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# THE ITALIAN EXPERIENCE OF THE COMMONS.
## RIGHT TO THE CITY, PRIVATE PROPERTY, FUNDAMENTAL RIGHTS

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# The Italian Experience of the Commons

## *Right to the city, private property and fundamental rights*

ANTONIO VERCELLONE

### 1. Introduction

In Italy, the discussion on the commons is characterised by certain particular elements with respect to its manifestation in the international debate[1]. While internationally – especially in the Anglo-American world – the issue of the commons has been tackled through the lens of economic theory[2], in the Italian context it is within the law (and private law primarily) that the discourse on the commons has found its breeding ground, in a constant and fruitful dialogue between legal scholarship and political battles emerging from the bottom-up.

The Italian approach to the theory of the commons deserves attention because it undermines the traditional perspective, according to which the notion of commons can be inferred from the intrinsic characteristics of a good: indeed, according to the Italian perspective, being a "commons" does not amount to an ontological characteristic of the good. This qualification comes, rather, *ex-post*, as a result of a triangular political relationship that sees on one side the good itself, on another a community of people

[1] For an introduction to the theory of the commons in Italy see: U. MATTEI, *Protecting the Commons: Water, Culture and Nature: The Commons Movement in the Italian Struggle against Neoliberal Governance*, in The South Atlantic Quarterly, 3, 2013, p. 367.

[2] It is a debate which finds its roots in G. HARDIN, *The Tragedy of the Commons*, in Science, 1962, p. 1243, the perspective of which has been overturned by E. Ostrom (cf. E. OSTROM, *Governing the Commons. The Evolution of Institution for Collective Actions*, Cambridge, 1990). For an introduction to this debate see O. DE SCHUTTER and B. RAJAGOPAL, *Property from Below: An Introduction to the Debate*, in O. DE SCHUTTER and B. RAJAGOPAL (ed.), *Property Rights from Below: Commodification of Land and the Counter-Movement*, Routledge, Abingdon-on-Thames, 2019.

and, on a third side, the fundamental rights that the good is able to satisfy (and the community demands).

The perspective is thus overturned: are not the intrinsic characteristics of a certain good that demand it to be governed as a commons. It is rather the model of governance adopted for its management which makes it so. In other words, we are dealing with the idea of an opposite path, which, overcoming the logical priority of goods over regimes, dogmatically assumed by the Western legal and economic traditions, focuses first of all on regimes and on how *they* qualify the good.

Such an approach, although often accused of giving rise to an excessively vague and not always clear category (that of the commons), has nevertheless had the merit of offering important theoretical tools, capable of setting up a serious critical reflection on some traditional legal categories.

## 2. The category of the commons in Italy: legal doctrine, case-law and political battles

### 2.1. The law proposal issued by the "Rodotà Commission"

The starting point for the debate on the commons, in Italy, can be traced back to the work of a ministerial commission appointed by the then Minister of Justice, in June 2007. The Commission was charged with drafting a reform of the part of the Italian civil code dedicated to goods (*beni*).

The commission, chaired by Stefano Rodotà – a popular jurist who spent his life combining legal scholarship with a strong political commitment – was the culmination of something which took place previously, which must therefore be given account of.

A few years earlier, at the Accademia dei Lincei, one of the most prestigious scientific institution in the country, a group of scholars had taken stock of the state of Italian public assets and of the privatization processes that had affected them[3].

[3] See U. MATTEI et E. REVIGLIO, S. RODOTÀ (eds.), *I beni pubblici. Dal governo democratico dell'economia alla riforma del codice civile*, Roma, 2010.

The research revealed how, in the previous years, the state had carried out a tremendous divestment of public assets and services, for a total value of more than 150 billion euros.

This privatization process was giving rise to an alarming phenomenon. On the one hand, fundamental services were being increasingly entrusted to the private sector and subjected to the dynamics of profit, all this usually resulting in both a great deterioration in the quality of the service provided and an unjustified rise in prices (this was the case, for example, with the water supply, which will be discussed shortly). On the other hand, entire real estate holdings, previously accessible to all, were privatized and the community was denied access to them (think, in this case, of the many historic buildings used as museums or for community services, and sold to private investors to build apartments or luxury hotels).

All this led to a critical reflection on the relationship between private property and public intervention as set forth by the civil code. Under this perspective, indeed, the code was accused of being somehow anachronistic.

In fact, while the discipline governing the de-privatisation (or nationalisation) of private property ensures the owner a great level of protection (just think of the guarantees that, in Italy as well as in the rest of the western legal tradition, surround the doctrine of eminent domain), no symmetric rules exist with respect to the opposite process, i.e. the privatisation of public assets.

This historical legacy, which made sense at the time of the development of modern constitutionalism and the construction of current private law, seems today to be obsolete[4].

While at the end of the nineteenth century it was the landowner who, in order to be guaranteed his freedom, had to be protected from a Leviathan State that ran the risk of becoming excessively powerful and intrusive, in the current structure it is rather the "collective", contingently embodied by an increasingly weakened state, that has to be

[4] It must be highlighted that, in the Italian debate on the commons, a great role was played by legal historians and, especially, by the studies carried out by Paolo Grossi. See: P. GROSSI, *Un altro modo di possedere: l'emersione di forme alternative alla proprietà nella coscienza giuridica post-unitaria*, Milan, 1977.

defended from a private sector that no longer corresponds to the paradigm of the small/medium landowner, but rather to those "new forms of ownership"[5] typical of financial capitalism.

In other words, while at the origin of legal modernity the protection of the owner from the state responded to the need to allow the maximum extractive exploitation of resources (mostly agricultural) through institutions able to foster the transformation of an excess of commons into capital; today the opposite problem arises. The current ecological and economic crisis calls in fact for a protection of the commons in a situation in which the scarcity of common goods pairs with an overabundance of capital.

Although the members of the Rodotà Commission were aware that a reform of the Civil Code would not in itself be sufficient to bring about such a reversal, still, the theory of ownership is the lintel of the structure under discussion and, therefore, in a reformist perspective, was considered as being a good starting point.

Moving on from these reflections, the proposal drawn up by the Commission envisaged overcoming the distinction, which the Italian civil code borrowed from the *Code Napoléon*, between *demanio* (those public goods subjected to a lien of inalienability) and disposable public goods (i.e. those goods the state can sell without any specific restriction). The category of *demanio* was indeed considered insufficient to protect fundamental public goods from privatization: in fact, the lien of inalienability could (and still can) be easily dismissed through a very simple procedure (*sdemanializzazione*), which allows the removal of an asset from *demanio* turning it into a disposable alienable good, all this through the simple adoption of a decree.

The proposal enacted by the Commission therefore provided for a new taxonomy, which, in the first place, would make it more difficult to privatize fundamental public goods.

However, the most important novelty of the proposal, and what is most relevant here, was the provision of the new category of the commons (*beni comuni*). These were defined

[5] Cf. U. MATTEI, *Proprietà (nuove forme di)*, Enciclopedia del diritto, Annali, 2012.

as goods instrumental to the enjoyment of fundamental rights and the autonomous development of the person, the use of which is to be protected for future generations. The proposal provided for a list of them, but one that was purely illustrative: natural resources, such as rivers, streams, lakes and other waters, and air; parks, forests and wooded areas; high-altitude mountain areas, glaciers and perpetual snows; stretches of coastline declared an environmental reserve; protected wildlife and flora; other protected landscape areas; cultural heritage; archaeological heritage; and so on. In other words, it was about assets that are closely linked to fundamental human rights, and to which, therefore, the proposal was due to ensure access for all, even in a diachronic key, in accordance with the principle of intergenerational justice.

Under a theoretical perspective, the main characteristic of the new category, as developed by the Rodotà Commission, was the breaking of the link between fundamental rights, collective needs and necessary public ownership of the good.

In fact, in the proposal, a reservation of public ownership was envisaged only for those goods which satisfy the fundamental interests of the state ("necessary public goods"), either because they are strictly connected to the exercise of public sovereignty (military structures, strategically important roadways, main railway networks, etc.) or because they are functional to public welfare ("social goods": e.g. hospitals, educational institutions, etc.).

The commons, instead, did not belong to these two categories of goods.

For the commons, a principle of "indifference to the formal title of ownership" applied. The commons were described as resources of shared ownership, which may belong either to public or private entities. In both cases, they had to be subjected to a model of governance able to guarantee their collective use, according to criteria of ecological sustainability and intergenerational justice. Thus, what really mattered, in the new category, was not the qualification (public or private) of the owner, but rather the way the goods had to be managed.

Due to the fall of the government that had appointed the reform commission, the law proposal, although completed, was never examined by Parliament.

Nevertheless, the proposal, and especially the new category of the commons, had a significant impact on Italian law. Although it did not succeed in changing the provisions of the Civil Code, the elaboration carried out by the commission had the power to filter through the system by other legal formants: doctrine, case law and praxis (political and administrative).

2.2 The referendum on water distribution and the commons as a legal concept[6]

Since 2010, several political and social conflicts have been conducted under the banner of the commons, which are very different from each other, but whose common key feature lies in the idea of countering concentrations of power and processes of exclusion, with specific reference to assets or services functional to the fulfilment of fundamental rights of communities and/or to their social and territorial cohesion.

The forerunner of these conflicts was, without a doubt, the one that, in 2011, led millions of Italians to repeal, making use of the institution of the referendum provided for in Article 75 of the Italian Constitution, a regulation that, at the time, had just been introduced and that would have led to the privatization of the water service[7].

In particular, in 2009, a decree law passed by the Government and converted by Parliament provided that, by a certain date, municipalities should put the water distribution service out to tender, in favour of entrepreneurs set up in the form of for profit corporations[8]. There was also provision for the possibility of setting up public-private equity joint ventures, but even in this case the private partner would have to be selected from for-profit investors.

The plan was therefore clear: the water service would be subjected, in its entirety, to market dynamics and its direct management by the public would become a marginal hypothesis.

Against this law, a common front was formed that saw movements for the defence of public water, associations involved in the third sector, environmental organisations,

[6] M.R. MARELLA, *The commons as a legal concept*, in Law and Critique, 2016, p. 62.
[7] On the Italian legal discipline of water distribution see A. QUARTA, U. MATTEI, *L'acqua e il suo diritto*, Rome, 2014.
[8] Article 23 of the Decree Law no. 135 dated 25 September 2009, converted, with amendments, into Law no. 166 dated 20 November 2009.

certain political parties and part of the legal academia as allies together (many of the jurists who had been part of the Rodotà Commission were, in 2011, part of the drafters of the queries of the referendum held on 12 and 13 June of the same year).

The success of the referendum that resulted from this mobilization (overcoming the structural quorum, with twenty-seven million voters and a prevalence of "yes" votes, equal to 97% of the voters) inaugurated the great diffusion of the concept of the commons, a concept that, from there onwards, would be used in many disputes concerning the defence of environmental resources, cultural heritage, urban real estate, etc. against their privatization or their abandonment by the state (or by other public bodies).

The effect of this phase of mobilization, and the consequent spread of the concept of the commons, was twofold.

First of all, the notion of "*beni comuni*", which had failed to make its way into the system through the main door (i.e. the door of legislative reform), began to penetrate it by other means.

The theoretical formulation underlying the draft law proposed by the Rodotà Commission is found, in fact, in an important decision of the Corte di Cassazione (the Italian Supreme Court), which recognizes the notion of the commons as intrinsic to the Italian legal system and as a category directly descending from an interpretation of statutory law in the light of the constitution[9].

In this judgment, which established the ownership of the fishing valleys of the Venetian Lagoon, the Court upheld that from the provisions of the Constitution, and from their direct applicability, derives "the principle of the protection of the human personality and its proper conduct within the welfare state, including within the 'landscape', with specific reference not only to those goods formally part of the *demanio* or attributed to public ownership, but also with regard to those goods which, *independently of a prior identification by the legislator, by their intrinsic nature or finalization, are […] functional to the pursuit and fulfilment of the interests of the community [...]*."

[9] Corte di Cassazione, Judgement n. 3811/2011

It follows, according to the Court, that "*where an immovable property, regardless of the owner, is, due to its intrinsic connotations, especially those of an environmental and landscape nature, intended for the realization of the welfare state as outlined above, this property is to be considered, beyond the now outdated perspective of Roman dominium and code-related ownership, 'commons', that is, regardless of the title of ownership, instrumentally linked to the realization of the interests of all citizens".*

The notion of *beni comuni*, in Italy, did not only impact on case law, but also on the theoretical elaboration of the legal doctrine. It began, in fact, to be widely discussed by scholars, and, particularly, by private law scholars[10].

The initial problem that had to be posed was linked to the need to bring back to a systematically coherent and in some way unitary theory instances that, in practice, described very different situations.

The question, in other words, was that of identifying a sufficiently precise notion of *beni comuni* in the face of the extremely wide use that the lemma was beginning to take on in practice, a use that was an extension of the meaning that the Rodotà Commission had adopted, which, after all, had had mainly scarce natural resources (water, air, etc.) in mind. The doctrine investigated what the qualifying element of such assets was and, therefore, which assets could be subsumed within the notion of common goods.

Part of the legal scholarship, assimilating the various declensions that the term "*beni comuni*" began to assume in practice, offered a simple taxonomy that put the common elements of these heterogeneous uses in order, identifying material commons (water, natural resources linked to the environment and to the historical and artistic-cultural heritage of the country, etc.) and immaterial ones (intellectual creations, knowledge and popular traditions etc). According to this perspective[11], those institutions providing services that are the object of social rights (health and university) as well as the urban space, meaning not only the urban territory to be protected with respect to the processes of cementing but also the cultural specificities of neighbourhoods put at risk

[10] Within Italian legal scholarship, see: U. MATTEI, *Beni comuni. Un manifesto*, Bari, 2011; M.R. MARELLA (eds.), *Oltre il pubblico e il privato. Per un diritto dei beni comuni*, Milan, 2012; S. RODOTÀ, *Il terribile diritto. Studi sulla proprietà e i beni comuni*, Bologna, 2013. In English: M.R. MARELLA, *The Commons as a Legal Concept*, cit.; U. MATTEI, F. CAPRA, *The Ecology of Law. Towards a Legal System in Tune with Nature and Community*, Oakland, 2015.

[11] M.R. MARELLA, *Introduzione*, in M.R. MARELLA (eds.), *Oltre il pubblico e il privato*, op. cit., p. 9.

by gentrification, also belong to the category of the commons. Lastly, the taxonomy envisaged the idea of "work", "information" and "democracy", thus including within the notion of "*beni comuni*" those political and economic relations endowed with constitutional protection.

Although it is true that a taxonomy undoubtedly facilitates the discussion, it is also true that, when it comes to the commons, the risk is coming up with categories which may seem too vast and, thus, somehow fuzzy.

A further passage was therefore attempted.

This is where the second important consequence of the broadening of the concept of "*beni comuni*", we referred to earlier, comes in.

If, in fact, in a first phase, the conflicts about the commons contingently coincided with the idea of contrasting the privatization of assets and collective resources so that their public ownership would be maintained (think, in this sense, of the conflict about water), in this second phase, what is, instead, more valorised is the most innovative element of the notion of "*beni comuni*" developed by the Rodotà Commission (an element which has also been emphasized by the Corte di Cassazione). It is a principle that we have summarized with the expression "indifference to the formal title of ownership" and, that is, the idea that the commons depict a terrain that lies beyond the public and the private, since what qualifies them is not certain physical characteristics which they possess but, rather, the regime of governance to which they are subject, by virtue of political processes that led to their collectivization and that can be qualified as "constituent".

Put in other words, what qualifies a commons is not so much its title of ownership (which can be either public or private), but rather the fact that it has been declared by a given community of reference as a good fundamental to the satisfaction of its rights and social cohesion and that, as a result of this, has been subjected to a model of governance with specific characteristics. These characteristics can be summarized as follows: i) perpetual exclusion of the asset from the market; ii) submission of the good to a system of democratic and participatory stewardship; iii) the respect of the principle of intergenerational justice; iv) a set of rules where access, instead of exclusion, becomes

the ordering category. In other words, it is the model of governance around which the use of the good is structured that qualifies the commons, regardless of both, the intrinsic characteristics of the asset and the branch of law (public or private) that is used to build it.

It is precisely this perspective that has been adopted by the most recent theoretical perspectives[12]. Its valorisation has, indeed, led to a third phase of reflection on the commons.

In such a phase the notion of "*beni comuni*" is increasingly used as a hermeneutical device to investigate, in a counter-hegemonic key, existing law, in order to identify interpretative solutions enabling the construction of legal regimes which can oppose to the extractive nature of the traditional structure of private property a model of ownership which can be qualified as generative and ecological.

## 3. Urban common

### 3.1. At the heart of the legal conceptualization of urban governance: the public/private divide

The urban space is perhaps the area within which both the practice and theory of the commons have developed most consistently[13].

In this context, the commons represent the answer, from the bottom up, to the failure of the traditional structure of governance of cities, based on the dichotomy between private property and public intervention.

From modernity onwards, private property has been the default structure to which urban lands have been subjected.

However, private property, conceived and designed around the paradigm of agricultural land, is incompatible with an interconnected fabric such as that of cities and, above all, with those needs that, in cities, must be satisfied. These needs can be effectively summarized by the notion of "right to the city", understood in its dual

[12] In this perspective see the essays in A. QUARTA and M. SPANÒ (eds.), *Beni comuni 2.0. Controegemonia, nuove istituzioni,* Milan, 2016; also see: M.R. MARELLA, *The Commons as a Legal Concept*, op. cit.

[13] See U. MATTEI, A. QUARTA, *Right to the City or Urban Commoning?*, in *The Italian Law Journal*, 2/1, 2015, p. 304.

meaning of right to housing and right to *habitat*, i.e. the collective right to live in a healthy, serviced and economically, ecologically, artistically and culturally adequate environment[14].

Private property (at least in its traditional structure) is antithetical to these needs. Such needs call for ownership regimes based on access and on the distribution of the utility obtainable from the good, in accordance with the satisfaction of fundamental rights. On the contrary, the default structure of private property is preordained to encourage the extraction of the maximum value from a land, allocating all its benefits to the owner, according to the well-known perspective of alignment between costs, benefits and incentives outlined by the Coase theorem[15].

For this reason, private property, as the founding structure of the market, cannot provide an answer to the needs underlying the right to the city.

This is evident with regards to the right to housing. Given that the market only acknowledges demands, and not needs, an urban governance based on private property excludes anyone not having the necessary purchasing power from having a home.

Similar problems also arise with reference to the right to *habitat*: since the dynamics of private property select, among the various possible uses of a good, only the most profitable ones, a city delegated exclusively to market forces would end up with an overabundance of residential and commercial buildings and the with a lack of green areas and assets intended for services and public spaces. Obviously, the latter do not guarantee a profit since they amount to non-rival and non-exclusive goods: this is the well-known problem of *public goods*, one of the hypothesis of market failure envisaged by neoclassical economics.

Similarly, urban regeneration plans fully entrusted to the market would limit the redevelopment only to sufficiently profitable areas (for example historic centres), relegating to abandonment those areas that conceal a low or negative rent-gap (for

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[14] See D. HARVEY, *Rebel Cities: from the Right to the City to Urban Revolution*, London, 2012; by the same author see: *The Right to the City*, in 53, New Left Review, 2008, p. 5; also see H. LEFEBVRE, *Le droit à la ville*, Paris, 1968; on the relationship between the right to the city and urban commons see S. FOSTER, *Urban Commons, Property and the Right to the City*, in O. DE SCHUTTER e B. RAJAGOPAL (eds.), *Property Rights from Below*, op. cit.

[15] R. COASE, *The Problem of Social Costs*, in The Journal of Law and Economics, 1960.

example former industrial suburbs). Similarly, they would lead to the subjection of the area to its most profitable uses (e.g. hotels, apartments and luxury shops, etc.) and, therefore, to its substantial privatisation and to the urban displacement of the weakest part of the resident population.

Precisely to avoid these imbalances, the dogmatic model on which urban governance is based in western legal systems provides that the drive of private ownership (i.e. the market) is limited or obviated by public intervention. It is in this sense that institutions such as the land use plan, public-private tools for urban regeneration, the control of the market of rents and, finally, the various public systems of access to housing for disadvantaged groups must be read.

However, this dual system (private ownership/public control) brings about structural imbalances[16]. These are the consequence of the fact that such a system, instead of being based on directly functionalized ownership regimes aimed at the satisfaction of fundamental rights, finds its foundation in a model of ownership (i.e. private property) that is completely antithetical to the needs arising from cities. Obviously, from the perspective of the public, having to constantly fix dysfunctions caused by private property involves an enormous expenditure of resources. Precisely for this reason, the shortfalls of the paradigm under examination emerge with particular force in periods of economic crisis and of big cutbacks in public funds.

In these cases, not only is the public no longer able to stem private property due to lack of resources, but, above all, it ends up pandering to its drive, politically and legally building the conditions for the private accumulation of land rent.

A good example of that are the legal mechanisms at the cornerstone of urban regeneration.

As is well known, the post-industrial city – a key feature of the urbanistic paradigm of western cities since the 1980s and 1990s – brings with it important reconversion needs. Disused industrial spaces, urban voids, entire districts (think of the so-called dormitory districts designed for the working class) that need to find a new purpose.

[16] See A. VERCELLONE, *Il Community Land Trust. Autonomia privata, conformazione della proprietà, distribuzione della rendita urbana*, Milan, 2020, pp. 9-81.

In a context of very limited public resources, local authorities, which certainly cannot leave entire areas of cities abandoned, have very limited options if they move within the traditional framework set on the private ownership/public intervention dichotomy. In particular, the choice is between not redeveloping (due to lack of resources) or redeveloping by attracting private capital. However, this can only be done by allowing the private investors to extract the maximum land rent from the area[17], either by enabling the privatization of entire portions of the city, or by subjecting real estates assigned to collective use to more profitable uses, or by selecting only the most relevant areas, such as the ones which have a greater historical value, for redevelopment. Any barrier that the public wants to put to these variables requires this latter to refund the private investor of the losses it will have to face. This may take the form of either the injection of a portion of public capital, usually justified as leverage to raise private funds, or, as is more often the case, by authorizing the investor to construct new volumes, in addition to urban planning standards, and thus to make a profit by placing the new areas on the market.

We are dealing, in other words, with mechanisms which promote gentrification and overbuilding of entire areas of the city.

This is the rationale at the cornerstone of most urban regeneration disciplines in force in EU Member States.

In other words, in times of cutbacks in public resources, the dualism of private ownership/public intervention strongly shows its limitations, since the public cannot stand up to market pressures by guaranteeing services and collective spaces.

European cities (but the same could, with the necessary adaptations, be transposed to other contexts) are the mirror of these shortfalls. As recent data certifies, they are characterized by a clear contrast between strongly gentrified areas and ghetto quarters, to which the disadvantaged sections of the population are relegated, in a context that

[17] See, on this point, the theoretical framework elaborated by N. Smith, and known as "theory of rent gap": N. SMITH, *Uneven Development. Nature, Capital and the Production of Space*, Athens, 1984; ID. *The New Urban Frontier. Gentrification and the Revanchist City*, London, 1996; ID. *New Globalism, New Urbanism: Gentrification as Global Urban Strategy*, in Antipode, 3, 2002, pp. 427-450.

sees the proliferation of urban voids, as well as the growing increase in inequality, both within the city and between the city and the surrounding suburbs.

### 3.2. Urban commons as a bottom-up solution to the shortfalls of the public/private divide

It is within this context that urban commons are placed[18]. This term refers to a series of experiences in which groups of active citizens organize themselves from the bottom up to take direct care of urban immovable goods, often urban voids or abandoned spaces, with the aim of managing and administering them through open and participatory governance mechanisms. In these experiences, the so-called commoning phase takes on fundamental importance. This is the phase in which a group of people demands the care, direct and participatory management of a given asset, emphasising its importance for the satisfaction of the rights of the community or for its social cohesion, and calls for it to be administered according to the principle of access[19].

In this way, the group of citizens becomes the community of reference, and the good a *bene commune*.

The main characteristics of these experiences can be summarized as follows: a) the presence of a good in need of care and regeneration because it is in a state of abandonment or to which, for other reasons, access by the community is denied (the asset is often in public ownership but this is not always the case); b) the presence of a community of citizens who decide to take care of it, adopting democratic and participatory procedures; c) the management of the good in order to offer services of a collective nature, directly related to the social cohesion of a given community or to the satisfaction of fundamental rights.

Some examples could be of help.

Think of an historical theatre owned by a municipality, in need of maintenance and therefore closed for years, which the public owner decides to sell to private investors to

[18] See S. FOSTER et C. IAIONE *The City as a Commons*, in Yale Law and Policy Review, 2, 34, 2016, p. 282.
[19] See D. BOLLIER and S. HELFRICH, *Overture*, in D. BOLLIER and S. HELFRICH (eds.), *Patterns of Commoning*, Amherst, 2015, p. 18.

build a shopping mall, and then occupied by artists and citizens who, opposing privatization, reactivate a theatre season and organize the afternoon use of the space for courses, political meetings and food kitchens for people in need. Another example is the case of the abandoned industrial property in which various actors involved in the housing crisis sector decide, in agreement with the local authorities and the private owner, to organize a community land trust and thus to organize the use of the property according to a participatory, democratic and sustainable model of social housing and to allocate it, therefore, to the satisfaction of the right to housing. A last example could be the one of the public garden that has been closed for years due to lack of funds for its maintenance and the neighbourhood committee that organizes itself from the bottom up to prune its plants, manage its cleaning and allocate part of it to urban vegetable gardens according to rules of access, use and organization shared and collectively drawn up during various meetings and assemblies.

Although these occurrences, especially in their early stages, are largely based on informal dynamics, law is central to them.

It is clear, in fact, that the self-organization of a community with regards to the use and management of an asset is, in the first place, an institutional matter.

The first problem, from this point of view, concerns the fact that, often, the assets subject to care and regeneration are under public ownership.

Although it is true that, in some cases, the act of taking charge by the community of reference expresses a conflict with the public administration (to the point of sometimes taking the form of illegal occupations), it is equally true that in many contexts the dialectic between the community of reference and the administration has turned from conflictual to collaborative and has seen the municipality and the community of reference engaged in a path of participatory co-planning on the shared use and management of the estate.

The success of these experiences has changed the political culture of many Italian local administrations, which are increasingly willing, especially in recent times, to promote regeneration paths based on the direct care of goods by the citizens and to start collaborative dialogues with the communities of reference.

### 3.3. The Italian experience of municipal regulation on urban commons

In order to provide a legal framework within which to place the administration's actions in the context of these experiences, lacking a national legislative framework, many Italian municipalities (now more than two hundred) have adopted specific regulations on urban commons[20].

These regulations, which each city issues under partially different names (the most widespread is regulations "on collaboration between citizens and administrations for the care and regeneration of urban commons", along the lines of the Bologna regulation, which is the archetype), have specific features and differences between them.

An in-depth analysis of them would, therefore, require a great work of micro-comparison, which would go well beyond the more modest objectives of this paper. We would thus just describe some common basic features of these regulations.

Firstly, their stated aim is to establish a cooperation (in the forms we will see shortly) between the administration and what are called active citizens and/or communities of reference. The regulations define the communities of reference (or the active citizens) as those individuals or association or social groups, *including informal* ones, who are committed to the care, management and administration of an urban commons.

The notion of "active citizens" is therefore closely linked to that of urban commons, according to a schema whereby the latter is a hermeneutical parameter of integration of the former. The regulations, although not always concurring, qualify urban commons as assets that citizens and the administration recognize as functional to the satisfaction of the fundamental rights of the person, to the individual and collective well-being, and to the interests of future generations, which must be administered according to the forms and principles provided for by the regulations themselves. These

[20] See: R. ALBANESE, E. MICHELAZZO, *Manuale di diritto dei beni comuni urbani*, Turin, 2020; C. ANGIOLINI, *Possibilità e limiti dei recenti regolamenti comunali in materia di beni comuni*, in A. QUARTA, M. SPANÒ (eds) *Beni comuni 2.0.*, op. cit.; on the Italian experience of urban commons see, also, T. DALLA MASSARA, M. BEGHINI (eds.), *La città come bene comune*, Napoli, 2019.

postulate the need for co-management through democratic and participatory models of governance, based on access, rather than exclusion.

From these regulations, it is therefore possible to deduce one of the main legal characteristics of the *commons*: that is, the overcoming of the dichotomy between subject and object within the conceptualization of the exercise of the legal prerogatives on a good. According to the legal framework set up by the regulations, a community of reference can be defined as such because not only does it declare an asset as a *commons*, but also because it subjects it to a model of governance that bear specific characteristics. These local disciplines thus translate into a legal text what we have referred to as the process of "commoning", that is, that dialectical process in which, by virtue of a political-institutional relationship between subjects and thing, a community of people becomes a community of reference and a thing becomes a commons good.

At the cornerstone of the regulations is the so-called "collaboration pact" (this, too, is called in different ways, depending on the case) [21]. This is the agreement signed by the public administration and the community of reference in which the shared modalities for the management, care and regeneration of the asset are established. The agreement is made following a proposal for co-management of the good, which may formally come from either the administration or the community of reference.

Much can be said about collaboration pacts, a very innovative institution that, in Italy, is beginning to be discussed both by the administrative and the private legal scholarship[22].

We will limit ourselves here to a few brief observations.

Leaving aside the much debated (and, indeed, very relevant) issue of the legal qualification of that pact (which calls for a choice between the administrative act, the contract – the latter being an option that seems preferable – and a *tertium genus* of uncertain collocation), what is interesting here is to observe how this institution breaks with the top-down dynamics typical of citizen-institution relations in administrative law. On the contrary, it promotes a legal relationship of an equal nature, in the wake

[21] See A. GIUSTI, *La rigenerazione urbana. Temi, questioni e approcci nell'urbanistica di nuova generazione*, Naples, 2018.
[22] See R. ALBANESE, *Nel prisma dei beni comuni. Contratto e governo del territorio*, Turin, 2020.

of the principle of horizontal subsidiarity that the Italian Constitution upholds in its Article 118.

In particular, in the collaboration pact, citizens and administrations establish together the role that each of them assumes in the *shared* care of the asset and they regulate the aspects related to its participatory stewardship.

It should be noted that the collaboration pact makes it possible to set up direct cooperation between citizens and local authorities without having to resort to open public tenders. This because the pact shall be legally qualified as a tool for structuring the cooperation between citizens and the administration (and not as a mean by which the administration grants a private actor the exclusive and profitable use of a public immovable good) [23]. In other words, urban commons replace the dynamics of profit with that of the value produced by social cooperation: for this reason, they fall outside the scope of the regulations on public procurements.

From this perspective, it is also noteworthy that the pact of collaboration does not definitively define the subjects to whom the administration entrusts the care and management of the good. In fact, it identifies a community of reference which must necessarily equip itself with an internal regulation that allows anyone to become its member. In other words, the community of reference, in order to be able to stipulate the pact, must structure its internal organization in such a way as to allow anyone to participate in the care and management of the good and actively participate to its internal decision making processes. This implies that the admission of a new member into the community cannot in any way be left to the discretion of one of its organs. It may, at most, be subject to the concrete demonstration, by the interested party, of an effective interest in the management and care of the asset. For example, in a community of reference structured in the forms of an association, an article of the bylaws subordinating the admission of new members to the discretionary choice of the board of directors shall be considered inconsistent with a pact of collaboration (and, more

[23] See E. MICHELAZZO, *Riflessioni sui patti di collaborazione in rapporto alla concorrenza*, in R. ALBANESE, E. MICHELAZZO, A. QUARTA (eds.), *Gestire i beni comuni urbani. Modelli e prospettive. Atti del convegno di Torino 27-28 febbraio 2019*, Rubbettino, Turin, 2020.

generally, with a model of governance inspired by the principles of the commons). By contrast, a clause that admits *de plano* new members, but that subordinates the exercise of the right to vote in the assembly to the participation in a minimum number of consecutive meetings or to specific acts of care and management (e.g. participation in a specific working group), might well be legitimate.

In any case, this principle guarantees that anyone who is interested can take part in the management and administration of the good and can directly influence the choices concerning its stewardship.

This means that the pact does not constitute a transfer of a public good to the exclusive use of a private subject (something which would give rise to a concession and, consequently, would require the undertaking of a public tender). The pact of collaboration, on the contrary, implements to the maximum the principle of horizontal subsidiarity by entrusting the care of the good directly to the community, understood in a widespread sense. Consistent with this, and with this new form of "administration", the public administration's duty of impartiality, in this context, is not guaranteed upstream (according to the top-down dynamic that oversees the regulation of public tenders). In the domain of urban commons it is, rather, assured "downstream", that is, through the concrete mechanisms of management and governance that the community of reference is given in the exercise of its civic autonomy.

## 4. Model of governance for the management of urban commons

### 4.1. Overview

From all that has been discussed so far, one element emerges: the centrality assumed by models of governance in both the theory and practice of the commons. With models of governance we refer to the concrete ways in which the communities of reference organize the open, participatory and democratic management of the good.

This centrality is inherent in the principle that we have defined as "indifference to the formal title of ownership" which predicates, as we have seen, that the commons are collocated beyond the public and the private. In order for this formula to take on meaning, it can only be understood in the sense that what counts is the property

arrangements through which the commons are managed, regardless of the qualification – public or private – of the owner.

These models of governance must then be examined and studied, because otherwise the principle of indifference to the formal title of ownership, which is at the heart of the theory of *commons*, becomes an empty word.

Also in this case, urban commons are the area in which both social experimentation and doctrinal reflections appear, at least in Italy, more advanced.

However, as already partially mentioned, the establishment of an open and participatory model of governance of the good is the final aim of any process of urban commoning, including those which follow the paths traced by municipal regulations on the commons, regulations which, not by chance, usually dedicate specific paragraphs to the models of governance.

Without claiming to be exhaustive, let us therefore look at some of these models.

### 4.2. The *uso civico* (civic usage)

A first set of instruments can be built using public law institutions.

This is the case with *uso civico*, a model that, in Italy, has enjoyed a remarkable echo because it represents the model of governance of a very well-known and important experience of urban commoning: the former Asilo Filangieri in Naples.

It should be pointed out that the *uso civico* discussed here does not correspond, from a technical point of view, to the *uso civico* conceived by continental private law, the latter being an institution which moves integrally within the domain of private property, allowing a community access to a certain use of a good according to rules and principles of customary law.

With *this uso civico*, the "Neapolitan-style" *uso civico* shares the idea of collective access, but differs profoundly from a technical-legal perspective.

In the Italian experience, *uso civico* is conceived as a tool of governance of common goods *in public ownership* and, in particular, municipal ownership[24].

[24] On *uso civico* see the essays contained in the third part of the volume edited by R. ALBANESE, E. MICHELAZZO, A. QUARTA, *Gestire i beni comuni urbani*, op. cit.

It provides that the community of reference of the good builds, autonomously and from the bottom up, the rules on the use of the spaces, on the deliberative and decisional procedures, on the organization of the activities, etc., joining them together in one document: the so-called "declaration of *uso civico*".

It is therefore up to the municipality to incorporate the declaration in an administrative act (which takes the form of a deliberation of the city council). Such a deliberation has the dual effect of giving some form of legal effect to the declaration and, above all, of legitimising the possession of the good by the community of reference, a possession which takes shape in the forms and ways provided for in the declaration itself.

The main Italian experience relying on this form of governance amounts to a best practice in the European urban commons landscape. The feeling, however, is that this is more the result of favourable political contingencies rather than the product of the institutional choice made.

From a more strictly institutional point of view, in fact, it is our opinion that *uso civico* bears serious limits and shortfalls.

The most relevant among them is that just as the municipality can grant *uso civico*, acknowledging by its own act the declaration drawn up by the community of reference, the same municipality, as owner of the property, can at any time, and *ad nutum*, ignore it, by simply adopting an equal and contrary act. From a strictly legal point of view, therefore, *uso civico* does not protect the good from public power, which may, at its sole discretion, decide to withdraw its effects and use the good for other purposes, for example by selling it on the market for commercial use. The risk, in other words, is that *uso civico*, granted during a favourable political climate, typically at a time when the majority of the city council welcomes experiences of urban communing, may be revoked at the first change of political majority.

In this way, the good is put once more at the mercy of the contingent political will of the *pro tempore* majority. *Uso civico* thus ends up by obliterating one of the cornerstones that should oversee a good mechanism for the management of the commons, namely, the structural (*rectius*: legal) capacity of the model to withstand the opposing pressures that, in the long term, could come from both the state and market.

Secondly, *uso civico* appears to be a scarcely scalable mechanism, given that civil liability for any damage related to the use of the good remains with the municipality. Except in special cases where some municipal manager, out of political passion and civic dedication, decides to take responsibility for damages to third parties, it is clear that in the ordinary operations of a public entity it is difficult to expect it to maintain responsibility for the use of the good without, however, being able to exercise any control over it.

### 4.3. The foundation and the trust

It is interesting to note how the shortfalls mentioned with reference to *uso civico* can be overcome through the use of private law institutions.

The example of the foundation is paradigmatic[25].

The notion of foundation is common to most of the systems belonging to the Western legal tradition, where a substantial convergence is found mainly in continental jurisdictions.

The foundation can be defined as the establishment of assets earmarked for a general interest purpose as a legal person. From a technical point of view, the typical effect of the establishment of a foundation is, therefore, twofold: i) the creation of a lien of a proprietary nature on one or more assets; ii) the elevation of the intended assets to an independent legal person.

It is precisely these aspects that make the foundation a particularly useful tool in the management of urban commons. In fact, the foundation can be used to assign, on a permanent basis, an immovable property to the collective use registered in the bylaws and in the articles of association, thus protecting it, in the long term, from the extractive pressures which might come both from the state and the market. The foundation, in most western legal systems (and certainly under Italian law) also bear a certain

[25] See A. VERCELLONE, *La fondazione*, in R. ALBANESE, E. MICHELAZZO, A. QUARTA (eds.), *Gestire i beni comuni urbani*, op. cit.

flexibility, a flexibility that allows private autonomy to build participatory and democratic governance mechanisms.

With respect to the first aspect, a pivotal role is to be attributed to the scope set out in the bylaws and in the articles of association, as well as in any further and more precise use restrictions provided for by such documents.

In fact, pursuant to Article 25 of the Italian Civil Code, any act adopted by the foundation's governing bodies in breach of the bylaws or the articles of association is null and void and, in the case of a breach of a use restriction that is clearly stated in such documents (which are usually published and registered), such nullity is enforceable against third parties.

The effects of this rule are extremely relevant for our purposes. Let us take as an example a foundation set up to manage, as a commons, an urban property, a good which, when the articles of association of the foundation are drawn up, is declared to be used for theatrical and cultural activities. Imagine, now, that the board of directors of the foundation resolves, in contravention of the purpose recorded in the articles of association and of any more precise restrictions of use included in specific clauses of the bylaws, to sell a part of the real estate holdings to a for profit corporation, to establish a luxury shop there. In a case such as this, not only would the resolution of the board of directors be considered invalid, but equally invalid would be the contract of sale entered into with the company, given that the latter would lack the necessary power of attorney (due to the invalidity of the resolution authorizing the transfer). The invalidity of the contract of sale would be enforceable against the company, given the manifest contrast between its object and the foundation's articles of association. The effect would, of course, be the retrocession of the good to the foundation (as well as the possible removal of disloyal directors, especially where this is expressly provided for in the articles of association).

According to the Italian legal doctrine and case-law, an indefectible element of the foundation is, in fact, precisely the scope (and therefore the usage restrictions) recorded in the bylaws and in the articles of association. The scope is not only unchangeable, but also *cannot be disposed of* by the bodies of the entity. This limit must be understood

both in its direct meaning (it is not possible to approve an amendment of the bylaws or of the articles of association aimed at changing the scope) and indirect (any act or resolution adopted in violation of the scope is null and void). It is, moreover, precisely this constraint that, under Italian law, distinguishes the foundation from the association. The association is an "organization of men" who agree to pursue a common purpose. Precisely for that, the scope is at the members' disposal and they can modify it. This is not the case with the foundation, which, on the contrary, is usually defined as an *earmarked good* that becomes a legal person.

The Italian doctrine insisted on this aspect to legitimise the use of private autonomy in the creation of atypical governance structures, which disregard the model of governance provided for in the civil code, which, as far as foundations are concerned, provides for a board of directors as the only organ.

It has indeed been upheld that if what qualifies the foundation is the non-modifiability of the scope by the organs of the institution, only this (and not also a specific structure of governance) is the indefectible element of the foundation. Therefore, given the mandatory nature of this principle and the necessary presence of a board of directors, there is nothing in the law which prevents the articles of association from flanking the board of directors with other bodies such as, for example, an open assembly structured according to participatory and democratic mechanisms.

On this basis, Italy has seen the spread of foundations with very atypical models of governance, which graft into the foundation bodies typical of other entities, such as an assembly. This is a practice which, today, has found detailed recognition in some recent legislative reforms[26].

Precisely because of the flexibility and the ample space that Italian law grants to private autonomy in the construction of the governance of the foundation, this institution is being discussed more and more in Italy as a possible model for the management of urban commons. It is not by chance that some municipal regulations on the commons (see, for example, the Regulations of the City of Turin) include the foundation among

[26] D.lgs. 3 luglio 2017, n. 117 (Codice del Terzo Settore). On this reform see E. QUADRI, *Il terzo settore tra diritto speciale e diritto generale*, in Nuova Giurisprudenza Civile Commentata, 5, 2018, pp. 708 ss.

the models of governance on which the community of reference and the municipality can agree upon for the management and care of an urban property subject to a collaboration pact.

Indeed, it is quite possible to imagine that the community of reference comes together in an assembly, which is characterized by those open and participatory mechanisms that ensure that *anyone* can take part in it and that the latter (considered as the highest deliberative instance of the entity and the holder of the power of political direction) elects the members of the board of directors, depositary of the classic executive and managerial powers.

But this flexibility also makes it possible for the board of directors to be structured in such a way as to reflect the various stakeholders of the good and the activities that take place in it. And so, to return to our example, there is nothing to prevent a foundation, to which a property previously belonging to the municipality has been ceded so that it can be used for cultural and theatrical activities, from constituting a board of directors composed partly of representatives of the assembly, partly of representatives of the city council and partly of representatives of the local theatre association.

The foundation therefore contains all the elements necessary to ensure proper governance of an urban commons: i) it allows the creation of a lien on the good, preventing it being subjected to market speculation; ii) it allows such a lien to be enforceable *erga omnes*; iii) it allows the building of a democratic and participatory model of governance, flexible enough to give representation to all the stakeholders.

To this we must be add a further, fundamental, element.

When the foundation is used to manage a good that was originally in public ownership, it makes it possible to overcome the main shortfall that is typical of the models of governance of the commons which rely on public ownership, a shortfall we pointed out when discussing the institution of *uso civico*.

And in fact, since the public body assigns ownership of the good to the foundation, it cannot in any way change its intention to administer it according to the criteria related to the commons (for example, by deciding to sell it on the market) through a simple administrative act. The administration will at most be able to participate in the

management of the good in the forms provided for by the foundation's articles of association and bylaws (and thus, for example, exercising its right to be represented in the excecutive body) and will, therefore, also be bound by the scope provided for by the acts constitutive of the legal person.

The only way for the public to regain ownership of the good is through expropriation. In such a case, however, it would be subjected to the burden of proving the requirement of public interest, and would therefore be required to prove that the use it intends to make of the good is more socially desirable than that envisaged by the foundation's bylaws (and activities).

Similar results to those achievable with the foundation can be accomplished through a trust, in an arrangement in which the trustee takes the form of a non-profit organization (e.g. an association) structured according to an open and democratic model of governance.

It is known that the trust, institution typical of common law systems[27], has, since the late 1990s, started to be recognized in many civil law jurisdictions[28].

This also happened in Italy[29], where an early prudent position on the part of the legal doctrine and case law was followed by a substantial openness towards the recognition of the institution, and this also following some (albeit timid) interventions by the legislator. The praxis has thus not hesitated to make use of this tool for the purpose of organising the participatory administration of public goods intended for collective purposes, as evidenced by the important trials in this sense carried out in the city of Bologna[30].

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[27] To give a comprehensive account of the literature on the law of trusts would go far beyond the scope of this work. For an introduction see J.E. PENNER, *The Law of Trusts*, 11th ed., Oxford, 2019; for an account of the law of trusts in the US see: AMERICAN LAW INSTITUTE, *Restatement (Third) of Trusts*, 2003; for a theoretical perspective very relevant for the scope of this essay see: H. HANSMANN, U. MATTEI, *Functions of Trust Law. A Legal and Economic Analysis*, in NYU Law Rev., 73, 2, 1998.

[28] See L. SMITH (eds.), *Reimagining the Trust. Trusts in Civil Law*, Cambridge, 2012.

[29] On the institution of the trust in the Italian experience see: M. GRAZIADEI, *Recognition of Common Law Trusts in Civil Law Jurisdictions under the Hague Trusts Convention with Particular regard to the Italian Experience*, in L. SMITH (eds.), *Re-imagining the Trust*, cit. p. 29; ID. *Trusts in Italian Law*, in M. CANTIN CUMIN (eds.), *La fiducie face au trust dans le rapports d'affaires*, Bruxelles, 1999, pp. 265; M. LUPOI, *Il trust nel diritto civile*, in Trattato di diritto civile diretto da Rodolfo Sacco, Milano, 2004.

[30] On this matter see A. TONELLI, *Trust e beni pubblici: un nuovo ed efficiente percorso*, in R. ALBANESE and E. MICHELAZZO, A. QUARTA (eds.), *Gestire i beni comuni urbani*, op. cit.

4.4. The community land trust

The experiences of urban commons also point to the very creative and orchestrated use of existing tools of private law to create new and sophisticated ownership regimes capable of directing the utility obtained from the goods towards the satisfaction of fundamental rights.

In this respect, the American example of the community land trust (CLT), a model invented in the United States in the 1970s, but mostly developed during the years of the recent economic crisis, is paradigmatic[31].

In its traditional definition, the CLT is a non-profit organisation, whose aim is to promote access to housing for low to medium income people, through the sale of property at a price below market value, and to create a participatory governance of the urban space, combining the interests of the owner with the wider needs of local communities and the territory. The structure of the CLT is based on three elements: i) the dissociation between the title of ownership of the land and the title of ownership on the improvements; ii) a strong conformation of the property rights of the home-owner; iii) an open associative model, based on participatory mechanisms involving not only those who have rights over the assets placed in the trust, but also other stakeholders.

An essential element in the creation of a CLT is the ownership of land by the non-profit organisation. The position of the CLT in relation to the land it owns is, generally, that of trustee, who must administer it for the purposes of the trust and in the sole

[31] On the community land trust from an historical, legal and political perspective, see: K. WHITE, (eds), *The CLT Technical Manual*, Portland, 2011; M. TOWEY, *The Land Trust Without Land: the Unusual Structure of the Chicago Community Land Trust*, in Journal of Affordable Housing and Community Development Law, 2009; E. THADEN, *Results of the 2011 Comprehensive CLT Survey*, CLT-Network Papers, 2011; S.I. STEIN, *Wake up Fannie, I Think I Got Something to Say to You: Financing Community Land Trusts without Stripping Affordability Provisions*, in, 60, Emory Law Journal, 2010; C.A. SEEGER., *The Fixed-Price Pre-emptive Right in the Community Land Trust Lease: a Valid Response to the Housing Crisis or an Invalid Restraint on Alienation?*, in Cardozo Law Review, 11, 1989; S.T. PASTEL, *Community Land Trusts: a Promising Alternative for Affordable Housing*, in Journal of Land Use and Environmental Law, 6, 1991; J. MEHAN, *Reinventing Real Estate: the Community Land Trust as a Social Invention in Affordable Housing*, in *Journal of Applied Social Science*, 8, 2, 2010; J.J. KELLY, *Land Trusts that Conserve Communities*, in Depaul Law Review, 59, 2009; J. FARREL CURTIN and L. BOKARLSY, *CLTs: a Growing Trend in Affordable Home Ownership*, in Journal of Affordable Housing and Community Development Law, 17, 2008; J.E. DAVIS (eds.), *The Community Land Trust Reader*, Cambridge (MA), 2010; D. ABROMOWITZ, *An Essay on Community Land Trusts: Towards Permanently Affordable Housing*, in *Mississipi Law Journal*, 61, 1991; D. ABROMOWITZ, *Community Land Trusts and Ground Leases*, in Journal of Affordable Housing and Community Development Law, 1, 1992; J.E. DAVIS J.E., A. STOKES, *Lands in Trust, Homes that Last. A Performance Evaluation of the Champlain Housing Trust*, Champlain Housing Trust Papers, 2009.

interest of its beneficiaries. These bonds can be either created by establishing an actual trust, and thus through a deed of trust, or by relying on specific clauses contained in the bylaws and articles of association of the non-profit corporation. These acts impose a number of further and more precise limitations on the CLT, the first of which is a lien of inalienability on the land held in trust. Similar to what happens in the foundation, here too the permanent subtraction of the land from individual appropriation and from the dynamics of the market, is combined with the advantage of an instrument that removes the good from the possible mercantilist choices that could come from public administration, given the private nature of the owner.

If the CLT retains ownership of the land on a permanent basis, it will, functionally, sell the houses which stand on it. It is precisely this subjective dissociation of the title of property (ownership of the land/ownership of the improvements) that allows that mechanism of socialization of land rent that is at the heart of the model. Such a mechanism permits the CLT to generate resources to be invested in reducing the costs of access to housing and in the redevelopment of the area. In fact, the CLT, while retaining ownership of the land, can legally intervene to shape the property interests on the improvements.

The homeowners are in fact bound to the CLT by a ground lease. The ground lease not only legally allows the inhabitants of the CLT to maintain their construction on the land belonging to the CLT, but also establishes a series of rights and obligations of the owners towards the trust, as well as certain limits on the exercise of its property rights, which thus appear conformed in such a way as to reconcile – even in a diachronic way – the needs of individuals with those of the community.

The ground lease provides, in the first place, that the homeowner cannot re-sell the improvement at any price, but at the fixed price resulting from the application of the criteria contained in a specific clause (the so-called resale formula clause), and grants the CLT a purchase-option. The objective of the formula is to divide the land rent among all the participants in the transaction (the dynamics of which will be discussed shortly), allowing the seller to obtain, in addition to the capital, an adequate return on

their investment and, on the other hand, the buyer to buy the property at a price below the market value of the good.

The most common formula applied in the American CLTs provides that the lessees cannot sell the home at a price higher than the sum of the amount they paid to purchase it, revalued in line with inflation, and a fixed percentage (usually 25%) of the increase in value the estate had acquired between the purchase and the selling.

Both elements of the equation deserve some clarification.

As regards the first, it must be said that the price at which the seller bought the good was also below its market value. This is because if you go back through the chain of sales of a CLT-home, you always come to a first purchase in which the price had been reduced through the payment of a subsidy, usually public. Since all buyers in the chain are bound by the ground lease, and therefore to the resale formula, under normal macroeconomic conditions *all* purchases after the first one will be made at a price below the market value.

The market value of the home is not, however, completely exempted from the equation, but is part of the calculation of its second term, that is, the appreciation acquired by the improvement over the time between the two sales. This variable, in fact, is obtained by subtracting the market value of the good at the time of the first purchase, revalued in line with inflation, from that estimated at the time of its sale.

However, it should be noted that both these values, of course, are determined by deducting the value of the land from the market price of the property unitarily considered (land + improvement), since the seller has a fee simple interest only in the building while, as we have seen, with respect to the land they have a mere leasehold interest for a limited time (usually ninety-nine years, renewable).

Of the plus-value thus identified, the seller is entitled to obtain only 25%, the remainder being distributed between the buyer and the CLT. The buyer is usually allocated 70%, in the form of a reduction in the purchase price, and the CLT the remaining 5%, which is used to cover the transaction management costs and, above all, is invested in the redevelopment of the area.

An example may better clarify how the model works.

Taking the inflation variable out of the picture, for simplicity's sake, let us take the case of a newly formed CLT, which has acquired ownership of an estate (land + home) with a market value of $120.

In order to start its operations, the CLT obtains public funding for $20, an amount which is linked to the reduction in the price of the first sale.

Having identified the prospective home-buyer (A), the organization, at time T1, decides to sell the house to her. Since, however, the CLT retains ownership of the land, the price of the sale will be determined by subtracting not only the public subsidy ($20) but also the value of the land (say, another $20) from the purchase price sustained by the CLT. The first sale will, therefore, take place at a price of $80, allowing A to access a home that, on the market, would have required a payment of $120.

Let us assume, now, that A, at time T2, decides to resell the property, and that for this purpose a new low-income buyer, B, has been identified.

In order to determine the resale price, it will first be necessary to establish any increase in the value acquired by the good between time T1 and time T2, and then subtract the relevant market prices, net of the value of the land.

Let us suppose, at this point, that, at the moment of T2, the entire estate is valued, on the market, at $200, of which $170 is the value of the building and $30 is the value of the land.

The plus-value acquired by the improvement alone, which is the subject of the transaction, will therefore be equivalent to $170-$100 =$70.

We can, at this point, calculate the resale price to which A is bound. It is equal to $80 (the first purchase price) + 25% of $70 (= $17.50) and, therefore, adding up to the total amount of $97.50.

When the purchase option is exercised, A will then be obliged to sell the good to the CLT for a sum equal to $97.50. It will then be up to CLT to formally sell the improvement to B, for a price equal to the resale price + 5% of the plus-value (5% of $70 = $3.50) and, therefore, at $101.

B will thus find himself in a situation similar to the one in which A found herself at that time, having bought, for $101, a property with a market value of $170, and having had

access to a housing solution that on the free market (where, usually, the land is sold together with the building) would have required a payment of $200.

This logic is destined to reproduce itself endlessly, in a chain pattern.

And so if, in turn, B wanted to sell the improvement, whose market value has meanwhile increased by another $50 (from $170 to $220), C could buy it for $116 ($101 + 30% of $50); then, D could access the property, which in the meantime has appreciated by another $30, for the price of $130, instead of $250... and so on.

In this way, a virtuous circle is created, permitting the CLT to permanently subtract the properties from the speculation of the real estate market and which fosters, in the wake of a single initial investment which surplus value is constantly distributed, a system of permanent affordable housing (lock-in effect of the initial investment).

The ground lease then imposes on the inhabitants of the CLT obligations relating to the ordinary maintenance of the building and the care of the surrounding space. Further clauses are also designed to curb absentee ownership and to hinder the use of market mechanisms that could distort the ultimate purpose of the institution. From this last point of view, the contractual practice reveals a tendency of the ground leases to set rules that commit the owner to inhabit the property personally, in a constant and stable way, and provide binding limits to the lease of the property in favour of third parties.

The legal structure of the CLT allows it to enjoy a certain economic and financial stability. Firstly, by appropriating part of the plus-value produced by each re-sale, the CLT can keep its equity stable. In addition, the ground lease requires the homeowners to pay the organization a fee, commensurate with the income and economic capacity of each inhabitant, thus ensuring the entity a concrete financial autonomy.

It is for the articles of association to determine, in general terms, how the CLT's economic resources are to be allocated and the decision-making procedures to be followed to support the investments. In any case, the distribution of profits is excluded. Any revenues shall thus be invested in the pursuit of the institutional purposes of the entity. In the traditional model, the CLT employs its revenues in two different ways.

First of all, resources are invested in the extraordinary maintenance of all improvements as well as in the (ordinary and extraordinary) maintenance of CLT spaces that are not subject to individual use. However, the largest proportion of the CLT's revenues are generally allocated for development plans of the area: renovation of buildings for public use, redevelopment of green areas, cultural initiatives, the construction and management of social gathering places (theatres, small sports fields, etc.).

In general, it is up to the CLT to determine which spaces should remain open to all and which, on the other hand, should be allocated for residential purposes. With regards to the former, access must be guaranteed to everyone, in accordance with the usage restrictions established by the trust, and can never be limited to CLT members only. It is also up to the trust, according to the criteria set by the bylaws, to determine whether and to what extent some properties can be rented to other private actors, so that they can establish productive, recreational and commercial activities. There are examples of CLTs which, for instance, host urban gardens, youth hostels, workshops, co-working offices and cultural spaces which are managed by associations, cooperatives etc., all linked to the trust by a contract of lease. Moreover, while the contract binds the lessee to respect the values and fundamental principles of the CLT, it generally also fixes the rent at current prices, given the essentially commercial nature of the activities carried out.

In the CLT's traditional model, the governance of the territory is therefore accompanied by the need to respond to the housing crisis, as a further element that qualifies the model. This is a participatory and open form of governance, guaranteed by precise institutional mechanisms. The first consists of the open membership which characterizes the non-profit entity that supervises the CLT.

In fact, anyone (and not only the homeowners) can become a member, as it is sufficient to share the values, ideals and scope of the organization.

The CLT's homeowners, those who participate in the cultural initiatives it promotes, those who run their own business on the common land, citizens of the surrounding districts, etc., can all be members of the CLT, all linked by the common interest in and

commitment to the care and collective enjoyment of the spaces. In most CLTs, membership gives the right to vote in the assembly, which is the highest decision-making body of the organisation. Decisions are taken by a board of directors with a tripartite structure: it is composed, in equal measure, of representatives of the homeowners, representatives of the public interest and representatives of the inhabitants of the surrounding areas. The organs of the CLT adopt, in a democratic manner and following the procedures provided for by the organisation's bylaws, all decisions relating to the governance of the territory: use of space, investments, usage restrictions, cultural initiatives, etc[32].

In light of this, it is therefore clear that the CLT cannot be regarded as just a system of social housing, one of the many solutions developed to stem the shelter emergency. It represents an articulated paradigm, which opposes the extractive logic of traditional (private and public) tools of urban governance, a generative and sustainable ownership regime.

The success of the model in ensuring, thanks to the lock-in effect, perpetual affordable housing with fewer resources than any public social housing programme and in promoting a territorial redevelopment able to stem the pressures of gentrification, has contributed to its widespread diffusion.

This diffusion has not been limited to the United States. The CLT has been transplanted into many other jurisdictions, where activists, public administrations and local housing organizations have relied on their domestic law to recreate the model.

It is interesting to note that this phenomenon of legal transplant "from the bottom up" has not remained confined to common law jurisdictions (such as the United Kingdom, Australia or Canada, all countries where the institution of the CLT is quite widespread) [33]. Important experiences of CLT have now also taken place in civil law countries: the

[32] The idea of an interconnection between object and subject within the theory of ownership, of which the CLT is a clear example, was firstly theorized, within the Italian legal scholarship, by S. PUGLIATTI, *La proprietà e le proprietà con riguardo particolare alla proprietà terriera*, in ID., *La proprietà nel nuovo diritto*, Milano, 1964. On this point, also with reference to the CLT, see A. DI ROBILANT *Property and Democratic Deliberation: The Numerus Clausus Principle and Democratic Experimentalism in Property Law*, in American Journal of Comparative Law, 62, 2, 2014.

[33] On the Australian experience see: *The Australian Community Land Trust Manual*, Sydney, 2013; with regards to the UK cf. K. WHITE (ed.), *The Community Land Trust Handbook*, London, 2013.

most relevant example, in this sense, is the CLT of the city of Brussels, commonly considered as one of the most relevant best-practice of participatory social housing in the EU[34].

Although no CLT has yet been established in Italy, the model has been much debated as a paradigm for the management of urban commons, and some municipal regulations mention the institution as a possible model of governance. In a manner not too dissimilar to what is happening in Belgium, the CLT can be translated into Italian law, where results similar to those pursued in the US can be obtained by coordinating a foundation together with the establishment of a *diritto di superficie* (a sort of a ground lease) [35].

## 5. Conclusions

The theory of the commons, and in particular, its declination in the Italian experience, allows one to draw some theoretical conclusions.

The first concerns something that we have already partially mentioned: namely the ascertaining of how, in Italy, the debate on the commons has dragged the category out of the difficulties into which economic theory had forced it. Expanding the strict economic notion, according to which common goods correspond to goods which bear certain specific characteristics (subtractability and non-excludability), the Italian legal scholarship has instead loaded them with a markedly political connotation, identifying the key feature of the commons in the process of commoning[36]. It is a political component which directly implicates the law and which, in this way, reveals the illusion (all internal to legal positivism) of the separation between the political dimension and the "neutral and technical" domain of legal institutions.

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[34] On the community land trust in Belgium, with specific reference to the experience of Brussels, cf. N. BERNARD, G. DE PAW, L. GERONNEZ, *Le Community Land Trust, solution pour concilier l'accessibilité du logement, les advantge de la propriété et un foncier au service de l'intérêt général*, in Les cahiers nouveaux, 78, 2011; N. BERNARD, G. DE PAW, L. GERONNEZ *Cooperative de logement et Community Land*, in Courrier hebdomadaire, 2010; N. BERNARD, *L'emphytéose et la superficie comme pistes de solution à la crise du logement*, in Les échos du logement, 1, 2010.

[35] A. VERCELLONE, *Il Community Land Trust*, op. cit., especially the last chapter.

[36] Cf. P. DARDOT, C. LAVAL, *Commun. Essai sur la revolution au XXI siecle*, Paris, 2012.

The consequence of this is that, and this is a second important aspect, the notion of the commons in Italy, far from qualifying specific goods due to their intrinsic characteristics, is rather a hermeneutical picklock to identify experiences of political practice and to develop, based on them, innovative legal solutions through a counter-hegemonic use of existing law.

The commons thus describe situations in which, in the face of the shortfalls of both the state and the market in satisfying the needs of individuals and communities (needs which, from the legal point of view, translate into an equivalent number of fundamental rights) see formal and informal communities organizing themselves to provide welfare solutions from the bottom-up, through cooperation.

It is not by chance that, in the social and legal practice of the commons, the state does not relate to communities according to a top-down approach but adopts, instead, institutionalized models of a cooperative nature. In other words, the commons reveal how the state is not the only body responsible for providing answers for collective needs and fundamental rights, but how these can find a solution directly through social cooperation. In the latter case, the state (and its territorial articulations) can certainly play a role (even an important one), but it is a role in which the state cooperates, in a horizontal relationship, with the communities of reference. This is, in other words, a context that sees a marked enhancement of the principle of horizontal subsidiarity, a principle which, as mentioned, the Italian Constitution expressly provides for in its Article 118.

The second, and perhaps most important, element that emerged from our analysis concerns private law.

Indeed, the commons reveal how private law can be used as a tool *against* privatisation and how, in certain circumstances, it can guarantee access to collective goods and their participatory management more successfully than traditional forms of public ownership. What has been said about the foundation and the trust is, in this sense, of paradigmatic example.

This only *appears* paradoxical.

Indeed, the legal tools we have examined (*rectius*: the use of these tools as instruments of governance for the commons) show how the asymmetry of protection between public and private ownership, which was mentioned at the beginning of this article, can be exploited for a strategic purpose, an opposite purpose to the *rationale* that inspired this asymmetry within post-revolutionary European constitutionalism. In other words, at the origin of modern constitutionalism, the strong protection of private property was justified by the need to guarantee the market before the intrusive needs of the "collective", embodied by the state. Our analysis has shown how, in an historical moment where we are facing the opposite needs, we can strategically rely on the legal protection the system grants to private property to conceptually overturn it as a means to guarantee access and participation in the management of important collective goods. The assignation of a public good to a foundation or a community land trust marks, after all, the possibility to resort to privatisation to fight privatisation or, to phrase it better, the possibility to transfer goods from public to private-law entities in order to prevent them from becoming the subject of market exchanges.

This is particularly interesting, since it shows another "face" of private law. From the branch of the law that organizes the market, setting forth its institutional premises (i.e. property and contract), private law can become the space within which the communities organize themselves and, resorting to contractual autonomy[37], create property regimes capable of streamlining the utility obtainable from a good not for market exchanges but for the fulfilment of fundamental rights[38].

This conclusion is particularly interesting if compared to the narrative typical of the classic theory of ownership. Private property is, in fact, traditionally described as that institution which, by assigning all the prerogatives of use and disposal of a good to one person, allowing this latter to exclude all the others, promotes the maximum extractive use of resources[39].

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[37] See W. C. SFORZA, *Il diritto dei privati*, (second edition), Macerata, 2018, with an essay by Michele Spanò.

[38] See A. QUARTA and U. MATTEI, *The Turning Point in Private Law. Ecology, Technology and the Commons*, Cheltenham, 2018; M. Spanò, *Making the Multiple: Towards a Trans-Subjective Private Law*, in The South Atlantic Quarterly, 4, 2019, p. 839.

[39] This is a point very much debated in the field of law and economics. Also with reference to the commons, see: G. HARDIN, *The Tragedy of the Commons* cit.; H. DEMSETZ, *Towards a Theory of Property Rights,* in 57, Am. Econ. Rev., 1967 pp. 347 ss.; ID. A., *Toward a Theory of Property Rights II: the Competition between Private and Collective Ownership*, in 31 Journal of Legal

The theory and the praxis of the commons show, however, how, under existing law, it is possible to create, from the bottom-up, ownership regimes that overturn this perspective. Think, in that regard, of the community land trust. It ultimately amounts to a form of ownership which places access, rather than exclusion, at its heart. A form of ownership that allocates the goods and the utilities they produce not according to the criterion of supply and demand but on the basis of individual (access to housing) and collective (urban regeneration) needs, needs which correspond to an equivalent number of fundamental rights. It is a model of ownership which, instead of fostering the maximum exploitation of resources and the allocation of their value to one single subject, allows the constant distribution of land rent.

This is perhaps the most important aspect of the commons. That is to say, to show how it is possible to combine extractive ownership, namely that form of ownership handed down to us by tradition and of which the nineteenth century codes still speak today, with forms of generative ownership[40]. These are forms of ownership which, overcoming the now obsolete dichotomy of private property (market) and public intervention (state), set out property arrangements directly streamlined for redistribution and, above all, for the satisfaction of fundamental rights, which privilege access over exclusion and value in use over value of exchange, also in the interests of future generations[41].

Studies, 2002, pp. 653 ss.; C.M. ROSE, *Evolution of Property Rights*, in *The New Palgrave Dictionary of Economics and the Law*, 2, London, 1998, pp. 93 ss.; J-E. KRIER, *The Evolution of Property Rights: a Sythetic Overview*, in Law and Economic Working Papers Archive – University of Michigan Law School, 2008, pp. 1 ss.; R.C. ELLICKSON, *Property in Land*, in 102, Yale Law Journal, 1993, pp. 1315 ss.

[40] On the distinction between extractive and generative ownership, see M. KELLY, *Owning Our Future, The Emerging Ownership Revolution*, San Francisco, 2012.

[41] See: M. MONTEROSSI, *L'orizzonte intergenerazionale del diritto civile. Tutela, soggettività, azione,* Pisa, 2020.