

## The Relevance of 'Commons' Today

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### Abstract

*In this paper I will explore the concept of 'commons' by looking at the process of registering a space as a town or village green and its implications in urban areas. The significance of commons is increasingly being recognised, particularly in urban areas, as a way of thinking of property differently and looking at how patterns of use can legitimise collective interests. A central theme in private property is the power to exclude and the concept of commons could prove a useful tool in the claim of the 'displaced' and 'excluded' not to be overlooked. Commons have further potential as a sustainable economic model, specifically, the sharing of resources by communities. This paper looks at how holding property and resources in common could prove far more sustainable, moving away from the concept of the 'tragedy of the commons.' Furthermore, it highlights the far-reaching implications the concept of the contemporary commons has against a backdrop of increased privatisation, 'gentrification', and a recognition of the value of community.*

**Keywords:** *commons, Commons Act 2006, privatisation, community, common property regimes*

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*A generic definition of commons is almost impossible to formulate, because the shared interests and values that produce (legally determined) commons are themselves in constant flux, producing fluid and often unpredictable groupings and initiatives across industries, historical public places and cultural identities.<sup>2</sup>*

The concept of 'the commons' allows us to think and look at property in a different way, moving beyond the idea of property based on private ownership. Indeed, this emerging and growing area of law is becoming a powerful political, legal, and social tool raising questions regarding identity, communality, and sociality.<sup>3</sup> This article will examine how we have moved away from traditional concepts of commons to a more modern, flexible approach, looking at how the concept of 'the commons' can be used in a changing landscape. Increasingly, areas are being developed, urbanised, and privatised, excluding communities. Jane Holder and Tatiana Flessas argue for the necessity of the commons, stating that 'in a world in which global warming, identity politics, religious conflict and political differences all contribute to the increasing atomization of individuals and communities, the trope of commonality has immense power.'<sup>4</sup> This article will primarily explore the uses and implications of commons in the context of our increasing urban landscapes and also in a wider context as a sustainable economic model.

Historically, commons have played an important role in English law, forming an integral part of the manor in medieval England over which certain tenants had some rights. Indeed, the first Act of Parliament passed in 1235 concerned the commons.<sup>5</sup> It is possible to trace the transformation of land ownership from these medieval beginnings to the present day, and the move from land being held 'in common' to the conflict of private ownership over public space. F E Johns writes of the 'perpetual tug-of-war between the private and the public in spatial terms',<sup>6</sup> highlighting the current conflict between public and private spheres.

The Commons Registration Act 1965 (CRA 1965; replaced by the Commons Act 2006) served as recognition of the public importance of specific privately owned open spaces.<sup>7</sup>

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<sup>2</sup> Jane Holder and Tatiana Flessas, 'Emerging Commons' (2008) 17 Soc Leg Stud 300.

<sup>3</sup> *ibid* 299.

<sup>4</sup> *ibid* 310.

<sup>5</sup> The Statute of Merton.

<sup>6</sup> F E Johns, 'Private Law, Public Landscape: Troubling the Grid' (2005) 9 LTC 60.

<sup>7</sup> Kevin Gray and Susan Francis Gray, *Land Law* (7<sup>th</sup> edn, OUP 2011) 551.

Through it, the government tried to regularise the definitions of common land and establish a register and increasingly, this device of registration is being used as a 'weapon of environmental warfare'.<sup>8</sup> Through the Commons Act 2006 (CA 2006), there is an increasing sense that the aim of registration is to protect public rights over open land. However, Alison Clarke argues that the main concern of the CA 2006 is the registration and management of long-established communal land and does little to address the development of new concepts of commons.<sup>9</sup> What is significant about these Acts is that they require land which constitute a town or village green (TVG) to be registered and the confusion over what a TVG actually is has partially enabled this area of law to expand and become more encompassing.

The CA 2006 states that an area can be registered as a TVG where a 'significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years'.<sup>10</sup> It is this area of the concept of 'commons' which is proving to be particularly relevant in more recent years with regards to the growth of urbanised areas.

*R v Sunderland City Council*<sup>11</sup> has proved an important case in considering the extent of the use of commons, particularly as a tool for local groups and campaigners. A development site near the town centre of Washington in Tyne and Wear was held by the House of Lords to legitimately be registered as a village green. Lord Walker highlighted the controversy which surrounds the expansion of concepts of greens by stating that the campaigners had achieved this end 'in a way which may be thought to stretch the concept of a town or village green close to, or even beyond, the limits which Parliament is likely to have intended'.<sup>12</sup> However, this case represented an important change in contemporary common use as it provided a community the opportunity to have their social practices legitimised in law. This is still a key concept in why commons can be relevant today; a community is able to build up a pattern of recreational use of land in a locality, and the law will legitimise their use giving them the right to continue to use that land indefinitely. Furthermore, this area does

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<sup>8</sup> *ibid.*

<sup>9</sup> Alison Clarke, 'Creating New Commons: Recognition of Communal Land Rights with a Private Property Framework' (2006) 9 *Env L Rev* 320-321.

<sup>10</sup> The Commons Act 2006 s 15(2)(a).

<sup>11</sup> *R (Beresford) v Sunderland City Council* [2003] UKHL 60, [2004] 1 AC 889.

<sup>12</sup> *ibid* 92.

not necessarily have to be a traditional 'green', but this could have implications in urbanised areas. A campaign in London, 'Long Live South Bank', centred on this idea of an 'urban commons'. After plans were unveiled for the redevelopment of an area traditionally used by skateboarders and graffiti artists, a campaign group sought to protect it.

Under the Localism Act 2011, the Undercroft area on the South Bank in London was listed as an 'Asset of Community Value' (ACV). The 2011 Act was in part a response to the loss of public and communal areas and under it, if a space comes up for sale, the community is given a period to raise the funds themselves to purchase it. The intention is to aid local communities in saving sites of local importance. The fact that the skate park was awarded ACV status highlights the broadening nature of commons; it confirms that even a concrete area can potentially be as much a community 'common' as traditional green spaces. The group also attempted to register the Undercroft as a TVG. However, this has become increasingly more difficult with the passing of The Growth and Infrastructure Act 2013 which tightened the rules on town and village green designations. Campaign group Long Live South Bank launched a legal challenge against a decision by the London Borough of Lambeth to refuse the campaigners' application to register the Undercroft area as a TVG. This move is widely regarded as being the first test of the tightened rules on TVG designations.

The group had a judicial review hearing scheduled for the beginning of March 2014. On the final day of the hearing, Justice Lang adjourned the hearing and made a formal invitation to the Government to participate in the proceedings, inviting them to clarify their position on a number of issues raised during the hearing, namely its view on the interpretation of the restrictions on village green registration contained in the Growth and Infrastructure Act 2013. However, at the beginning of September 2014, an agreement was reached outside of court securing the future safety of the Southbank area for the skateboarders. As a result, Long Live South Bank have withdrawn their legal actions and the Government are no longer required to offer clarifications on the Growth and Infrastructure Act 2013. Whilst a victory for the campaign group, this result means that a sense of uncertainty still prevails regarding the scope of TVG designations in more urban areas.

This case highlights the importance of local areas of cultural and social importance and interest, and why the concept of commons is relevant in the reclaiming of space,

communality, and resources. In an increasingly urban environment, the concept of commons needs to expand and be more flexible in order for the value of common land as a community resource to be recognised. Indeed, in a 2001 case, the House of Lords highlighted the importance of the commons:

[W]hat happens on the commons [is] a matter of general public concern. They are the last reserve of uncommitted land in England and Wales. They are an important national resource.<sup>13</sup>

M'Gonigle suggests that such an expression might be seen as an aspect of a broader recognition of the 'sweeping privatisation (or enclosure) and "cloning" of public space.'<sup>14</sup>

However, a Supreme Court case last year overruled a crucial feature of the *Beresford* case. In *R v North Yorkshire CC*,<sup>16</sup> the Court defined the phrase 'as of right' in the CA 2006,<sup>17</sup> stating that the legal meaning of this expression applied where land was used without the permission of the landowner.<sup>18</sup> It was held that as recreational activities were enjoyed on the land held by a local authority,<sup>19</sup> they were done so under a licence, rather than 'as of right'. Therefore, the piece of land could not be registered as a TVG. Significantly, the Supreme Court not only distinguished the *Beresford* case, but in obiter comments, stated that it was wrongly decided and should no longer be relied upon.<sup>20</sup> This judgment has huge implications. It reflects a recent trend of decisions that are hostile to efforts by communities to register land under the CA 2006 and makes it easier for such applications to be defeated. Further, it reflects a worrying trend for the collective voices of the 'excluded' to be ignored, favouring private property interests over the interests of the community for public space.

Nicholas Blomley explores the idea of the 'urban common' using Vancouver's Downtown Eastside as a case study.<sup>21</sup> He highlights the issues of 'gentrification', and the 'unchecked displacement of the poor'.<sup>22</sup> There are many examples across the world where

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<sup>13</sup> *Bettison v. Langton* [2001] UKHL 24, [2002] 1 AC 27 [15].

<sup>14</sup> Michael M'Gonigle, 'Minding Place: Towards a (Rational) Political Ecology of the Sustainable University' (2006) 24 (3) *Environ Plan D: Society and Space*, 325.

<sup>16</sup> *R (on the application of Barkas) v North Yorkshire CC* [2014] UKSC 31, [2015] AC 195.

<sup>17</sup> Commons Act 2006 s 15 (2)(a).

<sup>18</sup> *Barkas* (n 15) [14] Lord Neuberger.

<sup>19</sup> Pursuant to the Housing Act 1985 s 12 (1).

<sup>20</sup> *Barkas* (n 15) [48] Lord Neuberger.

<sup>21</sup> Nicholas Blomley, 'Enclosure, Common Right and the Property of the Poor' (2008) 17 *Soc Leg Stud* 311.

<sup>22</sup> *ibid* 312.

either state or private power is used to exclude; this is a central theme in private property. The concept of commons could prove a useful tool in the claim of the 'displaced' and 'excluded' not to be excluded. These claims are a collective and turning a collective interest into an individualised, private one can threaten the survival of the community. Dana Cuff argues that contemporary development disputes 'often pit the developer-owner's private property against the community's common property'.<sup>23</sup> This idea of collective entitlement and community, using a language of historic rural right, has been used in Britain to contest urban redevelopment.<sup>24</sup> Blomley argues that cases such as the Vancouver example highlight the need to extend analyses of the commons as all too often they are trivialised or ignored.<sup>25</sup> These cases also highlight the complexity of the commons; commons are not just about a space, but embody something much bigger. We can think of the concept of the commons as an ideology, a set of practices. Roger Cotterrell offers a useful way of thinking of community in this broader sense:

Community in this sense is a mental construct [...] It provides people with a means of orienting themselves. It gives them their sense of identity. Hence community can be a matter of shared beliefs or values, but also of common projects or aims, or common traditions, history or language, or of shared or convergent emotional attachments. For individuals it is all or any of these in intricate, shifting combinations. The concept of community, if it is to be meaningful in contemporary conditions, is thus complex. It has nothing in common with the old pre-modern imagery of *Gemeinschaft*, suggesting static, enclosed, and exclusive communities.<sup>26</sup>

Both the situation in Vancouver's Downtown Eastside, and the Undercroft in London are examples of modern grassroots movements working towards the reclaiming of resources in land and challenging traditional nineteenth and twentieth century notions of ownership. Holder and Flessas offer a tentative description spanning the different forms of commons as 'the collective and local ownership of land, resources, or ideas, held in an often communal manner, sometimes in opposition to private property.'<sup>27</sup> This definition covers another area where the concept of commons is valuable: the sharing by communities of resources in

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<sup>23</sup> Dana Cuff, 'Community Property: Enter the Architect or The Politics of Form' in Michael Bell and Sze Tsung Leong (eds) *Slow Space* (Monacelli Press 1998) 135.

<sup>24</sup> See urban activists 'The Land Is Ours' as referenced in Blomley, 'Enclosure, Common Right and the Property of the Poor' (2008) 17 *Soc Leg Stud* 317.

<sup>25</sup> *Blomley* (n 20) 317.

<sup>26</sup> Roger Cotterrell 'Law and Community: A New Relationship?' (1998) 51 *Current Legal Problems*, 389–90.

<sup>27</sup> *Holder and Flessas* (n 1).

common. Historically, property held in common was thought to be an economically inefficient model. However, in recent years, challenges have been made to this idea, and commons and collectivity may actually be a more sustainable model. Elinor Ostrom highlights the fact that communities have 'relied on institutions resembling neither the state nor the market to govern some resource systems with reasonable degrees of success over long periods of time.'<sup>28</sup> Since Hardin's 1968 article, the idea of the 'tragedy of the commons' has been used to symbolise the destruction of the environment which occurs when a scarce resource is used in common by a group of individuals. However, Ostrom challenged this concept and argued the benefits of 'local common pool resource management'<sup>29</sup> through common property regimes. She has highlighted how many communities devise ways in which to govern the commons, creating and sustaining resources for their needs as well as for future generations.

The concept of commons is useful in looking at our relationship with ecosystems and maintaining long-term sustainable resources. The idea behind common property regimes is to maintain the resource system. In order to do so, these regimes work together to keep the resource as a common property rather than dividing into sections of private property. Ostrom identified eight design principles of stable local common pool resource management, influential in analysing how commons can be governed sustainably and equitably in a community. Her principles are as follows:

*1. Well-defined boundaries*

The presence of well-defined boundaries around a community of users and boundaries around the resource system this community uses.

*2. Congruence between appropriation and provision rules and local conditions*

Agrawal recognises two conditions that are contained within this principle. The first is that both appropriation and provision rules conform in some way to local conditions. And secondly, congruence exists between appropriation and provision rules.<sup>30</sup>

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<sup>28</sup> Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (CUP 1990) 1.

<sup>29</sup> *Ibid.*

<sup>30</sup> Arun Agrawal, 'Common Resources and Institutional Sustainability' 41-86 in Elinor Ostrom, T Dietz, N Dolšak, P C Stern, S Stovich, and E U Weber (eds) *The drama of the commons* (National Academy Press 2002).

### *3. Collective-choice arrangements*

The principle that most individuals affected by the operational rules can participate in modifying them.

### *4. Monitoring*

There is a need for monitoring, but the monitors must either be members of the community or otherwise be accountable to those members.

### *5. Graduated sanctions*

Graduated sanctions are necessary as they help to maintain community cohesion while genuinely punishing severe cases. They also maintain proportionality between the severity of violations and sanctions.

### *6. Conflict-resolution mechanisms*

Ostrom accepts that conflict over an exhaustible resource is inevitable in common property regime management, thus necessitating the presence of established mechanisms for conflict resolution to maintain collective action.

### *7. Minimum recognition of rights*

This principle states that external government agencies must not challenge the right of local users to create their own institutions.

### *8. Nested enterprises*

The last principle holds that in successful systems, 'governance activities are organised in multiple layers of nested enterprises.'<sup>31</sup>

The issue of the governing of natural resources in common is one of growing concern and consideration. In moving away from the traditional concepts of commons, we can see

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<sup>31</sup> Elinor Ostrom, *Governing the Commons* (CUP 1990) 90 as discussed in Michael Cox, Gwen Arnold and Sergio Villamayor Tomás, 'A Review of Design Principles for Community-based natural Resource Management' (2010) 15 (4) *Ecology and Society*.

how an approach with an emphasis on collectivity can provide new models for future landscapes where issues of scarce resources are perhaps becoming more pertinent.

To conclude, commons is a far reaching concept that can be employed in a diverse range. Commons are not just a physical entity, but an enabler of community and cultural identity. In the twenty-first century, they are particularly useful as they 'represent the basis for a challenge to stale ideas of property and for imagining a new kind of landscape.'<sup>32</sup> With national legislation on the creation of 'common' spaces, we can see a move away from the traditional ideas of commons being green spaces; there also appears to be a growing recognition of the cultural and social importance of a place, as we can see through places like the Undercroft in London being granted ACV status. However, the *Barkas* case highlights a worrying legal trend which undermines the collective interests of the community and fails to address the wider implications of commons. The idea that commons and communality could be used as a new, sustainable economic model is an exciting and interesting prospect.

This approach underlines that commons are not just a regulated, physical entity, or the subject of a single dispute, but are a multi-dimensional socio-legal phenomenon, centred around how people relate to land (and other common resources) in ways other than through private property ownership, for example their social practices, recreation and protests, but also, paradoxically, their sense of 'ownership' of common land.<sup>33</sup>

The language of commons is changing and becoming more encompassing. It is more relevant than ever today in a world of increasing development and privatisation and gives communities the opportunity and ability to assert their right not to be excluded and to work in common to reclaim common spaces and resources.

### Postscript

Since this article was accepted for publication, the Supreme Court has handed down a significant judgment relevant to the issues discussed in this article. Following on from the case of *Barkas*, the Supreme Court again considered the meaning of the phrase 'as of right' in the CA 2006. In the case of *Newhaven Port and Properties Ltd*,<sup>34</sup> Newhaven Town Council had

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<sup>32</sup> *ibid* 365.

<sup>33</sup> *Holder and Flessas* (n 1) 309.

<sup>34</sup> *R (Newhaven Port and Properties Ltd) v East Sussex County Council & Another* [2015] UKSC 7, [2015] 2 WLR 601.

applied to the County Council to register a beach as a TVG. The Council felt that the beach had been used by a significant number of local inhabitants 'as of right' for a period of at least 20 years. However, the issue that was raised by this appeal is whether the County Court had been wrong in deciding to register the beach as a TVG under the CA 2006. The harbour and beach area in Newhaven, owned by Newhaven Port and Properties Ltd, had been subject to a Byelaw in 1931 as well as statutory provisions regulating access to the harbour and the use of the harbour for activities such as fishing, playing games, and dog walking.

As in *Barkas*, the Supreme Court allowed the appeal based on the fact that the public enjoyed an implied licence arising from the Byelaws and therefore the use was not 'as of right.' It was further held that the CA 2006 cannot be interpreted so as to enable registration of land as a TVG if such registration was incompatible with some other statutory function.<sup>35</sup>

This judgment has paved the way for the area to be redeveloped, with the local inhabitants losing out on use of the beach for recreational activities. This case highlights the conflicting nature between the interests of private and public entities, undermining the collective interests of a community. The full judgment provides further discussion of many of the issues raised here.

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<sup>35</sup> *ibid* 103.