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## **Constituting the Commons in the Context of State, Law and Politics**

Two years ago twenty seven millions italian citizens voted against the privatization of the water, cancelling via referendum some legal rules on water as a commodity. In many countries of the European Union more than one million and half signature have been already collected for a citizens' initiative that, according to the article 12 of the Lisbon Treaty, asks the European Commission to take an initiative aimed water services not to be privatised.

Why am I making reference to these two cases? For two reasons. First of all, because they make apparent how it is possible to have mass mobilisation through the existing institutional channels in the perspective of new rules recognising some goods as commons. Secondly, and mainly, because they show that a new exercise in citizenship is emerging, directly connected with the fundamental rights and the common goods. In this perspective, citizenship cannot be conceived as a tool separating people, but as a bundle of rights people carry along throughout the world, making possible individual and collective access to some categories of goods without any market mediation and following any people everywhere they are, irrespective of boundaries and of personal conditions. From this point of view we could say that more and more the whole world is becoming a "planetary common", a common place of a global citizenship, where people could circulate free of constraints regarding a national belonging, in order to make effective their fundamental rights and to be respected in their essential humanity.

Thus it makes apparent the direct relationship between person's fundamental rights and the common goods, and that personal rights and common goods become mutually interrelated.. Generalising this assumption, we could conclude that the common goods are the result of a social construction. More precisely, they are produced by the fundamental rights.

Before going deeper in analysing this perspective, it could be useful to make reference to a book published in 2004 by a distinguished Italian scholar, Franco Cassano, whose title is *Homo civicus. The reasonable madness of common goods*. Why is citizenship seen as directly related to common goods? And why are these goods referred to via an oxymoron – placing madness alongside reason? In fact, we must be aware that a new rationality is needed and is emerging, and that we must deal with this change, with new forms of social, economic, cultural, political rationalities. In fact, the true madness could result from a cultural and political blindness unable to elaborate the categories giving social evidence, cultural foundations and institutional support to the perspective of the common goods.

However, two problems arise immediately from this prospectively boundless citizenship. The former one has to do with the very quality of citizenship. It is no longer a formal requirement – a set of rights and duties allocated in a static perspective. Rather, it is a set of powers and opportunities an individual should be in a position to turn into reality – using them to determine the mechanisms of participation in politics and, generally speaking, public life, which is exactly the life of the "city". This is why the words "*homo civicus*", citizen, have been used – they highlight this active stance whereby every citizen is turned into the leading character. And this is why reference has been made to a strong citizenship – i.e. to underline the need for making available the tools required to breathe life into this stance. It means that, referred to a planetary common, citizenship is no more a tool separating people and defines the very condition of individuals in the world, where they encounter and product planetary goods.

Thus we must deal with two categories – citizenship and globalisation. And we must revisit and redefine them in the perspective of the "opposite of the property", the commons, so challenging two of the foundations of the modernity – property and sovereignty. If this is a correct approach, the next step implies a direct and clear answer to a crucial question. Are we living a revival of the historical concept and experience of the commons or we are dealing with a discontinuity?

New words are crossing the world creating a sense of a change of age – open source, free software, no copyright, free access to water, food, drugs, knowledge, Internet as a fundamental right of every person. And it happens in a space characterized by two essential novelties – immaterial and cross border dimension. Reflecting on this new reality, we can understand the reference to what happened between the XVI and the XIX century mainly in England, to the enclosure movement. But it could result much more in an intellectual operation for giving a strongest legitimization to the common goods approach than in a useful tool for analyzing the dynamics of the present and for design scenarios of the future. Trying to enter into the post-modernity, are we risking a regression to the pre-modernity?

Speaking frankly, inside the rich, multifarious discussion on commons there is an emerging, risky trend toward what can be looked at as a kind of nostalgic approach, of a metaphysical foundation of the commons. Thus it is suggested not only to have a gaze beyond the market and the state, but to conceive the commons, on one side, as a model that can be built up according to past experiences; and, on the other side, as the only way out the crisis we are living, a revolution changing radically our societies. Some remarks on these attitudes could be useful for discussion.

Not only in the field of the commons can we discover what has been since a long time called an “institutional neo-medievalism”. If, for instance, we have a look at the Manuel Castell’s researches on the information society or at the theoretical descriptions of a world marked by a multiplicity of “civil constitutions”, we easily discover that they start from the idea of a world without a center, to be organised around many communities producing their own rules and practices. But the features of this New Middle Age can rather produce dispersion, production of many centers with conflicting interests, difficulties precisely in the direction of the identification of what is the specificity of the commons. Many historians have stressed the risks of transplants in our environment of concepts and models coming out from non democratic societies.

Taking seriously the idea of discontinuity, we must deal with another crucial problem. How can we identify the common goods? The answer cannot be found searching an inner nature of the commons. In fact, discontinuity implies that we have to look at historical processes, so that the commons, from this point of view, must be considered a social construction. They are, first and foremost, a matter of organization of the society at large, of the position of individuals and groups inside the social environment. According to this analysis, the way the commons are recognised affects the distribution of the powers and shows their transformative attitude.

At large, this approach implies that we must go beyond a naturalistic view of the commons. It’s true that the new constitutionalism, emerging mainly in Latin America, makes explicit reference to the extension of rights to nature; that, for instance, Michel Serres called for a “natural contract” between humans and nonhuman beings; that there is a materialistic approach asking for a “Parliament of Things”, may be with an involuntary reminiscence of the Internet 3.0, the Internet of Things. And we can remember a seminal essay published in 1972 by Christopher Stone, whose title was “Should tree have standing? Toward legal rights for natural objects”. But, looking deeper into these documents, we can easily discover that they indicate, more or less in details, the ways and the legal means natural objects can be taken into account and which are the subjects charged of their respect and protection. Thus it’s the “artificial” world of the institutional procedures and of the legal rules that takes the responsibility to make effective the guarantees and gives the nature the adequate protection. Democracy needs this approach. Otherwise, who can speak on behalf of the nature? We must escape the risk of authoritarian initiatives, precisely because in the last years we had an impressive collective effort on the way of the full acknowledgment of the importance of the relationship with the environment, of the cultural traditions, of the popular consciousness.

Thus we must concentrate our efforts on the machinery for making the commons perspective effective. A very recent judgment of the India’s Supreme Court in the Novartis’ affair provides some important suggestion. As you know, the Supreme Court denied Novartis’ request for patent protection for its Gleevec cancer treatment, allowing the nation’s generic drug-makers to continue to sell copies of the drug at a lower price (the difference is between 2700 and 170 dollars). The

public health activists praised the judgement saying that it would protect India's ability to make inexpensive generics, so that India was confirmed as the pharmacy of the developing world.

We could say that through this kind of judicial intervention the reasonable madness of the common goods penetrated the patent's fortress, one of the strongest feature of the property in the dimension of the immaterial. Very shortly, we can reassume the case making reference to the conflict between the fundamental right to health and the property rights of Big Pharma, well known since the time when South Africa Supreme Court intervened in a similar issue. The solution has been grounded on Indian patent law, promoted by a popular movement aimed to give right to health effective protection. The connection between this fundamental right and an equitable access to drugs opens the way toward a consideration in this field of the knowledge as a prospective common. Nothing natural, but the production of a common goods through the full recognition of health as fundamental right.

This model can be generalised, finding a strong support in the new constitutionalism of the needs or of the material life, made evident in particular by the constitutions and the supreme courts' interventions in the area connecting Latin America, South Africa, India. New categories are emerging as access, commons not community based, common services and utilities.

It's noteworthy that the founder of the Web, Tim Berners Lee, answering a question on the opportunity to recognise the access to Internet as a fundamental right, made a comparison with the access to water. Thus water in the material world and knowledge on the Web are both looked at the commons perspective, beyond the market, but at the same time being aware of the necessity to have a state giving openly and tangibly support to the initiatives that contributes to build up commons. This approach can and must be generalised, escaping the risk of a self-reference attitude or of an exclusive bottom up analysis and exploring the role of supportive institutions, policy regimes and law. An integrated approach is needed, combining social practices and institutional machinery.

In fact, looking at knowledge, we must take into account the increasing role played by copyright's rule in the recent times, mainly because its default mechanism. The pervasive effects of this trend have been summarized by Lawrence Lessig making reference to a growing series of cases where it was asked for money for films or pictures showing the facades of a buildings in the street, a very well known monuments, a piece of designed furniture. As conclusion, Lessing reported the advice of a successful director to a young artist: "You're totally free to make a movie in an empty room, with your two friends". Reacting to this attitude, and inspired by the success of the free software movement, between 2000 and 2002 a group of scholars, entrepreneurs and activists proposed to produce a new set of rules called "Creative Commons", followed in January 2010 by a Public Domain Manifesto and by the reinforcement of the relations between the criticism of the patent rules and the no copyright movement.

These different cases confirm that the right attitude towards the commons is the kaleidoscope, not a forced unitary perspective. Look, for instance, at the management of the commons. The reference to a community raises at least two questions. How can we avoid the conflicts of interest among different communities? How can we manage the not community based commons?

Dealing with the conflicts of interest, the new medievalism reveals its inadequacy because its attitude towards separation, and a relational approach is needed. As for the not community based commons, we can look, for instance, at the knowledge on the Web, where it's not possible to identify a managing community in a population of more than two billions people. The way to be followed is not the attempt to create an impossible subject, but the definition of the rules making the access universal and not mediated by the market. It is the same legal status of the good to be taken into account and built up as a common.

Thus we can make a step forward the right approach to the common perspective and its general framework. Commons are reshaping the relationship between the world of persons and the world of the goods. Consequently, we cannot separate the analysis of the commons from a general reflection on what are becoming private and public property in an environment that is changed precisely by

the growing commons awareness. The new enlarged vision of the common goods defines a third dimension alongside the two traditional ones and reacts on their relationships.

Starting from this point of view, and enlarging the horizon, it could be useful to have a look at what is happening in the digital world of Google and Facebook. The role played by these two global players (Facebook with its more a billion participants is the third nation in the world, after China and India) is suggesting reflexions starting from the fact that they are performing a role similar to some public services, implying their consideration as “utilities”, giving evidence to public and common interests. It is more apparent on the side of management. After the controversial history of a referendum opened and then cancelled on Facebook in an authoritarian way by his founder, there are proposals to give voice to the Facebook people according to some models of the representative democracy. It means that a community is recognised, which must be organized and play a role

May be these are problems beyond a strict consideration of the commons, giving room a risky inflation of the reference to what must be correctly defined as a common good. But they are part of a more general movement redesigning the boundaries between the different categories of goods and services in a new perspective. It means that we are facing a new distribution of powers. And in this perspective common goods are strongly grounded in the constitutions, giving evidence to what can be called the constitutionalisation of the person, so that a comprehensive definition of the common goods could make reference to the goods functionally necessary for making effective the person’s fundamental rights and the fulfilment of her/his personality.

These goods reflect collective interests, are finalized to the fulfillment of collective needs, make possible the effectiveness of fundamental rights. As you know, common goods belong to all and to nobody: all people can have access, but nobody must have exclusive rights. They are shared *per se*. They must be managed starting from the equality and solidarity principles, improving different forms of interested people’ participation. They reflect the dimension of the future, so that they must be managed in the future generations’ interest too, making effective the intergenerational solidarity. In this sense, they are a truly “heritage of the humanity” and all interested person must be legitimized to intervene in order to make effective and to protect them. In the very nature of these goods there is the sharing of responsibilities among different actors, the effectiveness of equality, the building up of social relationships instead of selfish separation.

In this wider perspective we can rediscover some forgotten, lost words. The “common interest”, whose reference disappeared, submerged by the force of the personal, private interests. The “social relationships”, because the very nature of these goods produces continuous interrelations, testified not only by the Web. “The future”, cancelled by the “short-termism”, whilst the common goods embody the *longue durée* (long span) approach and obliges to take into account the future generations. “Equality”, as a direct effect of the way these goods are accessed and exploited. Thus all these words drive towards a fresh regards on what “democracy” means nowadays.

Other models and other rules have been adopted in other times and in other parts of the world. But what it is happening nowadays is something new, for all. The awareness of the essential role can be played by the common goods perspective is emigrating from the periphery to the core of the legal systems, from a narrow, local to a global dimension.

But “the democracy of the commons” cannot be conceived as a catch-all process. I am very suspicious towards the mystic of the “common” as the sole category for a progressive social and political action, towards a metaphysic vision irrespective of the history and of the social dynamics. We must escape the temptation of the extension of the qualification as commons to every good or service. We are risking the inflation. We risk loosing the specificity of the common. If all is a common, nothing is a common.

A large, diffused, increasing movement is at work everywhere in the world. The first important result of this collective action is the successful challenge to the obliged separation of persons and goods between public and private sphere. This separation has not disappeared, but we can look at the world free from the obsession of the possessive individualism, from the category of appropriation as the unique tool for defining the same anthropology around the *homo economicus*.

In fact, we are working in a meta-state and meta- individual dimension, where we can encounter not an ambiguous post-democracy, but a participatory process of liberation of constraints giving people the opportunity to exercise a strong citizenship, to fully implement the rights interrelated with the different common goods, so reinforcing the democracy in itself through the respect of the dignity and of the same life of every person.