take advantage of self emerging governance.

INDIAN JURISPRUDENCE ON COMMONS

The Indian judiciary has not often used the language of commons in its rulings. The 'public trust doctrine' is widely used, as are various other principles with welfare implications. However, these are different concepts from the commons, as we have explored earlier. It therefore becomes useful to highlight the occasional cases that explore the phenomenology of the commons.

One important ruling is that of Jagpal Singh vs State of

Punjab (MANU/SC/0078/2011), delivered by a two-judge bench of the Supreme Court of India. The case was regarding a dispute between the local gram panchayat and certain encroachers who had filled in and constructed upon a village lake. Justice Katju begins the judgment by iterating at the outset that there have been common lands in village communities for centuries; even listing a few. He identified that the common lands are used by villagers for various purposes. Interestingly, he noted that these belonged to the community and were managed through local gramsabhas/panchayats. The pond in question was used by villagers for drinking, bathing, irrigation, rain-water harvesting and for their cattle.

Further, the judge lamented the processes of enclosure that took over these common spaces; noting how powerful private interests colluded with State authorities. He noted that despite efforts of the local gram panchayat, there was no eviction, and State authorities had even tried to regularise the illegal constructions. Accordingly, the judge ruled that the encroachers on the common pond were required to remove their constructions and hand back the land to the Panchayat. Aside from merely being a success story for a specific commonly held pond, the ruling is significant because of the jurisprudence it opens up.

1) As a Supreme Court ruling in a commonwealth country, the judgment can be cited in countries like South Africa, England, USA, New Zealand, Canada and Australia to build commons-based jurisprudence everywhere.

2) The ruling built upon a previous judgment by the same court in Friends Colony Development Committee vs. State of Orissa (2004 (8) SCC 733), which had ruled that if the law allows compounding of unauthorised constructions, this can only be done by way of an exception. This particular ruling added weight to the idea of exception by requiring that compounding can only be allowed if "land has been leased to landless labourers or members of the SC/ST, or if the land is actually being used for a public purpose e.g running a school..or a dispensary" (Jagpal Singh vs State of Punjab : para 14).

3) The Judge issued directions that :

-The orders issued by State governments permitting allotments of Gram Sabha land to private persons or commercial enterprises on payment of money, are all illegal and should henceforth be ignored (Jagpal Singh vs State of Punjab : para 15)

-The state governments in the country must come up with schemes for the eviction of illegal/unauthorised occupants of common land and these must be restored to the gram

²The legal citation of this case on the Manupatra website is MANU/SC/0078/2011. The ruling was delivered in response to an appeal that reached the Supreme Court. The petition number is - CIVIL APPEAL NO.1132 /2011 @ SLP(C) No.3109/2011. The full text of the judgment is available on the URL: <https://indiankanoon.org/doc/1692607/> (last accessed on 14th June, 2020)

Sabha/gram Panchayat. The illegal occupant should be given show-cause and a brief hearing.

In this manner, the apex court of the country has attempted to prohibit illegal encroachment by protecting a specific pond, and imposing duties on the State government to protect it. However, there are some remaining issues:

i. Common spaces exist beyond designated gramsabha areas, and involve the patterns of usage and sustainability developed by villagers relying on distant wells of water, forest produce and natural rivers.

ii. The understanding of commons here is more in line with common-pool resources; which is different. The ruling did not specifically entrench the dynamic aspect of commoning in this ruling or identify a relationship between people and common-things.

iii. The term encroacher is a slippery slope. At times, the encroachers can even be those seeking to implement commoning behaviours in a new space. In protected forests, for instance, it is common for forest officials to treat long-resident native tribal folks as encroachers. Similarly, the panchayat heads could potentially exclude just about anyone they choose - preventing true commoning of the area.

FORGING COMMONS JURISPRUDENCE

Re-examining 'bundle of rights'

Property jurisprudence attempts to explain the complexities of property ownership through the analogy of 'bundle of rights'. Property is not a thing by itself, but rather a relationship amongst people about things (Bollier 2014). The parcelling-out of property as private domains is essentially a social custom that expects individuals to maintain their controlled portion of the over-arching commons (Dagan and Heller 2011).

This control is handed down in the form of rights, or bundles of rights. For example, in Indian copyright law, the owner of a book has exclusive rights that include adapting the book, reproducing it, publishing it, translating it, communicating it to general public, allowing educational institutions to use it or leasing for a play.

With land or goods, the bundle of rights plays out in different ways. The landlord of a plot will be the full owner of the land with all rights. However, a farmer tilling the land may have the right to till or cultivate, and even the right to

live on it, but this right is subject to the choice of the owner who may evict him at any moment. The landlord may or may not give a passing pedestrian the right to pass through to get to the road. The pedestrian or anybody else may not have the right to transfer his property to an interested buyer. However, the right to sell/transfer the property may be handed through power of attorney to a lawyer while the landlord is residing elsewhere.

In this way, the bundle of rights logic is used to parcel out usage, access and transferability rights. However, the bundle of rights theory contradicts commons thinking in the following ways (Schlager and Ostrom 1992)

I. It implies that the rights are provided by an over-riding authority that actually has control; whether it is a full owner or a State and hands out rights. This fundamentally contradicts Ostrom's principle that the rules and commitments must be modified by the commoners, and sanctions must be worked out mutually

II. The bundle theory assumes that rights exist independently or individually, and so property is infinitely decomposable into little parts. In fact, however, these rights have no meaning without each other. The cultivation of the land depends on one's right to access it, the right to change or modify the land, and the right to use the land in various other ways

III. As per Ostrom's eight principles, one of the requirements for effectively managing property is the setting of effective boundaries. However, as per the above conception of rights that do not function without one another, setting boundaries (such as a limited time slot for accessing a fisheries resource) will effectively mean that rights can be limited or curtailed. For this reason, it may be more useful to take commons jurisprudence away from "bundle of rights" and instead frame it around socio-economic rights and duties.

From 'bundle of rights' to 'rights and duties'

The 'bundle of rights' perspective implies that rights may exist naturally in the property of a thing, and that these rights can be further parcel-ised and sold. This thinking is firmly rooted in the assumption that the owner of a property has the 'highest' or maximum right to a property, and that this right emerges naturally. However, an altogether different conception of rights moves away from this unequal perspective.

Aside from its use in the form of a contract between parties to a private-property arrangement, the instrument of rights is used in Constitutional law between citizens and

State. The intention is to accord citizens protection against State tyrannies, and also to ensure the enjoyment of their civic liberties against each other. Jurisprudence on rights has determined that rights do not exist in isolation, however, in fact, creates corresponding duties upon the other party. Consequently, rights create duties in citizens and also the State (Hurd and Moore 2018).

To explain this further, let us look at the broad domains that the rights-jurisprudence falls into. Rights are broadly classified into civil-political rights, and socio-economic rights. The former are in the nature of right to freedom of speech and expression, right to faith and worship, right to travel freely, right to a forum of justice, right to participate in social life, the right to enjoy equal treatment, etc. The corresponding duties upon the State are

-to **respect** these freedoms, and to abstain from acting in ways that may restrict these rights

-to **protect** citizens from restrictive actions of others that may threaten these rights

Socio-economic rights usually lay emphasis on an additional duty. Socio-economic rights include the right to housing, the right to education, the right to water and the right to food. With these rights, the State is obliged to extend the same duties of respect and protection, and also an additional duty.

-to **fulfil** the substantive components of the right

This essentially means that the State cannot merely respect or extend protection but also has to divert economic resources towards making sure citizens actually realise these rights.

Seen in this manner, the logic of rights and duties can be applied to commoning practices. **The difference is that the social contract is not between two individuals, or between citizens and State, but rather exists as an agreement between all commoners.** The right to use and access resources therefore gives rise to corresponding duties. These duties include not only respecting the rights of other commoners to use and access resources, but also to protect their enjoyment of it in a mutually collaborative way. Further, the aspect of fulfilling those rights has ramifications for ensuring sustainability of resources. This requires active stewardship and care in order to ensure that the resources continue to be enjoyed.

It takes time to develop complex social contracts which can facilitate commoning behaviour. However, principles like

these in existing regimes help us imagine how commoning cultures can be achieved.

The concept of “gift and duty” has similar lessons for us.

Commons as gift and duty

Apparently, the word ‘commons’ comes from the term ‘commun’ which simultaneously means “gift” and “counter-gift”(Bollier 2014: 173). The implication of this is that people receive gifts from the commons and also fulfil duties towards it. A gift, by itself, is something of value that is given without expectation of a return or reward. It is not traded or sold, and so there is no explicit duty to return anything.

Let us extrapolate our ideas of gift and duty from the Indian law on private contracts. The Indian Contract Act, 1872 discusses the idea of gift as well. A legally enforceable agreement in the law is possible only when there is a promise and a counter-promise made by two parties to the agreement. The agreement implies that there is an exchange of things. In return for taking, there is a giving involved. Section 25, then explains that an agreement without a ‘consideration’ or reciprocated promise is not a legally enforceable contract. A ‘consideration’ in legal parlance, refers to anything of value given to someone in return for goods, services or some promise.

Conversely, the concept of a counter-gift inherent in the ‘commun’ idea indicates how a gift-economy can be effectively applied to people’s treatment of the commons. Legally, if a unilateral promise is made to compensate someone for something that they have already done then a valid and legally enforceable contract emerges³. Moreover, if a person promises to compensate for something simply on the basis of natural love and affection between the two parties who are in a close relationship to each other, then also a contract emerges⁴.

By thinking of people’s relationship with land, fisheries and other things in the form of gifts and counter-gifts, we see that the traditional monetary or barter approach turns on its head. Instead, land, fisheries and every other domain can be used as if they were gifts, as long as the people using them also fulfil their duties towards maintaining those common spaces. There is an element of love and affection involved in the usage of commons-based things. There is also implied a unilateral promise to compensate for the usage of those resources. These duties or ‘counter-gifts’ can be anything from engaging in local-management to actively tilling the land.

³see Section 25 (2) Indian Contract Act, 1872

⁴see Section 25 (1) Indian Contract Act, 1872

ACTUALIZING COMMONS

Having explored the conceptual moorings of commons-based thinking, as well as its relationship with existing jurisprudential regimes, we can now apply our lessons. This section concludes with a few entry-points into how commons-based governance can be (and has been) established.

Rallying through advocacy

Municipalities benefit the most from commons ideas because self-determination is the easiest to implement at this level. By rallying to win authority and form co-operatives, people in a neighbourhood can take control of decisions. They can bring pressure on businesses and politicians at various levels.

Part of this process of rallying together is about campaigning for the right kind of protocols. Decision making procedures that include users must be insisted upon. Mediation options between governments, industry and users must be established (Kratzwald 2018)

Commons-enabling infrastructures

Infrastructures are systems that enable and mediate certain activities. They are comprised of material and social relationships. Usually these favour profit-building and a disproportionate distribution of money. These are created, not naturally existing. For instance, the dependence on markets is not set in pre-history but a consequence of things we have created.

Shared usage is integral to the concept of infrastructures. This is because infrastructure may be

- i. too expensive to create individually.
- ii. related to activities requiring common labour and activity
- iii. related to things we see as public rights such as education, health and housing

Therefore, we need to explore how to turn existing infrastructures into commons enabling ones. This can be done by reappropriating state-provided infrastructures and applying commoning behaviours to them. The management of these infrastructures could also be made directly democratic.

It is also important to turn existing common-spaces into infrastructures that follow the above principles.

Take the example of free software projects like torrents. Free-software platforms turn the intellectual property regime infrastructure on its head. They currently exist in a grey zone between legality and illegality in some cases. However, the USP - Unique Selling Proposition - of such platforms is that they provide more equal access to existing software in a reliable way in one place. By managing them in a specific way, torrents could even be limited to only free software like certain Operating Systems or games. It could omit private or commercially sold software if it wishes so. Viruses and outdated versions could also be controlled or limited. Torrents ensure access to software that may be difficult to find, as people share links and make their own software publicly available.

The purpose of good commons-based infrastructures is to make sure things can be expanded, proliferated and networked. This also prevents clustering of resources with a few who can afford to have access to it.

Collaborating through commons councils

Responsibilities and rights of commoners can be formalised in the form of a social charter. This could be done by developing a legal entity or fiduciary association of citizen stakeholders. One way this can operate is in the form of trusts (Quilligan 2014).

The primary purpose of formalising a social charter or trust is to strengthen the 'third' power lobby of local governance in an effective way. Even in affirming the core tenets of liberalism, local governments remain vulnerable to the forces that support enclosure of commons. A commoner-represented lobby is thus able to represent people's voices in an environment of global governments and corporate powers where commoners are often unrepresented. A collaborative mixed-system approach can be a useful way of navigating these forces, while simultaneously retaining the interests of commoners. This way, the commons councils can take charge of what to regulate and what to outsource. For instance,

1. Commons councils can set caps on extraction or use of a resource according to non-monetised, intergenerational metrics like sustainability, quality of life and well-being.
2. Renting a proportion of the resources to private sector or government businesses for market-production. The fees could be used towards rehabilitation activities.
3. A percentage of this rent could also be taxed by the State, for the purpose of funding welfare and subsistence activities. Such an integrated system traversing State, private sector

and commoners would have multiple benefits:

i. The commons would remain under the control of local governance

ii. Sustainability efforts would be supported

iii. Private sector would profit

iv. Welfare activities would be sustained

v. State would gain administrative revenue through taxation

Acknowledgements:

Aarthi Sridhar for concept and advice; Manini Bansal for design and layout

References:

Bollier, David (2014): *Think Like A Commoner: A Short Introduction to the Life of the Commons*, British Columbia: New Society Publishers.

Helfrich, Silke (2014): "Common goods don't simply exist they are created", Bollier, David and Silke Helfrich (Eds.) (2014): *The Wealth of the Commons*, Massachusetts: Levellers Press; also available at URL: <http://wealthofthecommons.org/essay/common-goods-don%E2%80%99t-simply-exist-%E2%80%93-they-are-created> (last accessed on 13th June, 2020)

Helfrich, Silke (2014): "The logic of the commons & the market: A shorthand comparison of their core beliefs", Bollier, David and Silke Helfrich (Eds.) (2014): *The Wealth of the Commons*, Massachusetts: Levellers Press; also available at URL: <http://wealthofthecommons.org/essay/logic-commons-market-shorthand-comparsion-their-core-beliefs> (last accessed on 13th June, 2020)

Quilligan, James B. (2014): "Why Distinguish Common Goods from Public Goods?", Bollier, David and Silke Helfrich (Eds.) (2014): *The Wealth of the Commons*, Massachusetts: Levellers Press; also available at URL: <http://wealthofthecommons.org/essay/why-distinguish-common-goods-public-goods> (last accessed on 13th June, 2020)

Gannett, Henry (1909): "Report of the National Conservation Commission", National Conservation Commission, 1901-1909, 60th Cong, 2nd Session, Senate, S.Doc No. 676, Washington: Govt. Print Off., URL: [http://memory.loc.gov/cgi-bin/query/r?ammem/consrv:@field\(DOCID+@lit\(amrvvg38div114\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/consrv:@field(DOCID+@lit(amrvvg38div114))) (last accessed on 14th June, 2020)

Locke, John (1690): *Second Treatise of Government*, also available at URL: <https://www.gutenberg.org/files/7370/7370-h/7370-h.htm> (last accessed on 14th June, 2020)

accessed on 14th June, 2020)

Judge, Rebecca P. (2002): "Restoring the Commons: Toward a New Interpretation of Locke's Theory of Property", *Land Economics*, University of Wisconsin Press, Vol. 78, No. 3, URL : <https://www.jstor.org/stable/3146893?seq=1> (last accessed on 14th June, 2020)

Sainath, P. (1996): *Everybody loves a good drought*, New Delhi, India: Penguin Books

Marshall, Graham R. (2008): "Nesting, subsidiarity, and community-based environmental governance beyond the local level", *International Journal of the Commons*, Ubiquity Press, Vol. 2, No. 1, pp. 75-97.

Dagan, H. and Michael A. Heller (2001): "The Liberal Commons", *The Yale Law Journal*, Vol. 110, No. 4, pp. 549- 623, URL: <https://www.yalelawjournal.org/article/the-liberal-commons> (last accessed on 14th June, 2020)

Schlager, E. and Ellinor Ostrom (1992): "Property- Rights Regimes and Natural Resources: A Conceptual Analysis", *Land Economics*, University of Wisconsin Press, Vol. 68, No. 3, pp. 249-262, URL: <https://www.jstor.org/stable/3146375?seq=1> (last accessed on 14th June, 2020)

Kratzwald, Brigitte (2014), "Rethinking the social welfare state in light of the commons", Bollier, David and Silke Helfrich (Eds.) (2014): *The Wealth of the Commons*, Massachusetts: Levellers Press; also available at URL: <http://wealthofthecommons.org/essay/rethinking-social-welfare-state-light-commons> (last accessed on 14th June, 2020)

Hurd, H. M. and Michael S. Moore (2018): "The Hohfeldian analysis of rights", *The American Journal of Jurisprudence*, Vol. 63, No. 2, pp. 295-354., URL: <https://academic.oup.com/ajj/article-abstract/63/2/295/5232808> (last accessed on 14th June, 2020)

Indian Contract Act, 1872