

## REFLECTIONS ON PUBLIC PROPERTY FROM AN ANALYSIS OF THE EVOLUTION AND RECENT TRENDS IN THE COMMONS \*.

di Maria Chiara Girardi\*\*

**Sommario.** 1. Preamble. – 2. The *participated* management of public goods. – 3. Institutional attempts to recognise the legal category of the commons. – 4. The constitutionalisation of the commons in Latin America. – 5. Concluding remarks. The necessary enhancement of the social function of public property.

### 1. Preamble.

The theme of the common goods is at the centre of doctrinal and jurisprudential debates at global level<sup>1</sup>. The expression common good, which will be taken into consideration here from a purely legal point of view, is of great interest and involves other areas, such as economics, sociology, and philosophy.

From the juridical perspective, at the current state, in Italy, the legal value of common assets has not yet been recognised and there is no organic national legislation to regulate such goods<sup>2</sup>. There are, however, numerous local regulations aiming to protect goods whose usefulness is considered functional to the exercise of fundamental rights and the development of the human person<sup>3</sup>. In the meanwhile, a line of jurisprudence, aimed at recognising common goods, has developed. It is, therefore, a notion *de iure condendo*, which arises from the awareness of the limits of the proprietary relationship; debasing the founding role of the notion of exclusive and legal concepts developed outside the legislative framework, where it is noticed that two different categories: that of public goods and that of public property (or rather *genus* and *species*) have identified themselves, overlapping

---

\* Submitted a peer blind review.

\*\* Research fellow in Constitutional law – University of Naples Federico II.

<sup>1</sup> On the topic, recently, A. Lucarelli, *Beni comuni* (item), in R. Bifulco, A. Celotto and M. Olivetti (ed.), *Dig. disc. pubbl.*, Agg., 2021, p. 21 ff.

<sup>2</sup> *Contra* S. Staiano, *Beni comuni. Categoria ideologicamente estenuata*, in *Diritto e società*, n. 3/2016, p. 415 ff.

<sup>3</sup> Cmp. A. Lucarelli, *I Beni comuni: aspettando Godot*, in F. Politi and F. Marinelli (ed.), *Assetti fondiari collettivi*, Pisa, 2022, p. 37 ff.

and debasing the original role and function of the public goods; a legal category into which the legal concept of common goods had been incorporated<sup>4</sup>.

This means that, the idea of public property, always focuses on subjectivity and the concept of belonging. Regarding common goods, on the other hand, what matters is the functional aspect of the good and it is irrelevant whether it is owned by a public or private entity. Therefore, the attention should rather be focused on the social function of these goods, aimed at exercising the fundamental rights of the community and the development of the human person, rather than on the economic interests of individuals<sup>5</sup>.

Hence the need, on one hand, to construct a new legal category, that of common goods, or rather, to transfer the legal concept to that of legal category, or rather the legal subcategory of public goods<sup>6</sup>; on the other hand, to hypothesize, within the legal category of public property, new dimensions of the same, or legal concepts that do not give form to a new legal category, nor to a subcategory of public property. Therefore, the law must guarantee the collective enjoyment in any case, direct and by all, also in favour of the future generations<sup>7</sup>.

The statute of public property, stated in the civil code and afterward in the Constitution of 1948, is overlapping the model of state property, and in a broader sense, on public goods in public use, configuring exclusive relationships, attributable to structural and material relationships, subjective order, which bind the owner to the good, the function that the owner attributes to the good.

For this reason, the need today is to obtain a new and comprehensive reinterpretation of public goods and its model of democracy underlying them, beyond and against the sovereign right<sup>8</sup>. In other words, it is necessary to go beyond the classic characteristics of statehood, that is, of a legal system model recognising a classic type of absolute subjective relationship (individual property), with respect to extra-commercial goods that escape the logic of the market<sup>9</sup>. In this sense, the framework of constitutional principles, as outlined

<sup>4</sup> On the issue, A. Lucarelli, *Beni comuni. Contributo per una teoria giuridica*, in *Costituzionalismo.it*, 9 January 2015.

<sup>5</sup> On the topic, cfr. U. Mattei, *Beni comuni. Un Manifesto*, Rome-Bari, 2012.

<sup>6</sup> Cmp. V. Cerulli Irelli, *Beni comuni e diritti collettivi*, in *Diritto e società*, n. 3/2016, p. 529 ff.

<sup>7</sup> Cmp. A. Lucarelli, *Note minime per una teoria giuridica sui beni comuni*, in *Quale Stato*, n. 1/2007, p. 3 ff.

<sup>8</sup> See M. Renna, *Le prospettive di riforma delle norme del Codice civile sui beni pubblici*, in G. Colombini (ed.), *I beni pubblici tra regole di mercato e interessi generali. Profili di diritto interno e internazionale*, Naples, 2009, p. 23 ff.

<sup>9</sup> Cmp. M. Luciani, *Una discussione sui beni comuni*, in *Diritto e società*, n. 3/2016, p. 373 ff.

above – constituted in particular by Articles 1, 2, 3, 4, 9, 32, 42, 43 and 118 of the Italian Constitution – even if these are of a prescriptive nature, has not proved to possess the capacity for resistance in order to prevent the typical nature of the structural owner relationship, well rooted between the Constitution and rules of the Code, from prevailing over the functional relationship aimed at satisfying fundamental rights<sup>10</sup>.

Nevertheless, the lack of recognition of a legal category of common goods by the national legislator has not prevented actions on these profiles at local level. In fact, for example, the Municipality of Naples was the first Municipality to have established the Department of Common Goods. Also, several other cities have adopted regulations for the governance of urban common property. These experiences represent the attempt to enhance the value of urban common goods, especially with the aim of counteract the urban poverty, the social exclusion, and the degradation of public spaces<sup>11</sup>.

In the rest of the world, instead, the greatest progress on common goods has been made by Latin America. Brazil, Ecuador, and Bolivia are in fact the first countries to have included within their Constitutions the juridical notion of the common good and to have experimented forms of citizen participation in its management, highlighting the importance of protecting and valuing these goods for the achievement of the collective *buen vivir* and the protection of future generations.

## 2. The *participated* management of public goods.

In order to safeguard the pursuit of general interests, which can be traced back to the social function of state property, it appears necessary to establish the functional relationship between the *dominus* and the property, limiting, for those property identified as extra-commercial, the discretion of the powers of the owner over the property itself, favouring, on the contrary participatory processes of accessibility and usability, in implementation of

---

<sup>10</sup> Refer to A. Lucarelli, *Biens communs. Contribution à un théorie juridique*, in *Droit et société*, n. 1/2018, p. 141 ff.

<sup>11</sup> Cmp. C. Angiolini, *Possibilità e limiti dei recenti regolamenti comunali in materia di beni comuni*, in A. Quarta A. and M. Spanò (ed. by), *Beni Comuni 2.0. Contro-egemonia e nuove istituzioni*, Milan, 2016, p. 147 ff.

the principle of equality set out in Article 3 of the Constitution<sup>12</sup>.

In fact, accessibility and collective fruition are fundamental characteristics of public goods. The State must intervene to protect the community, as the guarantor of the protection of these goods and the defence of the utility bands they should express<sup>13</sup>.

In this perspective, an attempt is made to restore dignity to the concept of the *State-community*, of *communitas* within popular sovereignty, and a model is outlined in which the concept of *statehood* is not absorbed by the State as an *apparatus*, recognizing greater rights to the community<sup>14</sup>.

In order to do this, it is necessary to revise the category of public property, and the relative model of democracy underlying it, going beyond the classic characteristics of statehood, i.e. a model that recognizes a type of absolute subjective relationship, to enhance, instead, the rights of the person and the essential public interests linked to the utility of goods<sup>15</sup>.

The fundamental values of the person must be recovered and enhanced through, in the first place, the recovery of the duties of the State and citizens<sup>16</sup>. In fact, it seemed that the problem of the future was not that much the affirmation of the rights of the person as clear conscience of his duties: “All the democracies tend to slide towards forms of selfish individualism and those who want a firm and lasting democratic system must insist on the person's duties towards the community and claim the priority of the common good over the particular good”<sup>17</sup>. Therefore, in the management of the public goods, we recall the respect of the solidarity duties set out in Article 2 of the Italian Constitution. The State – as well as the various territorial entities that make it up – must prepare public policies capable of guaranteeing the accessibility and collective use of these goods, in particular if they are goods or services necessary to guarantee the collective well-being<sup>18</sup>.

<sup>12</sup> Refer to S. Lieto, *Riflessioni sulle categorie della proprietà e della partecipazione nel perimetro concettuale dei “beni comuni”*, in C. De Marco, F. Ricci and L.G. Sciannella (ed. by), *La democrazia partecipativa nell'esperienza della Repubblica. Nuovi segnali dalla società civile?*, Naples, 2012, p. 133 ff.

<sup>13</sup> Cmp. G.U. Rescigno, *Corso di diritto pubblico*, Bologna, 2005, p. 329 ff.

<sup>14</sup> See, U. Ronga, *La res publica nel segno del bene comune. Bene comune, bene possibile. Responsabilità, discernimento, progetto*, in *Quaderni di Dialoghi*, Rome, n. 2/2008, p. 40 ff.

<sup>15</sup> Refer to, A. Lucarelli, *Alcune riflessioni in merito ai beni comuni tra sottocategoria giuridica e declinazione di variabile*, in *Nomos*, n. 2/2017, p. 1 ff.

<sup>16</sup> Cmp. S. Staiano, *Riforma delle autonomie locali e partecipazione*, in S. Carnevale and D. Pizzuti (ed. by), *Cultura della cittadinanza e della partecipazione politica. Per un protagonismo della società civile nel Mezzogiorno*, Naples, 1996, p. 29 ff.

<sup>17</sup> In this sense, G. Gonella, *La nozione di bene comune*, Milan, 1938, pp. 121-122.

<sup>18</sup> On the issue, cfr. C. Iannello, *Beni pubblici versus beni comuni*, in *Forum dei Quaderni costituzionali*, 24 september 2013, p. 4 ff.

Another decisive aspect in the governance of public good is represented by the right of citizens to participate in decision-making processes related to their management<sup>19</sup>. This participation takes the form of direct or participatory democracy, which must be analysed in its delicate relationship with the representative democracy, on which, as it is known, there are many theories<sup>20</sup>. The active participation of citizens gives effect to the principle of popular sovereignty enshrined in the Art. 1 of the Italian Constitution, which is expressed through the institution of representation, but also through direct intervention *from below*<sup>21</sup>. Therefore, in this *inclusive* perspective of sovereignty, citizens' participation is not opposed to representative democracy, but integrates it, creating a collaborative and complementary relationship between the institutions of representation and the citizens directly involved<sup>22</sup>. In this way, civil society actively participates to the creation of a public space, with a solidarity view, where the state bodies act not in an authoritative but collaborative way, as the idea that representation is not the only form of democracy expression provided in the Constitution<sup>23</sup>.

Then, the *participatory* management of public goods, can represent a valid instrument to guarantee the effective involvement of citizens in the public sphere, in a solidaristic and egalitarian perspective, where the fundamental regulatory role, of direction and control, of the representative institutions remains<sup>24</sup>.

Clearly, the potential of the model under consideration requires an adequate implementation process. If this reasoning is valid, every time it is a matter of translating the theoretical expectations of a normative project into practice, this finds specific repercussions in the present case and, in it, especially regarding the theme of participation<sup>25</sup>. In fact, the objective of collaborative management between administration

<sup>19</sup> Cmp. A. Lucarelli, *Il diritto di partecipazione tra democrazia e disordine sociale*, in *Pol. dir.*, XXXIV, n. 1/2003, p. 129 ff.

<sup>20</sup> On the topic, extensively, U. Allegretti, *Democrazia partecipativa. Esperienze e prospettive in Italia e in Europa*, Florence, 2010.

<sup>21</sup> In this sense, M. Scudiero, *Gli istituti della partecipazione popolare nella prospettiva della nuova potestà statutaria*, in AA.VV. (ed. by), *La potestà statutaria regionale nella riforma della Costituzione*, Milan, 2001, p. 71 ff.

<sup>22</sup> Refer to A. Lucarelli, *Nuovi modelli del diritto pubblico. Sovranità popolare v. sovranità parlamentare: il ruolo della comunità tra democrazia della rappresentanza e democrazia partecipativa*, in *Dir. pubbl. eur. Rass. online*, January 2015, p. 4 ff.

<sup>23</sup> Cmp. N. Bobbio, *Democrazia rappresentativa e democrazia diretta*, in Id. (ed. by), *Il futuro della democrazia*, Turin, 1991, p. 199.

<sup>24</sup> Cmp. J. Habermas, *Cultura e critica* (1973), Torino, 1980, p. 46 ff.

<sup>25</sup> See V. Cerulli Irelli and L. De Lucia, *Beni comuni e diritti collettivi*, in *Pol. dir.*, n. 1/2014, p. 3 ff.

and citizenship, i.e., the participatory model aimed at sharing choices on public goods, can only be achieved when the conditions – legal and behavioural – aimed at promoting the effective democratic participation of citizens are really created<sup>26</sup>.

It is necessary to ensure a genuinely equal participation of citizens, as certain issues may arise in relation to the risk of social exclusion. Considering, for example, the possibility of support from the so-called *stakeholders*, i.e., highly qualified subjects who could, in fact, distort the participation procedures, making them accessible only to an *élite* of people<sup>27</sup>.

In turn, citizens must act in accordance with the principle of loyal collaboration with administrations, at all levels, aimed at balancing the need for decision-making with the participatory body<sup>28</sup>.

Nevertheless, it should be reiterated that the participation of citizens should never be considered as a substitute for essential services, which must always be guaranteed by state bodies, because of the representative model, since citizens cannot independently provide for the shortcomings of public administrative services<sup>29</sup>.

A further notable aspect in the promotion of the public goods concerns the issues of information and training on the processes and solutions adopted in relation to the common good. On the other hand, the theme of training, aimed at an aware citizenship on resource management issues, also involves public administrations, which must acquire specific technical knowledge on the subject in order to implement an adequate management plan for the public good. For this purpose, it would be necessary to organize real training courses also for state employees themselves, so as to broaden their knowledge on the subject of public goods.

In several Italian cities, for example, specific resources have been put in place to spread a sort of *culture of common goods* among citizens, with the aim of recovering and enhancing existing goods and creating new ones, such as social spaces. These integration and social development policies are aimed at enhancing transparency, as well as inclusion and accessibility, with the aim of combating and reducing discrimination between citizens,

---

<sup>26</sup> Cmp. U. Allegretti, *Democrazia partecipativa*, in *Enc. dir.*, Milan, 2011, p. 295 ff.

<sup>27</sup> See V. Crisafulli, *Stato, popolo, governo. Illusioni e delusioni costituzionali*, Milan, 1985, p. 122 ff.

<sup>28</sup> Cmp. M. Luciani, *Democrazia rappresentativa e democrazia partecipativa*, in L. Carlassare (ed.), *La sovranità popolare nel pensiero di Esposito, Crisafulli, Paladin*, Atti del Convegno di studio per celebrare la Casa editrice Cedam nel I centenario dalla fondazione (1903-2003), Padua, 19-20-21 June 2003, Padua, 2004, p. 181 ff.

<sup>29</sup> On the topic, A. Lucarelli, *La democrazia dei beni comuni*, Rome-Bari, 2013.

which can degenerate into social exclusion<sup>30</sup>. These involve citizens both in the phase of direct knowledge of the problems related to common goods and in the phase of social, economic, and environmental revival<sup>31</sup>.

Part of the doctrine<sup>3233</sup> considers that this is only possible through the recognition of the legal category of common goods. Such recognition would make it possible to initiate a participatory process, also with a view to reducing inequalities between citizens, enhancing the social function of these goods. Another part of the doctrine considers instead that this category is “ideologically exhausted”<sup>34</sup>. There would therefore be no need to introduce a new legal category of common goods. However, what emerges, beyond the different positions in the field, is the urgent need to intervene to enhance the social function of public goods enshrined in Article 42 of the Constitution, modifying the codified discipline on public goods, which is considered inadequate to protect the needs of citizens who are the recipients of the utility arising from goods<sup>35</sup>.

At the same time, there is a need for a widespread civic commitment from individuals, through the demand for active participation, which translates into a unified action of sharing legal solutions, inspired by the solidarity principles of cooperation and reciprocity<sup>36</sup>.

<sup>30</sup> Refer to U. Pomarici, *Beni comuni*, in P. Grossi (ed.), *Atlante di filosofia del diritto*, Turin, 2012, p. 1 ff.

<sup>31</sup> Cmp. A. Police, *La valutazione di impatto ambientale*, in E. Dell’Anno (ed.), *Trattato di diritto dell’ambiente*, II, Padua, 2013, p. 527 ff.

<sup>32</sup> Cmp. *ex multis*, A. Lucarelli, *Note minime per una teoria giuridica sui beni comuni*, cit., p. 3 ff.; U. Mattei, *Beni comuni. Un Manifesto*, cit., p. 32 ff.

<sup>33</sup> On the topic, extensively, U. Mattei and F. Capra, *Ecologia del diritto. Scienza, politica, beni comuni*, Saint Sepolcro, 2017.

<sup>34</sup> S. Staiano, *Beni comuni. Categoria ideologicamente estenuata*, cit., p. 415 ff. Similarly, D. Mone, *La categoria dei beni comuni nell’ordinamento giuridico italiano: un paradigma per la lettura del regime dei beni pubblici alla luce della Costituzione*, in A. Lucarelli and D. Mone (ed.), *Le trasformazioni della democrazia*, cit., D. Mone, *La categoria dei beni comuni nell’ordinamento giuridico italiano: un paradigma per la lettura del regime dei beni pubblici alla luce della Costituzione*, in *Rass. Dir. Pubbl. Eur.*, n. 2/2014, p. 63 ff.

<sup>35</sup> Cmp., above all, S. Rodotà, *Linee guida per un nuovo codice dei beni pubblici*, in U. Mattei and E. Reviglio, S. Rodotà (ed.), *Invertire la rotta. Idee per una riforma della proprietà pubblica*, Rome-Bari, 2007, p. 359 ff.

<sup>36</sup> See A. Lucarelli, *Forme e categorie per un nuovo modello di democrazia: beni comuni e diritto di partecipazione*, in AA.VV., *Studi in onore di Claudio Rossano*, Naples, 2013, p. 305 ff.



### 3. Institutional attempts to recognise the legal category of the commons.

In Italy, as mentioned, there is currently no comprehensive national legislation that gives legal dignity to the common good, despite authoritative jurisprudence and numerous regulations at local level have moved in this direction<sup>37</sup>.

At the jurisprudential level, the notion of common good has been expressly recognized especially by the United Sections of the Court of Cassation in the well-known judgment no. 3665 of 24 November 2011<sup>38</sup>, which clearly highlights how the function of goods is linked to the pursuit of the interests of the community, regardless of the good ownership.

On that occasion, the Court emphasizes that in the provision of essential public services at local level, which have as their object common goods and therefore belong collectively, it is not possible to follow only mercantile and competitive logics, but it is necessary to protect the fundamental rights to which those services are aimed, in the community and future generations interests. Therefore, the Court pointed out that for essential public services, the general interest prevails over particular and competitive interests and the protection of certain fundamental principles such as solidarity, equality, the right to work, social cohesion and the right to a healthy environment<sup>39</sup>.

In particular, the Court stated that: «the Constitution, as it is well known, does not contain an express definition of public goods, nor a classification of them, but merely establishes certain references which are nevertheless very important for the definition of the positive system. However, from Articles 2, 9 and 42 Ita. Const. we derive the principle of the protection of the human personality and of its correct development within the social State, also in the field of landscapes, with specific reference not only to the goods and properties constituting, by legislative-codicy classification, the State property or the patrimony object of the *property* of the State, but also with regard to those goods and properties which, independently of a prior identification by the legislator, by their intrinsic nature or finalization, on the basis of a complete interpretation of the entire regulatory system, these

<sup>37</sup> On the topic, cmp. G. Fidone, *Proprietà pubblica e beni comuni*, Pisa, 2017, p. 54 ff.

<sup>38</sup> See also Court of Cass., judg. n. 3811/2011, and n. 9580/2017; Const. Court, judg. n. 24/2011, and n. 29/1957, n. 269/1986.

<sup>39</sup> Cmp. S. Lieto, 'Beni comuni', *diritti fondamentali e Stato sociale. La Corte di Cassazione oltre la prospettiva della proprietà codicistica*, in *Pol. dir.*, n. 2/2011, p. 346 ff.



result functional to the pursuit and satisfaction of the interests of the community and that for this reason they must be considered common, regardless of the title of ownership, thus making the state property aspect recessive compared to that of the functionality of the asset compared to the interests of the community»<sup>40</sup>.

Therefore, the judgment explicitly recognizes the existence of common goods, such as goods whose usefulness is functional to the exercise of fundamental rights, incorporating the notion outlined by the Rodotà Commission in 2007<sup>41</sup>. This Commission, set up with the aim of reforming the part of the Civil Code relating to goods, and in particular public goods<sup>42</sup>, stressed the need to focus on the goods destination, rather than on their membership, and proposed the introduction of the new legal category of common goods, of collective membership and essentially unavailable because functional to the development of the human person and the protection of future generations<sup>43</sup>.

The Commission proposed, first, to abandon the formal distinction of public goods, in favour of a substantial and functional classification, based on the valorisation of the interests of the recipients of the goods. Into this classification came the provision of the new legal category of common goods, defined as things that express functional utility for the exercise of fundamental rights and the free development of the person. For the protection of these assets, it would be necessary to provide suitable instruments to guarantee their collective use and, at the same time, their conservation in the interest of future generations, while limiting the possibility of granting them in concession. Nevertheless, the Commission's draft delegated law did not proceed, due to the fall of the Prodi government. However, in 2009, the reform project was re-proposed in the Senate by the Piedmont Regional Council<sup>44</sup>, but was never discussed. Subsequently, on 5 November 2019, the draft was resubmitted by bill of popular initiative<sup>45</sup>, but in that case the *quorum*

<sup>40</sup> Court of Const., sent. n. 3665/2011.

<sup>41</sup> The Commission on Public Goods, known as the Rodotà Commission from the name of its President, was established at the Ministry of Justice, with a ministerial decree of 21 June 2007, in order to write a draft for the amendment of the Civil Code regulations on matter of public property.

<sup>42</sup> A first initiative in this sense was already registered in 2003, at the Ministry of Economy and Finance, but it did not take root.

<sup>43</sup> Cmp. R. Briganti, *Dimensione costituzionale dei beni comuni tra principi, regole e prassi*, in *Nomos*, n. 2/2019, p. 1 ff.

<sup>44</sup> Legislative proposal voted in October 2009 by the Regional Council of Piedmont. Also in the XVI Legislature, the legislative proposal (n. 2031) was resubmitted (and assigned on 16 March 2010), but the process was again halted.

<sup>45</sup> People's legislative proposal n. 2237.

of signatures enshrined in Article 71(2) of the Ita. Const. was not reached.

In any case, the results obtained from the analysis of these proposals is that, from the direct application of Articles 2, 3, 9 and 42 of the Italian Constitution, for those goods intended to satisfy the community interests, the protection of fundamental rights prevails over proprietary and market logic<sup>46</sup>.

On the other hand, numerous regulations have offered important indications regarding the recognition of the juridical category of common goods and various hypotheses of regulation of the same, at a local level<sup>47</sup>.

The Municipality of Naples, for example, was the first to have established the Department of Common Assets, to enhance the use of public property in the prevailing interest of the community and to have followed up the results of the referendum of 2011 for a participatory public management of water, and more generally, of common assets<sup>48</sup>. Moreover, the City of Naples was the first municipality to recognise common goods in its statute. Article 3(2) of the Statute states that the Municipality of Naples, also with a view to protecting future generations, recognises the commons insofar as they are functional to the exercise of the fundamental rights of the individual in his or her ecological context and guarantees their full enjoyment within the scope of municipal competences<sup>49</sup>.

In addition, two deliberations of 2013 of the Neapolitan Council have implemented, respectively, a Regulation for the regulation of common assets and a Public Space Charter for the enhancement of urban public areas (deliberations No. 17 and 521 of 2013). A resolution of 2014 established the procedures for the identification and collective management of public goods, highlighting how the administrative action should be directed to the overriding public interest, as enshrined in the Constitution. Resolution no. 458 of 2017 promoted and enhanced the use of public goods for social purposes.

To date, over 250 Italian municipalities have adopted regulations for the participatory administration of urban common assets<sup>50</sup>. Among them, the Regulation of the Municipality

<sup>46</sup> A. Lucarelli, *Proprietà pubblica, principi costituzionali e tutela dei diritti fondamentali. Il progetto di riforma del codice civile: un'occasione perduta?*, in U. Mattei, E. Reviglio and S. Rodotà (ed.), *I beni pubblici. Dal governo democratico dell'economia alla riforma del Codice civile*, Rome, 2010, p. 85 ff.

<sup>47</sup> On the topic, extensively, F. Di Lascio and F. Giglioni, *La rigenerazione di beni e spazi urbani. Contributo al diritto delle città*, Bologna, 2017.

<sup>48</sup> Resolution n. 740/2011.

<sup>49</sup> On this issue, in relation to the activities of the Municipality of Naples, see G. Vosa, *Autonomia territoriale e tutela dei beni comuni: riflessioni sulla potestà normativa comunale a partire dalla vicenda dell'(ex) Asilo Filangieri*, in *Nomos*, n. 1/2022, p. 1 ff.

<sup>50</sup> Cmp. <https://www.labsus.org/cose-il-regolamento-per-lamministrazione-condivisa-dei-beni-comuni/>.

of Bologna of 2014 on citizens and administration collaboration for the care and regeneration of urban common goods stands out and subsequently inspired many other municipalities<sup>51</sup>.

These Regulations provide different forms of management of some abandoned or disused goods, based on the collaboration between citizens and the administration, and are designed to combat urban poverty and social exclusion, ensuring the collective use of the goods regardless of the owner<sup>52</sup>. The absolute centrality is therefore given to the participation of citizens and the administration acts in a collaborative and non-authoritarian way, precisely to ensure the widest accessibility to these goods<sup>53</sup>.

An in-depth analysis of these local initiatives reveals an awareness of the inability of public property, in its constitutional and codicistic dimension, to guarantee the protection of fundamental rights in an egalitarian and solidarity-based perspective<sup>54</sup>. This implies the need to rework the legal category of public goods, with a view to enhancing the social function and democracy in its multiple forms<sup>55</sup>.

From this, part of the doctrine<sup>56</sup> follows the admission of the existence of a different public law definition, capable, on one hand of protecting and enhancing those goods functional to the effective development of fundamental rights, as goods for collective use and with a social function; on the other hand, of overcoming the classic public-private and property-management dichotomies<sup>57</sup>. The objective is to highlight the primacy of the protection of fundamental rights in the governance of the common good and indeed, in a more general perspective, to affirm the primacy of the right over the good. This process must be carried out in compliance with the principle of substantial equality, environmental sustainability,

<sup>51</sup> Cmp. A. Previato, *Processi di progettazione partecipata applicati alla rigenerazione urbana: cenni sulle tendenze di un fenomeno accolto anche nella recente "Legge sulla tutela e l'uso del territorio" dell'Emilia-Romagna*, in *Federalismi.it*, n. 15/2019, p. 18 ff.

<sup>52</sup> Refer to F.F. Guzzi, *Rigenerazione urbana e valorizzazione dell'esistente*, in *Federalismi.it*, n. 22/2016, p. 2 ff.

<sup>53</sup> Cmp. U. Ronga, *Le forme della partecipazione nella Regione Campania*, in S. Staiano (ed.), *Lineamenti di diritto costituzionale della Regione Campania*, Turin, 2016, p. 223 ff.

<sup>54</sup> See A. Giusti, *I beni comuni e la rigenerazione urbana*, in P. Chirulli and C. Iaione, *La co-Città, Diritto Urbano e politiche pubbliche per i beni comuni e la rigenerazione urbana*, Naples, 2018, p. 91 ff.

<sup>55</sup> Cmp. S. Lieto, *Il diritto di partecipazione tra autorità e libertà*, Naples, 2011, espec. pp. 36 ff.

<sup>56</sup> Cmp. *ex multis*, U. Mattei, *I beni comuni come istituzione giuridica*, in *Questione giustizia*, n. 2/2017, p. 59 ff.

<sup>57</sup> Refer to A. Lucarelli, *Crisi della democrazia e funzione sociale dei beni pubblici nella prospettiva costituzionale: verso i beni comuni*, in *Dir. e Soc.*, n. 3/2016, p. 483 ff.

and social justice<sup>58</sup>.

In this perspective, once the focus is shifted to the usefulness of common goods, public institutions do not manage these goods as owners, but have the duty and responsibility to manage them as bearers of general interests and ethical-social values. As a result, their powers of disposition are limited and the goods under consideration cannot in any way be declassified<sup>59</sup>.

#### 4. The constitutionalisation of the commons in Latin America.

In Italy – as it has been pointed out – despite the fact that jurisprudence and local authorities have repeatedly offered a definition of common goods, as goods functional to the satisfaction of the fundamental rights of the individual person and of the community, a regulatory model aimed at balancing the discipline of the ownership regime, based on the concept of belonging, with a discipline aimed at safeguarding the functional aspects of goods, has not yet been prepared at State level.

In some foreign countries, however, the legal category of the commons has been formally recognised at the legislative level. In particular, some Andean states have included common goods in their constitutional texts. The new Ecuadorian and Bolivian Constitutions, in fact, have expressly recognised the category of common goods, outlining a precise discipline for their protection and valorisation, also in the interest of future generations<sup>60</sup>.

In fact, the Constitution of Ecuador 2008 recognizes the right of people, communities, peoples, and nations to benefit from the environment and natural resources, considered common goods functional to the collective *buenvivir*.

But it is the 2009 Constitution of Bolivia that contains the broadest references to the legal concept of common goods.

The roots of the Bolivian Constitution, in fact, lie in the social mobilizations of the 21st century against the privatization of natural resources, in particular, water and gas. These

---

<sup>58</sup> Cmp. A. Abbruzzese, *La categoria giuridica dei beni comuni tra dimensione locale e attività giurisprudenziale, oltre l'assolutismo giuridico. Brevi note comparative*, in *Nomos*, n. 5/2018, p. 1 ff.

<sup>59</sup> See A. Lucarelli, *Beni Comuni. Proprietà, gestione, diritti*, in *Rass. dir. pubb. eur.*, n. 1/2007, p. 4 ff.

<sup>60</sup> On this subject, refer to G. Palombino, *Il principio di equità generazionale. La tutela costituzionale del futuro*, Milan, 2022, p. 45 ff.

mobilizations, which have become the symbol at world level of the defence of common goods, lead to the gradual delegitimization of traditional Bolivian political parties, which have shown themselves prone to corruption and incapable of managing public affairs and give rise to a process of re-founding the country, culminating in the adoption of the new constitutional text.

Within it, the protection of common goods and the management and care of them are considered a useful tool for achieving independence and social cohesion of the population. Among the common goods are not only natural resources, but also social goods, constituted by the values and traditions of the communities<sup>61</sup>. In fact, art. 30 Boliv. Const. states that indigenous peoples have the right to their own cultural and religious identity, to their own customs and traditions and to their own cosmovision; to the protection of the collective intellectual property of their knowledge, science and knowledge, and to respect and appreciation of traditional medicine, languages and rituals.

Furthermore, the second paragraph of Article 8 Boliv. Const. provides that: «The State is based on the values of unity, equality, inclusion, dignity, freedom, solidarity, reciprocity, respect, complementarity, harmony, transparency, balance, equality of opportunity, social and gender equity in participation, common welfare, responsibility, social justice, distribution and redistribution of products and social goods in order to live well»; while art. 9 Boliv. Const. specifies that the State has the obligation to ensure the protection of the environment in the interest of the community and future generations<sup>62</sup>.

In a completely innovative way, moreover, the Constitution of Bolivia differentiates fundamental rights from the very fundamental rights and among the very fundamental rights it includes the right to life, food and accessibility, and water. These rights are considered essential and necessary for accessing to other rights<sup>63</sup>.

Regarding property, whether indivisible or collective, the right to a social function is expressly subordinate.

The result is a constitutional model based on the legal protection of common goods and on the legal duty of the State as guarantor of a public right destined to the universalisation of

---

<sup>61</sup> Cmp. K.S. Ekeli, *Green Constitutionalism: The Constitutional Protection of Future Generations*, in *Ratio Juris*, XX, n. 3/2007, p. 378 ff.

<sup>62</sup> On the issue, cfr. B. Vimercati, *Il diritto ai beni vitali*, in *Rivista del Gruppo di Pisa*, n. 2/2016, p. 1 ff.

<sup>63</sup> In this sense, M. Carducci, *Costituzionalismo e sopravvivenza umana*, in *Diritti comparati*, 9 may 2014.

social welfare as an inviolable right belonging to all<sup>64</sup>.

Alongside this, there is the right of active participation by citizens in the management of commons: they have the right to participate in the government of public policies and to exercise social control of public management at all levels of the State (art. 241 of the Bolivian Constitution). Therefore, Bolivian Constitution aims at a real process of involvement and empowerment of all citizens in the fruition and defence of common goods<sup>65</sup>.

Then, a crucial role for the protection of the collective welfare is assigned to the state economic organization; in particular to public enterprises in charge of managing water services and protecting natural resources, ensuring their fair distribution among the entire population<sup>66</sup>.

All this being said, it is clear that in Bolivia economic and social development - and therefore the *buen vivir* of all citizens - is pursued through the constitutionalisation of commons and the procedures for access to them, accompanied by the provision of mechanisms for democratic participation and the recovery of the core values of Andean culture<sup>67</sup>.

Finally, it is also worth at least mentioning the Brazilian Constitution of 1988, which contains references to common goods. Article 20 of the Brazilian Constitution defines the land traditionally owned by the Indios as common property owned by the federal state.

Substantially, these Constitutions represent an effective model for the valorisation of common goods, as goods functional to the protection of fundamental rights – or “very fundamental” – and to the achievement of objectives such as social justice, substantial equality, and solidarity, also in the interest (*rectius buen vivir*) of future generations<sup>68</sup>.

Nevertheless, the profound differences between the Italian system and these types of systems cannot be overlooked, differences that are primarily cultural as well as legal. However, what is interesting is the role given to citizens in these Constitutions. They play

---

<sup>64</sup> On the topic, extensively, S. Baldin, *Il buen vivir nel costituzionalismo andino. Profili comparativi*, Turin, 2019.

<sup>65</sup> Cmp. S. Lanni, *Sistema giuridico latinoamericano e diritti dei popoli indigeni*, in S. Landini (ed. by), *I diritti dei popoli indigeni in America Latina*, Naples, 2011, p. 7 ff.

<sup>66</sup> On the topic, extensively, M. Foroni, *Beni comuni e diritti di cittadinanza. Le nuove Costituzioni sudamericane*, Vignate, 2014.

<sup>67</sup> Cmp. C. Carducci, *Il “nuevo constitucionalismo” andino tra alterità indigenista e ideologia ecologista*, in *DPCE online*, n. 2/2012, p. 319 ff.

<sup>68</sup> Cmp. M. Petters Melo, *Neocostituzionalismo e “nuevo constitucionalismo” in America Latina*, in *DPCE online*, n. 2/2012, p. 342 ff.

a central role in both the endogenous and exogenous phases of the management of public goods and more generally of public space. On the one hand, through active participation in the management and governance of these goods. On the other through the provision of a discipline that guarantees and fosters the social function of these goods in the interest of the community and that provides for a fundamental role of the state as guarantor of the interests of citizens.

Such systems are thus a fruitful example, first, of the attempt to foster a democracy that we could call *multilevel*, that is, declined both from the point of view of representation and from that of direct citizen participation, with an inclusive perspective; second, of a discipline of public goods focused on the recipients of the goods and not on the owner subject, where the state turns out to be more of a guarantor of the citizens' interest so as to enhance popular sovereignty.

### **5. Concluding remarks. The necessary enhancement of the social function of public property.**

From all the above-mentioned, it rises the need to govern the public goods through an effective and equal involvement of citizens and moreover, the adoption of public policies aimed at satisfying the general interests. The access to the public goods must be guaranteed through collective fruition and focusing on the functional aspect of the good, intended for the enjoyment of the person's fundamental rights. From this point of view, the State is either a manager, regulator, or controller, but always as the carrier of the interest of the entire population and therefore of public *utilitas* rather than of economic, exclusionary, and competitive interests<sup>69</sup>. The role of the State is therefore fundamental in the management and regulation of public goods<sup>70</sup>.

In this way, the revision of the discipline of public property should be directed towards enhancing its social function, at the same time providing for constraints on the regime of

---

<sup>69</sup> Cmp. U. Mattei, *Il benicomunismo e i suoi nemici*, Milan, 2015, espec. p. 22 ff.

<sup>70</sup> Cmp. A. Lucarelli, *Osservazioni in tema di impatto ambientale*, in *Rassegna di Diritto civile*, n. 2/1989, p. 370 ff.



alienation and trade of the property, as well as its use or concession<sup>71</sup>.

Indeed, in Italy, the processes of privatization of public property, which began in the 1990s, are currently spreading, contributing to the weakening of the notion of state property. The legal regulation of the category, in addition to constitutional regulations, is entrusted to the Civil Code, which is inadequate to curb the prevalence of particular interests over general ones. In this regard, privatization processes are not to be excluded *a priori*. The problem arises in relation to the manner and type of assets for which they are carried out. The way privatization processes were carried out especially in the 1990s, in a disorganized manner, generalized and unassisted by adequate public policies, they have led to the widening of deep social inequalities<sup>72</sup>.

In fact, Article 42 Ita. Const. does not absolutely preclude the privatization of public property or impose a specific ownership regime. However, the combination of constitutional norms does impose constitutionally relevant public purposes and thus a check on the reasonableness and merits of the many interests that functionally qualify the assets. This control, in turn, imposes an evaluation of the discretionary exercise of power that is responsive to an appropriate distinction between property functional to the satisfaction of interests essential to the development of the person and the community, and goods state-owned economic goods, which, on the other hand, can adequately satisfy public interests even if placed in a market regime<sup>73</sup>. That is, there is a need to protect public goods from the perspective of enhancing their inherent social function<sup>74</sup>.

Consequently, reflection on the public goods or on the commons involves a broader reflection on the new forms of democracy, beyond the classical mechanisms of political representation<sup>75</sup>.

Indeed, the valorisation of the functional link between goods and rights limits the discretion of public owners, favouring on the contrary participatory processes inclusive of the community. The idea of community that emerges in this context goes beyond particularisms

---

<sup>71</sup> See D. Mone, *La categoria dei beni comuni nell'ordinamento giuridico italiano: un paradigma per la lettura del regime dei beni pubblici alla luce della Costituzione*, in A. Lucarelli and D. Mone (ed.), *Le trasformazioni della democrazia*, cit., p. 63 ff.

<sup>72</sup> Cmp. R. Manfellotti, *Potere economico e Costituzione materiale*, in *Rivista AIC*, n. 3/2018, p. 235.

<sup>73</sup> On the topic, most recently, G. Cataldo, *Beni economici appartenenti allo Stato. L'art. 42, comma 1, Cost., come fondamento dell'intervento pubblico nell'economia*, Naples, 2022, *passim*.

<sup>74</sup> Cmp. A. Mazzitelli, *Costituzione e Beni comuni: una categoria giuridica auspicabile?*, in *Federalismi.it*, n. 22/2018, p. 2 ff.

<sup>75</sup> Cmp. M. Della Morte, *Rappresentanza vs. partecipazione. L'equilibrio costituzionale e la sua crisi*, Milan, 2012, espec. p. 57 ff.

mechanisms: it is not an exclusive community<sup>76</sup>. In legal terms, these processes must guarantee an effective and equal participation of the subjects, without discrimination and in respect of the principle of substantial equality and the duties of solidarity.

This form of participatory democracy, as highlighted, is not, however, understood in contradiction with the democracy of representation, but as a further expression of the concept of democracy provided for by the Constitution. It does not, however, exclude the responsibility of public institutions, which, on the contrary, retain a fundamental role of regulation and control, as well as of guaranteeing essential public services<sup>77</sup>.

Adequate reasoning about public goods thus requires a general recognition of the recessiveness of dominical title, as opposed to the preeminent social function of the goods in question, as well as of collective use and participatory management as distinguishing characteristics of public goods<sup>78</sup>.

In this sense, the Andean *buen vivir* model turns out to be an excellent example of legislative (and in that case even constitutional) provision of adequate instruments for the protection of natural resources, i.e., public goods par excellence, so that they are hostage to the changing will of Parliament, to the detriment of future generations.

Beyond the different doctrinal positions on whether or not the legal category of the commons should be recognized, it is evident and now imperative to intervene in the legislative regulation of public goods in order to enhance their social function from an egalitarian and solidarity perspective. The crisis affecting public goods, as demonstrated by the massive privatization processes, calls for an amendment of the Civil Code that enhances their destination to the satisfaction of citizens' interests. In this sense, in the wake of the work of the Rodotà Commission, it seems appropriate to classify these goods, distinguishing: public goods in public use, understood as goods specifically intended for the satisfaction of the interests of the community, from economic public goods, as such usable by it for economic purposes and for the achievement of predetermined purposes.

The objective pursued is to protect these goods within the perimeter indicated by the

---

<sup>76</sup> Refer to F. Pastore, *Il referendum negli statuti delle regioni ad autonomia ordinaria di seconda generazione*, in *federalismi.it*, 28 gennaio 2009.

<sup>77</sup> Cmp. A. Lucarelli, *Démocratie participative*, in M. Cornu, J. Rochefeld and C. Orsi (ed.), *Dictionnaire des Biens communs*, Paris, 2017, p. 371.

<sup>78</sup> Refer to U. Mattei, *I beni comuni e le comunità locali. Dai lavori della Commissione Rodotà ai percorsi di rigenerazione urbana*, in R.A. Albanese and E. Michelazzo (ed.), *Manuale di diritto dei beni comuni*, Turin, 2020, p. 15 ff.

Constitution and the form of welfare state<sup>79</sup>.

**Abstract:** The paper analyses the evolution and recent trends of common goods, in order to reflect on the advisability of amending the codified regulation of public goods, in order to enhance their social function. The legal recognition of commons requires, however, in advance, a rethinking of the State model, in order to make the concept of social function prevail over that of belonging. From this perspective, the Andean Constitutions represent the first example of the constitutionalisation of common goods, but above all an important example of the valorisation of citizens' interests in the use of goods such as natural resources. Beyond the different doctrinal positions in the field, on whether it is appropriate to introduce the legal category of common goods, these studies return the widespread conviction of the need to modify the discipline of public goods provided for in the Civil Code, in order to valorise the social function of these goods, in the interest of citizens and in line with the welfare State.

**Abstract:** Il presente contributo analizza l'evoluzione e le recenti tendenze dei beni comuni, al fine di riflettere sull'opportunità di modificare la disciplina codicistica dei beni pubblici, allo scopo di valorizzarne la funzione sociale. Il riconoscimento giuridico dei beni comuni richiede, infatti, preliminarmente, un ripensamento del modello proprietario, ancora del tutto incentrato sulla nozione di appartenenza. In quest'ottica, le Costituzioni andine rappresentano non solo il primo esempio di costituzionalizzazione dei beni comuni, ma soprattutto un importante esempio di valorizzazione dei diritti dei cittadini connessi all'utilizzo dei beni pubblici, in specie delle risorse naturali.

Al di là delle diverse posizioni dottrinali in campo sull'opportunità o meno di introdurre la categoria giuridica dei beni comuni, tali studi restituiscono la necessità di modificare la disciplina dei beni pubblici come delineata nel Codice civile, al fine di tutelare la sovranità popolare in chiave solidale ed egualitaria, nonché in armonia con la forma di stato sociale.

**Key words:** common goods – public goods – democracy – fundamental rights.

---

<sup>79</sup> Reference may be made to M.C. Girardi, *La proprietà pubblica. Percorsi costituzionali nell'evoluzione della forma di stato*, Naples, 2023, espec. p. 243 ff.

Parole chiave: beni comuni – beni pubblici – democrazia – diritti fondamentali.