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COMMONS IN THE PRISM OF INTELLECTUAL PROPERTY. EVOLUTIONARY PROFILES OF CONTRACTUAL MODELS AND CIRCULATION OF KNOWLEDGE ON THE NET*

1. – Taking inspiration from George Bernard Shaw's famous reflection "if you have an apple and I have an apple and we exchange these apples, then you and I will still each have one apple; but if you have an idea and I have an idea and we exchange these ideas, then each of us will have two ideas", this essay aims to analyze the category of commons in comparison to intellectual property law (*rectius,* copyright law), in the European framework of reference. Commons is elected as a leitmotif of this analysis, focused on knowledge as a common immaterial good (*id est,* intellectual and creative works, scientific product *et similia*), traditionally considered as intellectual property right but radically changing in the context of the new information society, thanks to digitization [1].

Then, this paper is focused on potentials and limits of the legal instruments of *copyright* and, subsequently, the development of new models of contracts on the net. From this perspective, it could ensure the difficult balance between *ius excludendi* and *ius utendi* which constitutes the primary objective of a modern intellectual property law.

In particular, the focus is on the implementation of open access principles, through the contract: the most flexible instrument to evolve the system. Considering the copyright directive transposition, we should analyze the legal framework of reference and elaborate best practices and new contract models [2].

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[1] Part of my reflections on this topic has already started during my PhD and allowed me to win the *Call for paper "Are We Owned? A Multidisciplinary and Comparative Conversation on Intellectual Property in the Algorithmic Society"*, organized by Prof. Guido Noto La Diega (University of Stirling & Scottish Law and Innovation Network), funded by *The Modern Law Review* for a one-day International Conference held in Stirling on Friday 8th October 2021, with the participation of speakers from all around the world, like Prof. Joshua Fairfield (Washington and Lee University). All information about the International Conference can be found on the website areweowned.wordpress.com.

[2] Germany is considered the cradle of Open Access European principles: The Berlin Declaration is the milestone in the European

2. – Considering so, the dialectical relationship between goods and property clearly emerges, which raises the question whether, in the perspective of reform of Book III of the Civil Code, it is necessary to deal «in primo luogo della teoria della proprietà o della teoria dei beni» [3].

If on the one hand it is certainly necessary to reflect on the notion of goods in the legal sense, on their use and to what extent this can affect the institution of property, on the other hand it is necessary to rethink the meaning of the very structure of property, handed down to us and rooted in our legal culture as a subjective right *par excellence,* characterized by the typical characteristics of real rights: absoluteness, fullness and exclusivity.

The relationship between goods and property reverberates and the necessary relationality between goods and person is realized, in fact, through the private graft. Already a few years after the entry into force of the new Code in 1942, but above all following the strong acceleration given by the advent of the Constitution, a few years later, the best doctrine has shifted the center of gravity of this relationality between goods and people in the egalitarian and solidaristic dimension of the codified property right [4], aligning it with the principles enshrined in articles 2 and 3 of the Italian Constitution [5].

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history of open access, dating back to 2003. The purpose of the declaration is to guarantee the maximum possible dissemination of scientific publications using the Internet, which allows the circulation of information, data and scientific products. Italian version is available here: *https://openaccess.mpg.de/67682/BerlinDeclaration_it.pdf.*

[3] The litterature about the theory of good is wide: S. PUGLIATTI, *Beni (Teoria generale)*, in *Enc. dir.*, V, Milano, 1959; ID., B*eni e cose in senso giuridico,* Giuffrè, Milano, 1962; D. MESSINETTI, *Oggettività giuridica delle cose incorporali*, Giuffrè, Milano, 1970; Id., *Oggetto dei diritti,* in *Enc. dir.,* XXIX, Milano, 1979; ID., *Commento all'art. 810*, in *Commentario al codice civile,* directed by P. CENDON, vol. III, Utet, Torino, 1991; M. ALLARA, *Dei beni*, Giuffrè, Torino, 1984; M. BARCELLONA, *Attribuzione normativa e mercato nella teoria dei beni*, in *Quadrimestre*, 1987; V. ZENO-ZENCOVICH, *Cosa*, in *Digesto disc. priv. sez. civ.,* IV, Torino, 1989; O.T. SCOZZAFAVA, *I beni e le forme giuridiche di appartenenza*, Giuffrè, Milano, 1982; ID., *Oggetto dei diritti*, in *Enc. Giur. Treccani*, vol. XXI, Roma, 1900; ID., *Dei beni (Artt. 810-821),* in *Il Codice Civile Commentario,* directed by P. SCHLESINGER, Giuffrè, 1999; C. SGANGA, *Dei beni in generale (Artt. 810-821),* in *Il Codice Civile Commentario,* founded by P. SCHLESINGER and directd by D. BUSNELLI, Giuffrè, Milano, 2015; A. GAMBARO, *I beni,* in *Trattato di diritto civile,* CICU-MESSINEO-MENGONI, Giuffrè, Milano, 2012; S. RODOTÀ, *Il diritto di avere diritti,* Laterza, Bari, 2015, 360, who, resuming the thought of Arianna Pretto-Sakmann, emphasizes the connection that is established through the profile of the alienability of the goods granted to the owner, therefore of the free availability of the good through contractual autonomy.

[4] According to an evolutionary interpretation, property right has gone from being considered in its static dimension in the Code of 1865 («La proprietà è il diritto di godere e di disporre delle cose nella maniera più assoluta […]», art. 436), to bring to the attention of the interpreter in a dynamic key with the new formulation of art. 832 of the Code of 1942 («Il proprietario ha il potere di godere e di disporre delle cose in modo pieno ed esclusivo»). Thus «si passa […] dalla individuazione dell'istituto sotto un profilo oggettivo ad una valutazione soggettiva e si offre una determinazione indiretta (del contenuto) della proprietà, fissando l'ambito delle facoltà del soggetto investito di quel diritto», see G. PESCATORE, *Considerazioni sul «diritto» di proprietà,* in *Studi giuridici in memoria di Filippo Vassalli,* Vol. II, Utet, Torino, 1960, 1257. On this point, see also F. MESSINEO, *Manuale di diritto civile e commerciale,* Giuffrè, Milano, 1957, 131 ss.

[5] The debate around this particular aspect of the property has been thriving since the years. thirty of the twentieth century. Subsequently, the contributions of the doctrine become huge and here we refer only to some of the most important: O. GIERKE, *Die soziale Aufgabe des Privatrechts*, Berlin 1889 (Frankfurt am Main, 1948); F. SANTORO PASSARELLI, *Risultati di un convegno giuridico interuniversitario sul tema della proprietà*, in *Rivista di diritto civile*, 1939, 270; E. BETTI, *Teoria generale del negozio giuridico*, in *Trattato di diritto civile italiano*, diretto da VASSALLI, Torino, 1955, 172 ss.; S. PUGLIATTI, *Istituzioni di diritto civile*, V, *La proprietà*, Milano, 1938, 120 ss.; ID., *La proprietà nel nuovo diritto*, Milano, 1964; F. Vassalli, *Motivi e caratteri della codificazione civile* (1947), now in ID., *Studi giuridici*, vol. III, t. 2, Milano, 1960, 623 ss.; ID., *La proprietà e le proprietà, con riguardo particolare alla proprietà terriera,* Giuffrè, Milano, 1954; P. RESCIGNO, *Per uno studio sulla proprietà,* in *Rivista di diritto civile*, I, 1972, 1 ss., spec. 39; G.B. FERRI, *La formula «funzione sociale», dalle idee del positivismo giuridico alle scelte del legislatore del 1942*, in *Rivista di diritto privato*, 2003, 673 ss.; S. RODOTÀ, *Note critiche in tema di proprietà*, in *Rivista trimestrale di diritto e procedura civile*, 1960, 1338; ID., *Rapporti economici*, in *Commentario della Costituzione* a cura di C. BRANCA, *sub* art. 42, Bologna-Roma, 1982, 114; ID., *Il diritto di proprietà tra dogmatica e storia. Il terribile diritto*, Bologna, 2013, 213 ss.; U. MATTEI, *Una primavera di movimento per la «funzione sociale della proprietà»*, in *Rivista critica del diritto privato*, 2013, 531 ss.; M.R. MARELLA, *La funzione sociale oltre la*

As authoritatively argued, if property is nothing but the particular configuration of the subject's relationship with the thing, such a change of perspective would seem to endorse the introduction of the new category of the commons, emancipated from exclusionary individualism and open to new horizons of inclusion and belonging. In other words, the acceptance of the category in question represents the only way capable of breaking [6], from within, the monolithic property block [7].

Since such goods do not allow discrimination in access and imply a total inclusion in fruition, the social function of property enshrined in our fundamental chart, through them, finally would be fully implemented [8].

In this perspective, article 42 constitutes the constitutional reference point, as well as the interpretative canon, of the code discipline of the regime to which the goods belong. From the lens of the European Union, the other pole towards which to tend the interpretative tension is to be traced back to art. 17 of the Charter of Fundamental Rights of the European Union. Both norms are placed in a hierarchically superordinate position with respect to the Civil Code. However, the first does not enshrine property among the freedoms and, although it guarantees and protects it, places it in the part that concerns the rights and duties of citizens (Title III), which refer to economic relations.

The property is thus placed in the heart of the cd. economic constitution [9], not already among the fundamental principles to which the whole system must conform. A position which imposes the overcoming of the conception of property as an absolute right [10]. It is precisely by moving on the side of the Constitutional Charter that concerns economic relations that emerges, in fact, a force capable of cracking and breaking the

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proprietà, *ivi*, 2013, 551 ss. In the same issue of the review, different is the position of L. NIVARRA, *La funzione sociale della proprietà: dalla strategia alla tattica*, 503 ss.

[6] A. SANDULLI, *Spunti per lo studio dei beni privati di interesse pubblico,* in *Studi giuridici in memoria di Filippo Vassalli*, Editrice Torinese, Torino, 1960, 1479; the Author is responsible for identifying the category of "beni private di interesse pubblico" which, also fulfilling purposes of public interest, are subject to a specific constraint regime.

[7] In this sense, recently P. FAVA, *Rights in Rem*, Giuffrè, Milano, 2019 422, where the author states that «in tale ottica, l'insieme dei beni comuni è destinato a produrre effetti dirompenti nel nostro ordinamento, scardinando le preesistenti e rigide forme di concetti e assiomi giuridici, ponendosi come strumento di riaffermazione della dignità della persona in opposizione a logiche foriere di diseguaglianze sociali». For further information, see Z. BAUMANN, *Danni collaterali*, Laterza, Bari, 2013, 6.

[8] Excellent in this sense the analysis of N. BOBBIO, *Dalla struttura alla funzione*, Laterza, Bari, 2007. Fundamental work in the production of the great Italian philosopher, who comes to support the pre-eminent *promotional function* of law, essential to adapt it to the transformations of contemporary society and the growth of the welfare state, in a universe that is constantly on the move. In particular, the author here states that this category marks a blurring of the great dichotomy between public and private, determining a conceptual tension towards a *tertium genus,* that is able to ensure decision-making techniques no longer based solely and merely on representation, but also and more actively on a participatory and deliberative democracy. See also M.R. FERRARESE, *La governance tra politica e diritto,* Il Mulino, Bologna, 2010, 29.

[9] As well known, it has assumed the same legal value as the Founding Treaties, following the entry into force of the Treaty of Lisbon in 2007. EU Charter of Fundamental Rights, article 17, entitled "Right to property", provides «1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. 2. Intellectual property shall be protected».

[10] U. NATOLI, *La proprietà, Appunti dalle lezioni,* Giuffrè, Milano, 1976. In this regard, the Italiana Constitutional Court, 28 November 1968, n. 16, already expressed itself as follows: «Per quanto riguarda l'asserita violazione dell'art. 2 della Costituzione, è da escludere che tra "i diritti inviolabili dell'uomo" si possa far rientrare quello relativo all'autonomia contrattuale degli imprenditori agricoli, che qui si pretende leso, giacché tale diritto, operando nell'ambito di quelli più generali della libertà di iniziativa economica e del diritto di proprietà terriera, è specificatamente tutelato, come si è visto, da altre norme costituzionali, le quali autorizzano il legislatore ordinario ad imporre adeguati limiti per soddisfare preminenti interessi di carattere generale e sociale». In the same way, C. Cost. 21 March 1969, n 37.

monolith of private property as an absolute right [11], placing limits in the light of the social function assigned to it.

2.1. – Today, dominant economic definition of *commons* is due to the extraordinary study of Elinor Ostrom, according to which «i commons sono risorse materiali o immateriali condivise, ovvero risorse che tendono a essere non esclusive e non rivali, e che quindi sono fruite (o prodotte) tendenzialmente da comunità più o meno ampie» [12]. On the other hand, the legal conception of *common* is strongly influenced by economic thought, although the doctrine has not yet come to a univocal definition, at least in Italy.

Broadening the lens of the analysis, it is possible to observe how the studies on the commons that have developed on the international level during the last century have had a remarkable echo also in the Italian legal reflection. In our country there have been, in fact, interesting contributions of an interdisciplinary nature [13], as well as a wide literature that has been formed in the economic field [14].

Legal literature is the most substantial [15]. It winds along critical lines of the right to property, as well as the classical theory of goods, and is inserted – giving it, indeed, new vigor – in that theoretical strand that

[11] P. RIDOLA, *Il principio libertà nello stato costituzionale,* Giappichelli, Turin, 2018, 98.

[12] E. OSTROM, *Governing the Commons. The Evolution of Institutions for Collective Action*, Cambridge University Press, 2015. The reconstruction that the economist Stefano Zamagni offers of the category of common goods is suggestive. He argues that a simple but effective way of grasping the proper meaning of the common good is to compare it with the concept of total good. While the latter can be metaphorically rendered with a summation, the addenda of which represent individual goods, common goods are rather comparable to a product, whose factors are the goods of individuals or groups. The sense of the metaphor is immediate: in a summation, even if some of the addenda cancel out, the total sum is still positive. This is not the case, however, with a production, because the cancellation of even a single factor resets the entire product. Conversely, the increase of a single factor has a multiplier effect on all the others. (From the report at the Conference "Il mercato giusto: per umanizzare l'economia", held in Lecce – Sala conferenze Seminario Antico, Piazza Duomo) on 22-23 october 2015. More broadly, see S. ZAMAGNI, *L'economia civile*, Roma, 2015.

[13] L. FERRAJOLI, *Diritti fondamentali. Un dibattito teorico,* Laterza, Rome-Bari, 2002; ID. *Principia iuris., Vol. 1: Teoria del diritto,* Laterza, Rome-Bari, 2007, which, in the context of his studies on fundamental rights, has also dealt with the problem of the commons; L. LOMBARDI VALLAURI, *Beni comuni e beni non esclusivi*, in P. CACCIARI, *La società dei beni comuni*, Ediesse, Roma, 2012; E. VITALE, *Contro i beni comuni. Una critica illuminista*, Laterza, Roma-Bari, 2013; L. PENNACCHI, *Filosofia dei beni comuni*, Donzelli, Roma, 2012; P. CACCIARI, *La società dei beni comuni*, Ediesse, Roma, 2010; G. RICOVERI, *Beni comuni vs merci*, Jaca Book, Milano, 2010; S. SETTIS, *Italia S.p.A.*, Einaudi, Torino, 2002; ID., *Azione popolare. Cittadini per il bene comune*, Einaudi, Torino, 2014.

[14] S. ZAMAGNI, L. BRUNI, *Economia civile,* Il Mulino, Bologna, 2005; A. FUMAGALLI, *Bioeconomia e capitalismo cognitivo. Verso un nuovo paradigma di accumulazione*, Carocci, Roma, 2007; I. MUSU, *Beni comuni e analisi economica*, in L. SACCONI, *Etica, economia e diritto dei beni comuni. Forme di governance democratica e cooperativa*, Il Mulino, Bologna, 2013; E. RULLANI, *Economia della conoscenza*, Carocci, Roma, 2007; L. SACCONI, *Beni comuni, contratto sociale e governance cooperativa dei servizi pubblici locali*, in ID., *Etica, economia e diritto dei beni comuni. Forme di governance democratica e cooperativa*, Il Mulino, Bologna, 2013; M. SALVATI, *I principi e l'efficienza*, in A. MARTINELLI, M. SALVATI, S. VECA, *Progetto 89*, Il Saggiatore, Milano, 165-284, 1989; ID., *Capitalismo, mercato e democrazia*, Il Mulino, Bologna, 2009; A. SOMMA, *Democrazia, economia e diritto privato. Contributo alla riflessione sui beni comuni*, in *Materiali per una storia della cultura giuridica*, 461-494, 2011; T. VITALE, *Società locali e governo dei beni comuni. Il Nobel per l'economia a Elinor Ostrom*, in *Aggiornamenti Sociali*, 2010, 91 ss.

[15] «[…] il discorso del giurista (raccordato con le riflessioni di altre discipline) costringe alla precisazione, contribuisce alla chiarezza, e quindi a evitare suggestioni che possono apparire affascinanti, ma rischiano poi di dimostrarsi prive di concretezza», C. SALVI, *Beni comuni e proprietà privata* (a proposito di *Oltre il pubblico e il privato. Per un dibattito dei beni comuni,* a cura di M.R. MARELLA), in *Riv. dir. civ*., 1, 2013, 1. Moreover, S. RODOTÀ, *Il terribile diritto. Studi sulla proprietà privata e i beni comuni*, Il Mulino, Bologna, 2013; A. GAMBARO, *Note in tema di beni comuni*, in *Aedon – Rivista di arti e diritto on line*, n. 1, 2013; A. LUCARELLI, *Il diritto pubblico fra crisi e ricostruzione,* La Scuola di Pitagora, Napoli, 2009; ID., *La democrazia dei beni comuni,* Laterza, Roma-Bari, 2013; M.R. MARELLA, *Oltre il pubblico e il privato. Per un diritto dei beni comuni,* Ombre Corte, Verona, 2012; U. POMARICI, *Beni comuni,* in Id., *Atlante di filosofia del diritto,* I, 1-57, Giappichelli, Torino, 2012; M. REVIGLIO, *Per una riforma del regime giu-*

over the years has been attentat of the last century had started a profound review of some cardinal institutions of civil law, starting from the right of property, then coming to reconsider the classic dichotomy public goods *aut* private goods [16].

The *thing* capable of forming the object of rights is only that which can be a source of utility and object of appropriation [17], likely to become part of the assets of a person, natural or legal, possible object of exchange for their value. In this last regard, the juridical notion of good does not coincide with the naturalistic but economic one.

To relate economic and legal theory is therefore equivalent to relating the concepts of good and utility [18]. In economics the term good designates the *quid* that satisfies a need of an individual, which in turn would constitute the *quid* that feels that need to be *satisfied.* This explains the phenomenon of the movement of goods, the possible restrictions of which derive from reasons that are not economic, but legal.

As is well known, in the last century the legal system has largely accepted the new and pressing demands of the economic system and this has led to a considerable expansion of the notion of good. From this perspective, the systematic placement of art. 810 ss. in the Italian Civil Code, dedicated to property, does not exhaust the theory of goods at all.

In fact, the concept of good fades into the broader and (almost) evanescent one of *utility,* even if it is not suitable to constitute the object of private subjective juridical situations. Characters such as *fullness* and *exclusivity,* referring to the fruition and disposition of the good, are considered less and less essential in the face of the massive and widespread of new forms of belonging and exploitation. Moreover, it is the very operation of the capitalist economies that has put in crisis the ancient proprietary logics, on which they were founded and erected. In this regard, there has been talk of the age of *access*, in consideration of the new trends aimed at preferring other and different ways of fruition goods (many characterized by rapid obsolescence). That is, aimed at allowing the user, on the one hand, the possibility of drawing from them all the utilities that that particular good is suitable to produce, on the other, the certainty of not having to bear the heavy burdens deriving from the purchase of the right to property (think of the great diffusion of new contractual models, such as *leasing* or, always in this perspective, the distinction between goods and services that tends to fade more and more). In the words of Paolo Grossi, therefore, *altri modi di possedere* [19].

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ridico dei beni pubblici. Le proposte della commissione Rodotà, in *Politica del diritto*, 3, 2008, 531-550; G. Dalisa, *Beni comuni* versus *beni pubblici,* in *Rassegna di diritto pubblico europeo*, 6, 2007, 23 ss.

[16] S. Rodotà, *Il terribile diritto, op. cit.* Also the authors who animated the debate on property rights during the sixties and seventies of the last century: U. Natoli, *La proprietà, Appunti dalle lezioni*, Milano, 1976, 278-284; A.M. Sandulli, *Profili costituzionali della proprietà privata*, in *Riv. trim. dir. e proc. civ.*, 1972, 468; P. Rescigno, *Per uno studio sulla proprietà*, in *Riv. dir. civ.*, 1972, I, 5-6; M.S. Giannini, *Basi costituzionali della proprietà privata*, in *Pol. dir.*, 1971, 475-477; M. Comporti, *Contributo allo studio del diritto reale*, Cedam, Padova, 1977; M. Costantino, *Il diritto di proprietà*, *op. cit.,* 210; Id., *Contributo alla teoria della proprietà*, Jovene, Napoli 1967.

[17] The most accredited manuals agree on this point. *Inter alia*, A. Torrente, P. Schlesinger, *Manuale di diritto privato*, Giuffrè, Milano, 2021; F. Gazzoni, *Manuale di diritto privato*, Esi, Napoli, 2021; P. Perlingeri, *Manuale di diritto civile,* Esi, Napoli, 2022; A. Trabucchi, *Istituzioni di diritto civile*, Cedam, Padova, 2021. About the distinction between goods and things, see also U. Mattei, *Tutela inibitoria e tutela risarcitoria. Contributo alla teoria dei diritti sui beni*, Giuffrè, Milano, 1989.

[18] From the economic point of view, the utility of good and, therefore, the meaning of good in the economic sense, reference is made to S. Pugliatti, *Beni (Teoria Generale),* in *Enc. dir.*, V, Milano, 1959, 168. On the utility as an interest that the system has in the protection of that good, as an exhaustible resource, see A. Falzea, *Dogmatica giuridica e diritto civile* in *Riv. dir. civ.*, 1990, 772; O.T. Scozzafava, *Dei beni (Artt. 810-821),* in *Il Codice Civile Commentario,* directed by P. Schlesinger, Giuffrè, Milano, 1999, 90; D. Messinetti, *Oggetto dei diritti,* in *Enc. dir.,* XXIX, Milano, 1979, 809 and 821.

[19] P. Grossi, *Un altro modo di possedere, L'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria,* Giuffrè, Milano, 1977.

The concept of utility must be related to that of *value.* For the founder of political economy Adam Smith, the word value applied to goods has two different meanings: «a volte esprime l'utilità di un oggetto particolare, a volte il potere di acquistare altri beni che il possesso di quell'oggetto comporta. L'uno può essere chiamato "valore d'uso", l'altro "valore di scambio". Le cose che hanno il maggiore valore d'uso hanno spesso poco o nessun valore di scambio»[20]. The example of water is emblematic. A good that has an absolute use value, configuring itself as indispensable, indeed vital because without it is impossible to survive; on the other hand, it has little exchange value, since it is a natural good, potentially accessible to all to an indeterminate extent[21].

In conclusion, if we accept the requests coming from economic science, we can better understand the variable morphology configuration of the norm which, based on a well-known tendency to broaden the notion, cannot come to encompass any object of the legal relationship. This implies that the main criterion for identifying goods is now based on their exchange value, as an effect of the phenomena of the dematerialization of wealth and the *commodification* of legal relations[22].

3. – The critique of the proprietary model is part of a broader and more articulated doctrinal debate, which moves from the attempt to disintegrate the granitic unity of the institute, through the full implementation of the new principles and values expressed by the Constitution[23].

Since the passing years[24], the discussion has focused on the «dissociazione tra proprietà e gestione, in forme che mirino a risocializzare l'economia con riferimento a beni, come quelli comuni, che presentano le-

[20] A. SMITH, *Indagine sulla natura e le cause della ricchezza delle nazioni (1776)*, Milano, 1973, 31.

[21] It has always been like this: Plato already recognized in the Euthydemus water, which "costs nothing", a "rare and precious value", in PLATO, *Euthydemus,* (edited by) G. REALE, Bompiani, Milano, 2008, 794; since Roman law, with GAIO, in its *Institutiones*, these vital goods such as water were conceived as commons, which he called them *extra commercium* and *extra patrimonium*: «Quaedam enim natural iure communia Sunt omnium», wrote Gaio «et naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris», Inst. 2, 1 pr.; D. 1, 8, 2, 1.

[22] «Lo sviluppo della tecnologia ha contribuito ad aumentare le tipologie di beni che possono essere ricomprese nella categoria dei beni immateriali. Infatti, accanto alle opere dell'ingegno […] alle invenzioni industriali e ai segni distintivi dell'impresa […], oggi si parla di nuovi beni immateriali per indicare il *software*, i diritti audovisivi sulle manifestazioni sportive, le immagini dei beni e l'etere», A. QUARTA, G. SMORTO, *Diritto privato dei mercati digitali,* Firenze, 2020, 228. There are many examples: financial instruments, *know-how*, *big data* etc. In this perspective, the European Commission noted in a recent communication [COM(2020)760] as «[i]ntangible assets such as inventions, artistic and cultural creations, brands, software, know-how, business processes and data are the cornerstones of today's economy. Over the last two decades, the volume of annual investments in such 'intellectual property products'increased by 87% in the EU, while the volume of tangible (non-residential) investments increased by only 30%. Investments in intangibles were also significantly less affected by the 2008 economic crisis».

[23] S. PUGLIATTI, *La proprietà nel nuovo diritto,* Giuffrè, Milano, 1954; ID., *La proprietà e le proprietà, con riguardo particolare alla proprietà terriera,* Giuffrè, Milano, 1954; P. GROSSI, *Un altro modo di possedere, op. cit.*

[24] Literature is very extensive, *ex multis:* S. RODOTÀ, *Il terribile diritto, op. cit.;* P. CAVALERI, *Iniziativa privata e costituzione "vivente",* Cedam, Padova, 1978; F. SANTORO PASSARELLI, *Proprietà privata e funzione sociale,* Cedam, Padova, 1976, 3 ss.; ID., *I beni della cultura secondo la Costituzione,* in *Libertà e autorità nel diritto civile. Altri saggi,* Cedam, Padova, 1977, 77-86; ID., *Aspetti privatistici della programmazione economica, in Atti della tavola rotonda tenuta a Macerata (1970),* vol. II, Milano, 1971, 182, 235; ID., *Proprietà privata e Costituzione, in Rivista trimestrale di diritto e procedura civile,* XXVI, 1972, 953-961; ID., *Proprietà privata e funzione sociale. Presentazione,* Cedam, Padova, 1976, 9-12; ID., *Libertà e autorità nel diritto civile. Altri saggi,* Padova, 1977, 241-244; ID., *La proprietà,* in *L'opera di Salvatore Pugliatti*, in *Rivista di diritto civile,* XXIV, 1, 1978, 569-575; A. LENER, *Problemi generali della proprietà,* in F. SANTORO PASSARELLI (a cura di), *Proprietà privata e funzione sociale*, cit., 16-19; S. NATOLI, *La proprietà, Appunti dalle lezioni, Milano,* 1976, 278-284; M. SANDULLI, *Profili costituzionali della proprietà privata,* in *Riv. trim. dir. e proc. civ.,* 1972, 468; P. RESCIGNO, *Per uno studio sulla proprietà,* in *Riv. dir. civ.,* 1972, I, 5-6; M.S. GIANNINI, *Basi costituzionali della proprietà privata,* in *Pol. dir.,* 1971, 475-477; M. COMPORTI, *Contributo allo studio del diritto reale,* Cedam, Pa-

gami con esigenze vitali dell'uomo»[25]. In the last instance, it was to separate the economic-social function of the good from the legal title of the property, or to operate a split, in antithesis to the system of the civil code of 1942 focused on the rigid belonging owner, between ownership and management of the property in property[26].

This change of perspective led to an abandonment in those years of the rigid dogmatics of a positivistic matrix, inaugurating an advanced anti-formalist reflection. The result was a radical rethinking of the classical institutes of civil law, with an ever-increasing attention to the right of jurisprudential source, to be inscribed within the framework of the constitutional design. Evidently, one of the first institutes to suffer the effects was precisely *property*, the best product of nineteenth-century legal positivism. Its full and exclusive individual belonging was immediately questioned, shifting the visual angle to the more markedly relational aspects that arise by virtue of it, which are established between individual and good, which are destined to develop between individuals themselves[27].

Historically, the legal institution of private property represented, in its transposition into the Civil Code of 1942, the synthesis of a whole era in which the nascent bourgeois class had been able to affirm the sacredness and inviolability of proprietary law. Conversely, all other proprietary forms – including collective ownership – were considered as mere relics of a past, which no utility could have unfolded in the present time, in a radically changed economic and industrial system[28].

Around the middle of the last century, the Constitution of the Republic enters the scene and the first veils of the original sacredness of the institute begin to fall: the «primato politico e culturale che la cultura giuridica borghese le aveva sempre conferito»[29], since it can «essere sottoposta a forme di governo complessivo dell'economia destinate a presidiare fini generali»[30], to the point of even calling into question its nature as a fundamental right[31].

The critical experience of those years, focused on the democratic government of the economy, moved, therefore, in the sign of a decisive revival of the *social function* of property, as enshrined in Article 42, paragraph 2, of the same Constitution. If in the liberal state the fulcrum of intersubjective relations was based on the binomial property-freedom, now, in the new constitutional state[32], property had to be reread in the light of the principles of equality (art. 3) and solidarity (art. 2)[33].

This is a real paradigm shift: during those years, the object of interest for scholars is no longer the legal

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dova, 1977; A. CORASANITI, *La tutela degli interessi diffusi davanti al giudice ordinario,* in *Rivista di diritto civile,* XXIV, 1, 1978, 180-204; M. COSTANTINO, *Contributo alla teoria della proprietà,* Esi, Napoli 2019; F. DE MARTINO, *Della proprietà, in Commentario del Codice civile (a cura di A. Scialoja e G. Branca),* Il Mulino, Bologna, 1976; L. MOCCIA, *Sui limiti della proprietà privata nell'interesse collettivo,* in *Foro italiano,* CIII, 5, coll. 57-64, 1978.

[25] A. SOMMA, *Democrazia economica e diritto privato. Contributo alla riflessione sui beni comuni*, in *Materiali per una storia della cultura giuridica*, 2, 2011, 463.

[26] *Ibidem.*

[27] H. KELSEN, *Lineamenti di dottrina pura del diritto*, 1934; N. BOBBIO, *Il positivismo giuridico. Lezioni di filosofia del diritto,* Giappichelli, Torino, 1997.

[28] It is hardly necessary to recall that pursuant to art. 29 of the Albertine Statute of 1848 the property was considered "sacred, inviolable, intangible and only in very rare and exceptional cases can it be sacrificed".

[29] C. SALVI, *Privatizzazioni, proprietà pubblica e privata. Verso un ripensamento critico*, *op.cit*., 362.

[30] A. SOMMA, *op. cit.*, 486.

[31] L. FERRAJOLI, *Diritti fondamentali*, Laterza, Roma-Bari, 2002, 12.

[32] U. ROMAGNOLI, *Il sistema economico nella Costituzione* in AA.VV., *La Costituzione economica*, in *Trattato di diritto commerciale e diritto pubblico dell'economia*, Cedam, Padova, 1977, 149; M. COSTANTINO, *Il diritto di proprietà*, cit., 210.

[33] A. BALDASSARRE, *Proprietà, Diritto Costituzionale*, in *Enc. giur. Treccani*, XI, Roma, 1989, 14.

institution itself considered, in a static perspective, but the function that property performs, in a dynamic perspective, in the context of the new value structure outlined by the new constitutional art. 42 [34].

The difficulties in thinking about the relationship between subject and good without the intermediation of the proprietary paradigm fall. We begin to think in terms of the prevalence of function over ownership.

Certainly, property continued to be the cardinal institution of Italian civil law, but in a new light. Indeed, the emergence of new instances of protection and needs, expressed by the nascent category of common goods, has revived the never dormant question of the social function of private property [35], with considerations then extended also to public property [36].

Passing from the level of principles to that of the complex and extremely complex system of sources, the linearity of the design is lost in a disordered framework where the same constitutional principles sometimes seem contradictory.

The most prudent doctrine has noted, in no more recent times, the need for a liberation from the property paradigm, in the conviction that the relationship between public and private property cannot exhaust the complexity of the relationships between person and goods [37]. In this regard, Paolo Grossi pointed out how the approval of the Constitution marked the transition from an individualistic meaning of nineteenth-century property, as an object of almost absolute dominion of the owner, to a positive and open vision, as an important factor in the production of wealth and a vehicle of social solidarity [38]. In this perspective, the social function reveals its power, not as an external limit, but as a fundamental feature of the internal core of the property.

3.1. – In art. 42 Cost. the formula that «la proprietà è pubblica o privata» is carved in a lapidary way. Everything that does not fall within the two poles of public or private remains wrapped in a cone of shadow. Nevertheless, through the consideration of the interests that converge on the goods and the *utilities* [39] they express (to use Pugliatti's words), as well as the limitations that because of these can compress the right to property, the unitary concept of private property and its primitive character of absoluteness enter crisis.

Proprietary regimes can vary according to pursued interests. The link, previously very close, almost intangible, between the interest of the private individual and the power to satisfy him unconditionally through the powers of fuition and disposition of *his* good is broken. In this framework, the functional homogeneity of

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[34] C. SALVI, *Il contenuto del diritto di proprietà*, Giuffrè, Milano, 1994, 67.

[35] The road was now paved: with the emergence of the new values, property could no longer be what it had been before, but as already expressed by Article 153 of the Weimar Constitution – a rule that later merged into the current Constitution of the Federal Republic of Germany – "*ownership obliges*" (Art. 14, II: «*Eigentum verpflichtet. Sein Gebrauch Soll zugleich Dem Wohle Der Allgemeinheit dienen*»); also F. SANTORO PASSARELLI, *Proprietà,* in *Enciclopedia del Novecento (1980)*, Treccani.it.

[36] Fruit of the new sensitivity of the times, they certainly reflect the change in the way of understanding public property induced by the financial crisis, to which the State, at least in Italy, has not been able to give satisfactory answers. S. MAROTTA, *La via italiana dei beni comuni,* in *Aedon, fasc. 1, gennaio-marzo 2013.*

[37] In other words, it was necessary to identify and follow a third way, opposite to property. Among the many authors who have opened the door to this new interpretative way of the relationship between ownership and goods, see U. MATTEI, *Beni comuni. Un manifesto,* Bari, 2011.

[38] For the Author, final destination of this evolution. P. GROSSI, *I beni: itinerari fra «moderno» e «pos-moderno»,* in *Riv. trim. dir. proc. civ.,* 2012; ID., *Un altro modo di possedere, op. cit*. And S. RODOTÀ, *Il diritto di avere diritti,* Laterza, Bari, 2015.

[39] This also explains the oblivion into which art. 714 of the Civil Code French, which reaffirms the existence of "things that do not belong to anyone and whose *use* it is *common to all*", assigning to *Lois de police* the task of regulating the methods of use; G. RESTA, *Beni comuni e mercato*, 2014, 3.

the good would be possible only in theory, but always denied by practice, since, following an inferential reasoning, the functions are instead multiple and heterogeneous [40].

The guarantee of private property and its irrepressibility is given by Article 42 of the Italian Constitution, which in its second paragraph provides: «[l]a proprietà privata è riconosciuta e garantita dalla legge». The protection of the legal system is therefore implemented by means of the instrument of the *legal reserve.* Now, here it is interesting to frame the institute within the constitutional dictate and weld it to the discourse on the commons, highlighting the impossibility of a flat vision with respect to the proprietary scheme. The reference is to the *functionalization* of private property in the social *sense:* article 42 with respect to property requires the legislator to «assicurarne la funzione sociale e di renderla accessibile a tutti». It is easy to grasp in this last opening of accessibility, so wide to encompass the entire horizon of possible subjectivities, a clear projection of the principle of equality, enshrined in art. 3 Cost., in its substantial declination (paragraph 2). In this framework, the Rodotà Commission, in outlining the regime of belonging to the common goods, tries to implement the constitutional dictate so that the articulation of the law goes beyond property, but without exceeding it, reconstructing the discourse around the common goods on an objective functional criterion.

The emphasis is no longer on the owner, but on the function that a *good* must perform in society, so as to make it completely indifferent whether these goods belong to natural or legal persons, public or private. From this point of view, the conclusions reached by the Court of Cassation in the judgment rendered to united sections on 14 February 2011, n. 3665, in which it recognizes that the ownership of certain goods must be attributed to the community of reference and, therefore, that in this sense they are common goods, goods belonging to that given community, are extremely interesting [41] of which they perform the function of satisfying their interests [42].

Despite this significant recognition, the Italian Supreme Court do not go so far as to clear affirm the possibility of community management of the same but attribute this task to the State.

For the Court «i beni appartengono alla collettività, ma sono amministrati dallo Stato, che ha come compito principale quello di garantirne la funzione, che […] coincide con la soddisfazione di un diritto fondamentale» [43]. In this sense, the Court seems not to be indifferent to the solicitations coming "bottom-up" and values another category, that of the common good, characterized essentially by the prevalence of function over ownership.

The judgment in question, in fact, starting from the direct application of Articles. 2, 9 and 42 of the Constitution, systematically elaborates a juridical framework of reference that seems perfectly in tune with the

[40] As a result of the advent of the fundamental article, it has failed "any recognition of the institute as an attribute of the human personality"; U. NATOLI, *La proprietà*, cit., 34. It would seem to assume a not dissimilar perspective who, with regard to the systematic framework of reference, inserts it among the fundamental rights without failing to point out that «if, therefore, a comparison is made between the recognition and guarantee of other fundamental rights of human persons or even groups, one realizes that in the scale of constitutional protections the right to property is assigned a modest place», M.S. GIANNINI, *Basi costituzionali della proprietà privata,* in *Pol. dir.,* 1971, 456.

[41] In the proposal for an articulated article relaunched more recently by the law of popular initiative, «i beni comuni sono a titolarità diffusa, appartengono a tutti e a nessuno, nel senso che tutti devono poter accedere ad essi e nessuno può vantare pretese esclusive».

[42] Of course, public property and private property are not two *species* of a single kind, but two distinct legal institutions, in the sense that the first is antithetical to the second, in that one expresses rights while, the other, interprets duties; S. RODOTÀ, *Il terribile diritto. Studi sulla proprietà privata e i beni comuni,* Il Mulino, Bologna, 2013.

[43] M. SPANÒ, *Istituire i beni comuni. Una prospettiva filosofico-giuridica, in Politica&Società*, 3, 2013, 433 ss.; S. LIETO, *"Beni comuni", diritti fondamentali e stato sociale. La Corte di Cassazione oltre la prospettiva della proprietà codicistica,* in *Politica del diritto,* 2, 2011, 331 ss.

requests for the prediction and elaboration of the juridical notion of the common good. In other words, the Supreme Court takes note of the substantial insufficiency of the code regime to include all possible ways of belonging and claims the need to expand the entire regulatory system of goods, beyond the regimes of ownership existing in the current system.

This is the perspective for an adaptation in a social and supportive manner of the rules of belonging and fruition, considering constitutional principles, definitively places the person at the center [44].

Shifting the viewing angle, «la Costituzione apre [...] un processo di trasformazione, basato sulla solidarietà e sull'accessibilità da parte di tutti all'uso dei beni, condizione intermedia tra la proprietà come dominio e la proprietà popolare ovvero la non proprietà» [45].

The meaning just recalled of the formula *social function* (which in itself, as noted by authoritative doctrine, is the subject of very different cultural solicitations and difficult to compose), seems to evoke the *Weimerian* social-democratic model that in Article 153 of the Constitution reported on the property *that obliges* citizens and is placed at the service of the common good. Unlike the notion of private property, which is essentially attributable to subjective right [46], that of public property seems calibrated above all on the concept of *function* [47].

In this perspective, some types of ownership provided for by the legal system and essentially attributable to the notion of public property must be identified. Among these, the category of collective rights over goods owned by social communities must be framed. In this case, these are goods of a varied nature [48].

With the expression "collective property", therefore, neither would be intended to evoke property not individual or that attributable to a public legal person, but a type of property based on the essential characteris-

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[44] In this way, «(...) le valli da pesca configurano uno dei casi in cui i principi combinati dello sviluppo della persona, della tutela del paesaggio e della funzione sociale della proprietà trovano specifica attuazione, dando origine ad una concezione di bene pubblico, inteso in senso non solo di oggetto di diritto reale spettante allo Stato, ma quale strumento finalizzato alla realizzazione di valori costituzionali. Detta natura di tali beni (come del resto per tutti i beni pubblici) ha la sua origine costitutiva nella legge (...), sulla base della sussistenza "all'attualità" di determinate caratteristiche (fisiche-geografiche) in concreto previste dal legislatore, e prescinde quindi da disposizioni e provvedimenti di ordine amministrativo (...)». These words come from the fundamental decision: Cass., sez. un., sent. 14 febbraio 2011, n. 3665. S. LIETO, *op. cit.,* 337; G. CARAPEZZA FIGLIA, *Proprietà e funzione sociale. La problematica dei beni comuni nella giurisprudenza delle sezioni unite,* in *Rass. dir. civ.,* 2012.

[45] G. BERTI, *Recenti scritti di giuspubblicisti intorno alla proprietà*, in *Quaderni fiorentini*, 5-6, 1976-1977, 998.

[46] About the meaning of the expression *social function*: F. RESCIGNO, *Proprietà* (voce), in *Enc. dir.*, XXXVII, Milano, 1988, 273 ss.; F. PEDRINI, *Note preliminari a uno studio sui diritti costituzionali economici*, in forumcostituzionale.it, 2010, according to which: «(...) sembrerebbe anzitutto opportuno sottolineare lo stretto legame sussistente fra il precetto della funzione sociale e quello della generale accessibilità: la funzione (non solo individuale, ma anche) sociale della proprietà privata sarebbe primariamente garantita dalla configurazione di quest'ultima non come privilegio di pochi ma come diritto di molti (e potenzialmente di tutti). Del resto, la "funzione sociale" della proprietà privata neppure parrebbe esaurirsi nella massima estensione della sua titolarità e piuttosto sembrerebbe coincidere – in forza del ragionamento secondo cui la funzione sociale dovrebbe, ovviamente, essere una funzione (non dannosa, né indifferente, bensì) utile rispetto alla società (in altre parole, servente rispetto al bene comune) – con l'area denotata della "utilità sociale" di cui al secondo comma dell'art. 41 Cost. (...)».

[47] Therefore, in this sense public property should not be understood as «un insieme di facoltà garantite dall'ordinamento al loro titolare per la soddisfazione di un interesse proprio, bensì una situazione giuridica strutturalmente diversa, con marcati tratti di doverosità, e rivolta alla tutela di un interesse altrui (o comunque distinto da quello personale di colui che esercita il complesso delle relative facoltà)», in F. PEDRINI, *op. cit., ivi*.

[48] V. CERULLI IRELLI, *Proprietà pubblica e diritti collettivi*, Cedam, Padova, 1983, 88., according to which, they are «beni economici della più varia natura (in ogni caso sempre immobili) ma generalmente beni agrari e forestali (boschi e pascoli). Essi presentano questo di caratteristico dal punto di vista giuridico, che appartengono non in proprietà individuale a persone, fisiche o giuridiche o a enti pubblici, ma in proprietà collettiva ad una comunità di abitanti; ovvero che sono oggetto di diritti reali parziali (di godimento e d'uso: usi civici) imputati alla comunità d'abitanti medesima».

tics of the commons [49]. In other words, it is a conception very close to the Germanic tradition of communion, or, according to an opposite perspective, very far from the Romanist proprietary system of an essentially individualistic mold. With this in mind, public servitude, civic uses, collective property as well as a series of legislative provisions that determine constraints aimed at protecting the environment and the landscape (see Legge quadro no. 394/1991 on protected areas), represent – also according to what the Court argued – regulatory provisions focused essentially on the fruition and use, for various reasons, of certain goods by the community and referable to the State-collectivity as an «ente esponenziale e rappresentativo degli interessi della cittadinanza» [50].

Beyond the traditional dichotomy of public property-private property, advertising is inherent, for example, in the category of *cultural goods,* in relation to the social function that it performs in terms of fruition of cultural value by the community. In this regard, it was appropriately emphasized that «il bene culturale è pubblico non in quanto bene di appartenenza, ma in quanto bene di fruizione» [51]. It is by vocation intended for the generality of the associates who must be able to use it without hindrance even if this belongs to private owners [52]. In conclusion, it can be argued that commons represent a specific category. On the contrary, from a normative point of view, an express conceptual autonomy has not yet been recognized, thus remaining for the Italian legislature a category confined to a meta-juridical dimension [53].

At this point of the investigation, one might wonder why there is such a need to identify a category *other* than the traditional one of public goods. As emerged with respect to the latter and the related legal structure, the common goods have prerogatives that distinguish them and make them functional to the satisfaction of specific needs, not adequately protected by the current regime. The effort aimed at identifying this category, regardless of the provision of specific statutes, must be understood in the perspective of the affirmation of a principle of absolute unavailability of certain goods considered essential to the existence and development of everyone. Not a particularly easy operation, which undoubtedly makes the selection of primary needs complex, even if the essential nucleus of those goods of life, fundamental to the survival of man, is of immediate identification and represents the starting point for the provision of a legal regime of absolute protection, devoid of the compromising character that in some ways has characterized the discipline of public goods, for some time more and more exposed to privatization and improper use, which have compromised its natural destination [54].

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[49] P. GROSSI, *La proprietà e le proprietà nell'officina dello storico*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, XVII, 1988, 364, for which «(...) contenuto fondamentale è un godimento condizionato del bene, con un indiscusso primato dell'oggettivo sul soggettivo: primato dell'ordine fenomenico, che va rispettato ad ogni costo, sull'individuo; dell'ordine comunitario – cristallizzazione della oggettività storica – rispetto all'individuo».

[50] Cass., sez. un., sent. 14 February 2011, n. 3665. «La tutela della persona, della dignità, della solidarietà che fondano i parametri di valore dei *commons* urbani sono punti di partenza e obiettivi di un discorso giuridico sempre perfettibile. Vero è che il mercato, la politica e il diritto plasmato dal (e sul) mercato in chiave neoliberale promettono la felicità; eppure le comunità di individui, con le loro attività fuori dal profitto, con le loro logiche inclusive, democraticamente e direttamente partecipate, di condivisione, di dono in funzione di interessi collettivi e di utilità generale mostrano, vivendole, che altre strade sono possibili», C. CREA, *«Spigolando» tra biens communaux, usi civici e beni comuni urbani,* in *Politica del diritto,* 3, 2020, 449; S. RODOTÀ, *L'inaspettata rinascita dei beni comuni,* La Scuola di Pitagora, Napoli, 2018, 63 e 59.

[51] M.S. GIANNINI, *I beni culturali,* in *Riv. trim. dir. pubbl.,* 1976, 31.

[52] The promotion of the development of culture, which is among the fundamental tasks of the Republic, affects the protection of the historical and artistic heritage, whose conservation and use must be guaranteed as key functions in the evolutionary process of the individual; cf. S. LIETO, *ult. op. cit.* 340. About cultural promotion, as a task of a general nature contemplated in the Constitution, see M.S. GIANNINI, *Sull'art. 9 Cost. (la promozione culturale),* in *Scritti in onore di Angelo Falzea,* III, Milano, 1991, 433 ss.

[53] About the relevance of the destination as a criterion for distinguishing goods of public interest from those of individual interest, see P. PERLINGIERI, *Introduzione alla problematica della «proprietà»*, Esi, Napoli 1971, 37 ss. and 186 ss.

[54] S. LIETO, *ult. op. cit.* 348; U. MATTEI, *Tutela inibitoria e tutela risarcitoria. Contributo alla teoria dei diritti sui beni*, Giuffrè,

4. – At this point of analysis, it is clear how the three ideal terms of theorical construction can be combined. The three terms are: commons, open access and contract.

We have dedicated an in-depth analysis to commons in the previous paragraphs. Proceeding in order, Open Access means an open mechanism by which some contents are digitized and made usable by an indeterminate series of subjects, free of charge and just with the aid of an Internet connection. In this perspective, Open Access creates a common good: a scientific article, an essay, a data collection, but also a poem or a piece of music, is made available to the community, so that everyone can freely dispose of it [55].

The characteristic trait of this kind of common good, thus coming into existence on the internet and free to circulate in it, rests in the fact that it is not consumable, it is not rival, it does not produce conflict in its use.

In other words, the use of a subject does not lead to the well-known *tragedy of the common goods* [56], or the risk of impoverishment that implies the non-use by another subject, but rather multiplies the potential for exploitation and expansion of the good itself.

The models for implementing the principles of open access, known to date, aimed at ensuring their effectiveness are the *Green Road*, which is based on the so-called self-archiving, and the *Gold Road*, instead based on the so-called author pays-model. The action of the European Union fits into this line, which stands out for its strong activism in this sector and has been supporting a principle of considerable scope for several years now. Through recommendations from the Commission and a substantial Impact Assessment, it established that the results of scientific research conducted through the use of public resources must be made usable by the community and, therefore, imperatively subject to a regime of open (free) access [57].

This strong position taken by the Commission strengthens the connection between common goods and free access, shifting the angle of view: the outcome of a study conducted with public funds can be said to be an common good *ab origine*. A careful observation does not escape the fact that this principle is destined to have a disruptive impact on contractual practice, within the perimeter of the European digital single market [58].

Milano, 1989; A. LUCARELLI, *Il diritto pubblico fra crisi e ricostruzione,* La Scuola di Pitagora, Napoli, 2009; ID., *La sentenza della Corte Cost. n. 199/2012 e la questione dell'inapplicabilità del patto di stabilità interno alle S.p.A. in house e alle aziende speciali,* in *federalismi.it;* A. QUARTA, *Non-Proprietà. Teoria e prassi dell'accesso ai beni goods,* Esi, Napoli, 2016.

[55] P. SAUBER, *Creare un bene comune attraverso il libero accesso,* in *La conoscenza come bene comune. Dalla teoria alla pratica,* Milano, 2009.

[56] The tragedy of the commons is feared by the American biologist Garrett Hardin, in his famous article with the same title published in Science in 1968, G. HARDIN, *The Tragedy of the Commons*, in *Science*, 1968. The reference to knowledge as common good therefore seems to avert that "tragedy" which would condemn *commons* in the sphere of inefficiency and inevitable *overgrazing*, or rather over-exploitation. This reconstruction is, in fact, calibrated on "excessive pastures" and does not reconcile with intangible and inconsumable goods such as works and online resources, the use of which enormously increases the creative potential of users.

[57] Recommendation of EU Commission, 17 July 2012, on access to scientific information and its conservation (COM 2012/417/EU).

[58] In the *Europa 2020 "Una strategia per una crescita intelligente, sostenibile e inclusiva"*, the EU Commission presented seven flagship initiatives, including the so-called *Digital Agenda*, aimed at «trasformare l'UE in un'economia intelligente, sostenibile e inclusiva caratterizzata da alti livelli di occupazione, produttività e coesione sociale». About the *Digital Single Market*, on the institutional website of the European Parliament it can be read that: «Il mercato unico digitale è uno dei settori più promettenti e impegnativi in termini di progresso e crea potenziali vantaggi in termini di efficienza, pari a 415 milioni di euro. Il mercato unico digitale apre nuove opportunità di incentivazione dell'economia tramite il commercio elettronico, facilitando nel contempo la conformità amministrativa e finanziaria per le imprese ed emancipando i clienti tramite l'*e-government*. I servizi di mercato e quelli governativi sviluppati nel mercato unico digitale stanno evolvendo dalle piattaforme fisse a quelle mobili, sono sempre più presenti e offrono accesso a informazioni e contenuti in qualsiasi momento, luogo e da qualsiasi dispositivo (commercio e *governance* diffusi). Quest'evoluzione

Lastly, the third ideal term: the contract. It is immediately evident that the necessary compliance with the obligation to make research results accessible will require the adoption of new contractual models, alternative to the traditional one of the integral transfers of the author's copyright to the publisher. Rather, the new models will have to be based on a breakdown of intrinsic rights related to the ownership of the intellectual work [59]. In this regard, it should be noted that there is no antinomy between the Open Access regime and the IP rights. Indeed, the sharing of the works would not deny, but would presuppose the protection of the prerogatives in the field of intellectual property [60]. The author is by no means stripped of the rights that derive from the ownership of the work but is only called upon to dispose of them in a manner compatible with the purpose of the maximum possible dissemination of scientific knowledge [61]. In this sense, this paper intends to innovate the current range of membership and use models, while respecting the traditional principles and institutions of the legal system [62], bearing in mind the delicate balance between the author and his rights, on the one hand, and the publisher, on the other.

This difficult balance could be effectively entrusted to the main tool for settling the divergent interests of the parties, the maximum expression of the autonomy of individuals.

The practices related to the so-called copyleft (General Public License, Creative Commons, etc.) are quite significant in this regard: they provide a sort of escape from the logic of copyright, without formally contesting the existence of its discipline. In particular, Creative Commons project despite being born from a strict critique of the concept of authorship and the super-protection guaranteed by copyright, recognizes an exclusive right to the author, but combines property rights with contractual options allowing accessibility and reproducibility of the work for non-commercial purposes.

The limits of private autonomy will set to protect the circulation of that commons, of which it is intended to ensure the widest fruition. In this perspective, the limitations on the free determination of the content of the contract will respond to the same *ratio* that characterizes the models of circulation of goods in relation to which it is possible to find general interests. So, this transcends the individualism and flow in the interest of the community. Therefore, a powerful quantitative and qualitative development of the legal instruments seems necessary, aimed at regulating these new relationships and safeguarding the commons of knowledge, «proiettando la loro tutela nel mondo più lontano, abitato dalle generazioni future» [63].

4.1. – One of these legal instruments is undoubtedly represented by legal design. In particular, the way proposed is the application and implementation of *legal design,* as a possible virtuous model for conveying

necessita di un quadro normativo che contribuisca allo sviluppo del *cloud computing*, a una connettività dei dati mobili senza confini e a un accesso semplificato alle informazioni e ai contenuti, pur tutelando la vita privata, i dati personali, la sicurezza informatica e la neutralità della rete». Available at the web address: *www.europarl.europa.eu*.

[59] The limitation of copyright is based on a fundamental characteristic of information, namely the fact that it is a good by its nature cumulative and incremental. An exclusivity without limits would paralyze the information production activity itself, R. CASO, *op. cit*.

[60] G. DONADIO, *Open Access, Europa e modelli contrattuali: alcune prospettive sui beni comuni*, in *Riv. crit. dir. priv.*, vol. 31, n. 1, 2013, 107-122.

[61] Moreover, a similar purpose is also in line with the particular interest of the author in obtaining greater visibility and a consequent greater number of citations.

[62] M.R. MARELLA, *Il diritto dei beni comuni. Un invito alla discussione,* in *Riv. crit. dir. priv.,* 1, 2011; by the same author, see also M.R. MARELLA (ed.), *Oltre il pubblico e il privato. Per un dibattito dei beni comuni,* Verona, 2012.

[63] Cass. civ., sez. un., 14 february 2011, n. 3665, in which the Supreme Court gave a first formal recognition to the category of common goods; see G. CARAPEZZA FIGLIA, *Proprietà e funzione sociale. La problematica dei beni comuni nella giurisprudenza delle sezioni unite*, in *Rass. dir. civ.*, 2012. See also Cass., sez. un., 16 february 2011, nn. 3811, 3812, 3936, 3937, 3938 and 3939.

and communicating rules. Recently, this methodology has been greatly developed through the use of new technologies in the digital environment.

Creative Commons (CC) Licenses are an excellent successful application of these instruments. We are sure that this model can be replicated equally successfully for other cases [64]. The Creative Commons (CC) Licenses are among the first examples of multi-layered notices: the traditional license in "legalese" (called the "Legal Code") is accompanied by the "Common deed", *id est* a more user-friendly version of the license. From the Common deed is always possible to have a quick access to the full license. Furthermore, a third layer complement the system of the CC Licenses, making them machine-readable [65].

This model would be a modular design solution building from best information design practices, such as design patterns aimed at conveying the information in a transparent way [66]. In this perspective, the concept of contract drafting could be replaced by that of contract design, where strategic choices about the drivers and goals of collaboration merge with business and legal knowledge about how to maximize the chances of success and minimize risks and disputes [67].

5. – We started with an in-depth reflection on the legal and economic meaning of property, probing the two existing categories of public and private property, to delineate a third kind where these prove insufficient

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[64] For instance: in the field of justice, see R. DUCATO and A. STROWEL (eds.), *Legal Design Perspectives: Theoretical and Practical Insights from the Field,* Milano, 2021, in particular chapter 4, L.R. LUPICA, G. GRANT, *Will human-centred Legal Design improve civil justice systems? And how will we ever know?,* 117, «as legal researchers concerned about access to justice challenges, we need to turn focus to evaluation of not just programs and products, but the process by which they are developed. We need to consider the myriad opportunities, functions, and performance of Legal Design beyond intervention outcomes»; in general, about digitalization of justice, see also S. SAPIENZA, M. PALMIRANI, C. BOMPREZZI, *Il ruolo dell'intelligenza Artificiale nel Sistema Giustizia: Funzionalità, Metodologie, Principi*, in *La Trasformazione Digitale della Giustizia nel dialogo tra discipline: Diritto e Intelligenza Artificiale*, Milano, Giuffrè Francis Lefebvre, 2022, 1-36; A. GARAPON, J. LASSÉGUE, *La giustizia digitale. Determinismo tecnologico e libertà*, Il Mulino, 2021; M. PALMIRANI, S. SAPIENZA, *Big Data, Explanations and Knowability*, in *Ragion pratica*, 2021, 57, 349-364; in the field of Data Protection, see R. DUCATO and A. STROWEL (eds.), *Legal Design Perspectives: Theoretical and Practical Insights from the Field,* Milano, 2021, in particular chapter 7, R. DUCATO, *Spaces for legal design in the european general data protection regulation*, 200, nt. 72: "[i]n this sense, it is encouraging to see that the Italian Data Protection Authority has recently launched a collaboration with the Italian chapter of Creative Commons to simplify the privacy policies in light of the famous CC 3-layered approach, see Italian Data Protection Authority, 'Semplificare le informative privacy attraverso il metodo "Creative Commons". Protocollo tra Garante Privacy e Creative Commons del 26 Luglio 2021' [doc web 9684797] *https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9684797*. See L. GATT, I. CAGGIANO, R. MONTANARI (eds.), *Privacy and Consent a Legal and UX&HMI Approach for Data Protection*, University Suor Orsola Press, 2021, 123, in which «considering an overview of current laws, it is believed that rewriting legal clauses according to the legal design method, represents a possible *ex ante* protection, as it should increase the awareness of the common user»; for further details L. AULINO, *Consenso al trattamento dei dati e carenza di consapevolezza: il legal design come un rimedio ex ante*, in *Il diritto dell'informazione e dell'informatica*, 2, 2020, 303-312; in the field of Banking and Financial contracts, P. GRIMALDI, *Information asymmetries in banking and financial contracts: possible solutions from legal design*, in *EJPLT*, 2, 2021, 70-75.

[65] A. ROSSI, R. DUCATO, H. HAAPIO, S. PASSERA, *When Design Met Law: Design Patterns for Information Transparency*, in *Droit de la consommation*, Vol. 122-123, no.5, 2019, 106; *https://creativecommons.org/licenses*.

[66] R. DUCATO and A. STROWEL (eds), *Legal Design Perspectives, cit.*, 200. And see also A. ROSSI, M. PALMIRANI, *Can Visual Design Provide Legal Transparency? The Challenges for Successful Implementation of Icons for Data Protection*, in MIT Press Direct, Vol. 36, no. 3, 2020, 82-96; G. LORINI, *Corporeal drawn norms. an investigation of graphic normativity in the material world of everyday objects*, in *Phenomenology and Mind*, n. 17 – 2019, 80-90; M. HAGAN, *Legal Design as a Thing: A Theory of Change and a Set of Methods to Craft a Human-Centered Legal System*, MIT Press Direct, Vol. 36, Issue 3, 2020, 3-15.

[67] H. HAAPIO, S. PASSERA, *Contracts as interfaces: Exploring visual representation patterns in contract design*, in M. J. KATZ, R.A. DOLIN, M. BOMMARITO (eds.), Legal Informatics, Cambridge, UK: Cambridge University Press, 2016, 2.

to exhaust all possible forms of belonging. In light of the social function of property rights, it is an indispensable prerequisite for the analysis of the commons. The new paradigms of circularity and sustainability offer the conceptual framework within which to develop the analysis according to new perspectives, as they go beyond the logic of the classically understood market, especially with regard to new contractual models. They constitute an extremely interesting conceptual laboratory and represent the starting points to develop new lines of evolution, thanks to new technologies and legal design. The latter seems capable of implementing the principles of transparency, inclusiveness and open access, placing the person at the center according to an anthropocentric view [68]. Furthermore, a correct use of legal design would allow for better access to justice, in a double meaning: greater awareness of the content of the contract for the parties who appeal to the judge in the event of a dispute and, *viceversa*, less burden for the justice system if disputes are avoided *ex ante,* thanks to a more effective communication of the rights and duties of the contractual parties.

[68] A. Santosuosso, S. Azzini, *Legal design e contratto: un nuovo sviluppo o un'alternativa?*, in *I Contratti*, 4, 2022, 465-476, in particular 467: «non si coglie l'essenza dell'idea di legal design se si trascura una delle sue principali caratteristiche: l'essere centrato sull'umano (*human-centered*)»; L.R. Lupica, G. Grant, *Will human-centred legal design improve civil justice systems? And how will we ever know?*, in R. Ducato, A. Strowel, *Legal design Perspective, cit.*, 118; S. Dangel, M. Hagan, J.B. Williams, *Technology that is not human-centered will not be a solution,* 2018, 9.