Understanding the Commons: the Reception of Elinor Ostrom's work in Italian Scholarship, Law, and Jurisprudence

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Abstract: Over the last ten years, the work of Elinor Ostrom has been the object of increasing attention in the Italian legal world. However, an analysis of the instances where reference to her work appear, reveals a frequent misreading and misrepresentation of her vocabulary, her research, and her claims. The reason for this misreading and misrepresentation may be found in the existence of long-standing concurring concepts attached to the expression "common goods," which nevertheless does not account for the whole phenomenon. Motivated by increasing environmental issues and a strong opposition to privatization in principle, Italian scholars and policymakers have turned to Ostrom's work, but without adequate knowledge and in-depth analysis: this reflects the status of Italian culture, law and politics, trapped in a patch of short-sightedness and individualism. The effect of this confusion is the risk of dispersing the meaning and actual utility that Elinor Ostrom's work may yield for the Italian system.

1. Premise

Since the award of the Nobel prize in 2009, Elinor Ostrom's work has been gaining headline fame, which only in a small measure accounts for the importance of her work and mission, and which has suddenly brought the subject of commons and their governance to World stage spotlight. This of course is good, because it allows greater visibility and wider interest for the accomplishments of her research and their potential outcomes, but also not so good, as from night to morning commons entered into a 'buzzword bingo' scenery alongside other fashionable words, like sustainability.

Over the last ten years, but particularly after 2009, Italy has been experiencing a cultural wave revolving around the commons, and Common Pool Resources (CPRs). Motivated by increasing environmental issues, and the generally poor state of the administration of public goods and services, and facing distrust and wariness from people, Italian scholars and policymakers have turned to Ostrom's work. While political science scholarship is quite familiar with Elinor Ostrom's work[1], the legal scholarship, the legislator, and judges are struggling with it and with its vocabulary. This is partly due to the existence of concurring legal concepts attached to the expression "common goods". But most of all, it reflects the poor state of Italian law and politics.

In this paper, I will first review some basic concepts on CPRs. I will then illustrate the concurring concepts attached to the expression "common goods", and from there proceed to the second part, which is focused on the reception of Elinor Ostrom's work in Italian legal scholarship, law and jurisprudence. In my conclusions, I will sum up the effects produced by the confusion over the subject of commons and CPRs and very generally pose and answer the question on if and how her work may be useful to address the issues Italy is facing.

2. Common Pool Resources, Social Dilemmas, Common property regimes in Elinor Ostrom's work

We start with vocabulary, from the concept of common pool resource all of you are familiar with:

[1] T. Vitale, "Societa locali e governo dei beni comuni. Il Nobel per l'economia a Elinor Ostrom", in *Aggiornamenti sociali.*

		EXCLUDABILITY Potential users can be denied goods or services unless they meet the terms and conditions of the vendor	
		High	Low
SUBTRACTABILITY Consumption or use by one person precludes its use or consumption by another person Partial Subtractability: At certain thresholds of supply, one person's use of a good subtracts in part from its use and enjoyment by others →Congestion	High	Private Goods	Common Pool Resources
	Low	Toll/Club Goods	Public Goods

Common Pool Resources are resources characterized by a low degree of excludability, meaning that it's physically or economically too costly to prevent access to them, and a high degree of rivalry, meaning that consumption by one person prevents others from enjoying that same unit.

A CPR has features that expose it to the risk of triggering a social dilemma. A Social Dilemma is a situation "in which the rational behavior of an individual—defined in pure and simple economic terms—leads to suboptimal outcomes from the collective standpoint" (Dawes, 1980; Kollock, 1998). Renowned examples of social dilemmas are the Prisoner's Dilemma, the Public Good Dilemma and the Commons Dilemma. The latter, also known as Tragedy of the Commons, depicts a situation in which a resource owned in common is managed by each owner with a individualistic short-term, maximizing approach – an approach which leads to the depletion or destruction of the resource.

According to mainstream political economy, there would be only two ways to fix such an (inevitable) situation: either by privatizing the resource into proprietary subunits, the owner of each unit maximizing his/her self-interest to the benefit of all, or by "mutual coercion, mutually agreed upon" (Hardin, 1968).

Elinor Ostrom's lifetime field research brought to light a wide number of cases in the most diverse settings, which proved that, certain conditions being met, people would be able to cooperate in order to collectively manage CPRs in an effective and optimal way, yielding benefits for participants and possibly also for others. Following initial findings, her research has been aimed at understanding how these collective strategies would work, and subsequently at identifying the conditions which allow for their success. So let's review some of the vocabulary used in Elinor Ostrom's work and some of her claims.

1) Common Pool Resources are not *by definition* scarce: scarcity is something that can happen to a CPR, sometimes resulting in a Social Dilemma, but is not inherent to its nature.
   - Not everything that is scarce or deteriorated is a Common Pool Resource.

2) It has been clarified that "*Shared resource systems – called common-pool resources – are types of economic goods, independent of particular property rights. Common property on the other hand is a legal regime – a jointly owned legal set of rights*"[2]. Given certain physical features of

[2] Hess and E. Ostrom, *Understanding Knowledge as a Commons: From Theory to Practice*, 2011, p. …

the resource and certain social conditions of the group depending upon the resource, a CPR may be subject to common property regime. Yet, "*using 'property' in the term used to refer to a type of good, reinforces the impression that goods sharing these attributes tend everywhere to share the same property regime*"[3].

- Not every CPR is subject to a common property regime.
- "*Common pool resources may be owned by national, regional, or local governments; by communal groups; by private individuals or corporations; or used as open access by whomever can gain access*"[4].

3) "Commons" is a general term for shared resources vulnerable to social dilemmas. We must bear in mind that the term "commons", like the other terms we have just seen, has a descriptive function.

4) "*The conventional theory distinguished among communal property, private property and state property and equated communal property with the absence of exclusive rights*" [5]. The analysis of existing field research allowed for the reconceptualization of property rights:

- The monolithic concept of property comprising all powers over its object was replaced by the idea of a bundle of rights – access, withdrawal, management, exclusion, alienation – held in various combinations[6];
  - "*Groups of individuals are considered to share communal property rights when they have formed an organization that exercises at least the collective-choice rights of management and exclusion in relationship to some defined resource system and the resource units produced by that system. Where communal groups are full owners, members of the group have the further right to sell their access, use, exclusion and management rights to others, subject in many systems to the approval of the other members of the group*"[7].
- A communal property regime does not necessarily imply open access, rather, open access may be the result of an unsuccessful claim to exclusion, of a conscious public policy choice, or the effect of ineffective exclusion[8];
- The nature of rights-holder can vary independently of the set of rights in a bundle, the two being analytically and empirically different[9].

5) Social Dilemmas over Common Pool Resources may be tackled by designing a collective action institution which deviates from the classical dichotomy between private property/management and governmental coercion: but this kind of strategy is not required or feasible at all times.

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[3] Hess and E. Ostrom, *Private and Common Property Rights*, 2007, p. 9.
[4] *Ibidem*.
[5] Poteete, Jansson, Ostrom, *Working together. Collective Action, the Commons, and Multilple Methods in Practice,* 2010, p. 45.
[6] Schlager and Ostrom, "Property-Rights Regimes and Natural Resources: A Conceptual Analysis", in *Land* Economics, 68, 3, 1992, p. 250-251.
[7] Hess and E. Ostrom,*cit*., 2007, p.
[8] Hess and E. Ostrom, *cit*., 2007, p. 7.
[9] V. Ostrom and E. Ostrom, "Public goods and public choices", in E. S. Savas (ed.), A*lternatives for Delivering Public Services: Toward Improved Performance*, 1977, p. …

Through field analyses, Elinor Ostrom identified eight "design principles", core factors affecting the likely long-term survival of a CPR institution.

- Not every CPR has or can effectively be managed collectively. "*Netting identified five attributes that he considered to be most conducive to the development of communal property rights: 1. Low value of production per unit of area; 2. High variance in the availability of resource units on any one parcel; 3. Low returns from intensification of investment; substantial economies of scale by utilizing a large area; and 5. Substantial economies of scale in building infrastructures*" and in addition to these environmental variables, Ostrom identified other variables related to the attributes of participants which are conducive to the selection of rules and rights which enhance the performance of communal property-rights systems, among which size group and homogeneity[10].
- An institution is different from the physical resource it manages.

These clarifications may seem obvious to those who are familiar with the Workshop and Elinor Ostrom's work, and to those in general who make it a point to read and analyze logically a text, but we will see that they must not be taken for granted. Above all, we must be reminded that there are no normative claims in Elinor Ostrom's work, that a particular legal class or set, or even a physical type of good or resource, should or should not be managed in just one particular way: "*These principles have inspired hundreds of studies. And they are, indeed, helpful as a possible place to start an investigation. But they are in no way prescriptive—nor are they models*"[11].

3. Concurring "common goods" concepts

One of the difficulties in reading Italian legal scholarship on "common goods" is that the literal correspondence – "beni comuni" – is a label for different and concurring concepts that pertain to different fields of law. Also, the expression "beni comuni" is used to translate into Italian the expression "Common Pool Resource", with the exception of the translation used in the Italian version of *Governing the Commons*, where the expression "beni collettivi" (=collective goods) is mostly used. Writers seldom, if at all, take time to state which concept they are referring to, and most of the time they seem to refer rather to a mix of concepts, or to assume that they are matching and that what applies to one applies as well to the other.

3.1. Res communes omnium usum

The first of these concepts takes us very far from the Workshop both in time and space: we need to go back to Roman law, II-III century A.C., and to the concept of *res communes omnium*, literally "things in common among all". This group of goods is first mentioned occasionally by reference to two single types that fall within its boundary: the see and the air, which are "*communem usum omnibus hominibus*". The turning point is Justinian's codification, the *Corpus Iuris Civilis* (CIC): this consists of a number of legal texts, among which the *Institutiones* and the *Digest*, issued in 533 A.C., which collected and opinions of jurists and gave them force of law. Justinian being the leader of the Eastern Roman Empire, the only province where the CIC was introduced in the Western part of the Empire was Italy, following the

[10] Hess and E. Ostrom, *cit*., 2007, p. 19,pp.22-24.
[11] Hess and E. Ostrom,*cit*., 2011, p. 7.

conquest in 554 A.C.. From Italy it would later pass to the rest of the Western Europe and influence civil law codification. Both the *Institutiones* and the *Digest* contain a passage by the jurist Marcian, where for the first time *res communes omnium* are made into a separate class of goods, between public and private things, stating "*Quaedam naturali iure communia sunt omnium, quaedam universitatis, quaedam nullius, pleraque singulorum, quae variis ex causis cuique adquiruntur. Etquaedam enim naturali iure communia sunt omnium*" and listing them: "*aer et aqua profluens et mare et per hoc litora maris*"[12]. These "things" were by natural destination to be used by any human being: regardless of citizenship, anyone had the (need and the) right to breathe, sail, draw water, fish and dry fishing nets on the beach – and none had the technology to appropriate air, rivers or the sea in a way that excluded these uses (exclusion which was also prevented by law). Yet by its nature the CIC, and the *Digest* in particular, contained alternative models of the *summa divisio* between classes of goods, and a fuzzy distinction between *res communes omnium* and *res nullius* (open access), as well as between *res communes omnium* and *res publicae* – a lack of clarity that carried on to following texts.

A lot can be said on this quote from Marcian, but what is interesting here is that this wording in modern times provided the foundation for both a legal class of goods, and a new branch of law. The Dutch jurist Hugo Grotius used this passage to deny Spain's exclusive claims to the commercial routes in the Eastern Indies sea after the capture of the Portuguese ship Santa Catarina and its precious load: Grotius argument was the "*most specific and unimpeachable axiom of the Law of Nations, called a primary rule or first principle, the spirit of which is self-evident and immutable*", that any nation had the right to travel and trade (Grotius, 1609), precisely based on Marcian's passage. This argument provided foundation to modern international law. Interestingly, a point Grotius highly emphasized was the fact that "*l'usage de la pleine mer, le quel consiste dans la navigation et dans la pêche, est innocent et inépuisable; c'est-à-dire que celui qui navigue, ou qui pêche en pleine mer ne nuit à personne, et que la mer, à ces deux égards, peut fournir aux besoins des tous les hommes*"[13].

At the same time, this exact quote gave rise to a partly different interpretation, which highlighted another aspect of this class: common goods conceived as goods that by their own nature are destined to support the living of any human being, and from which it would be uncivil to exclude anyone. This different *nuance* can be explained by the fact that, among jurists, Marcian was by far one of the most learned in literature and philosophy and his legal discourse was deeply influenced by the works of the stoics Cicero and Seneca, whose works had in turn been influenced by Greek Stoicism. In particular, Cicero – whose writings, like many others from the Classical tradition, need to be the object of careful reading, given that often legal, philosophical and political views and arguments are mixed together – had stated that these goods by their own nature are to be used by everyone, and just as much as anyone has a right to use them, each person has duties over their preservation too[14]. This way, the physical world, and the goods and resources therein, end being tied by their natural function to the realization of "the common good", that is, what is good for the community, as opposed to the pursuit of sheer self-interest[15].

[12] Marcian, *Inst*. 2.1. and 2.1.1.; *D.* 1.8.2.
[13] Vattel, 1758, p.
[14] Cicero, *De officiis*, Liber I, VII.21-22, and even more Liber I.XVI.51-53.
[15] Bruni, 2012, 113-114.

Hence, from what was once despite its fuzziness a single legal class of goods, two different *rationes* were extracted and emphasized, which shaped two distinct legal notions partially superimposed and partially opposed (or rather a two headed one?):

- Technical insusceptibility to occupation of the whole (and it's indeed interesting that one of the known critics of Grotius, John Selden, in the work *Mare clausum*, 1635, tried to demonstrate that appropriation of the sea was in fact as feasible as the appropriation of land)/lack of impact regardless of continued use and apprehension;
- Injustice of exclusion/Duty of care and rational use.

The second couple of features is based upon values, but also heavily relies on assumptions based on the first couple of features, as the two couples can be considered as the two sides of a same coin.

Centuries later, in international law further he notion of goods that could not be appropriated by individuals or nations was further developed, conceiving the "common heritage principle": according to this principle, certain natural resources or artificial goods are the common heritage of humankind, and should therefore be held in trust for the people and for future generations and protected from overexploitation. The expression "common heritage of mankind was first mentioned in the preamble to the 1954 Hague *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, and enunciated as an international law obligation in the *Outer Space Treaty* of 1967.

3.2. Common usages

A little later in time but not in space, we find another concurring legal concept attached to the expression "common goods" (though originally referred to as "collective goods" or "collective properties", or even better as "civic uses"): it refers to ancient medieval rights of use and appropriation which were granted to local communities by their lord within the feudal system to complement self-sufficient household private economies. These rights and their object would vary according to the features of the land: cutting wood, putting animals to pasture, fishing, drawing water, picking acorns, branches, bark, turf, clay, stone, sand, lime, or the remains from harvested fields. They correspond to medieval English common law rights of commons: a set of incorporeal hereditaments outlined by William Blackstone in his *Commentaries on the Laws of Ancient England* (1765-1769), which insisted upon common land and could be exercised only by members of the local community.

Throughout the Medieval period and the Modern era, these uses have been the object of acts and legislations meant to convey land into a more sensible, economy-wise private property structure or in alternative to preserve the benefits they yielded to the population by assigning land to the inalienable public domain held in trust by the State for the people. Yet, in many places they have survived, either formally or informally and still remain today. In Italy, their history has been uncovered by law and history of law scholar Paolo Grossi, who rescued them from the oblivion to which they had been sentenced from the French Revolution on, and in Italy particularly after the unification of the nation[16].

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

These usages characterized European local self-sustenance economies up to the last century and are now going through reforms in many countries, which seek to transform their structure to serve the new purposes of landscape protection, sustainability, and green tourism[17].

In the literature on common goods, all these different concepts are used with very little accuracy, and with a quite poor methodological approach.

4. The Italian system

I will examine three legal sectors where the expression "common goods", often in association with Elinor Ostrom's work, keeps popping up: Scholarship, legislation and jurisprudence.

4.1. Italian scholarship

4.1.1. Mattei's holistic approach

The main work I will discuss is Ugo Mattei's *Beni Comuni. Un manifesto*, a blockbuster book on common goods written by a former legal scholar in private and comparative law. Right from the title, it's clear that the author is forwarding some sort of political agenda, against the evils of capitalism and the severe shortcomings of the State. Throughout the book, despite the declared intent to sketch an "*institutionally viable notion of common goods, that may reduce to unity a number of different fields, yet without degenerating into a sort of fashionable, abstract, ambiguous, and excessively generic password*"[18]. Mattei never introduces nor suggests a clear definition of common goods. Like many other scholars who tackle the subject, he would rather say what the common goods are not: "*Common goods are not – like reality as a whole – a set of well-defined objects ("cut" as in Bergson's view) that may be studied in a lab and seen from the outside according to a Cartesian logic and an empirical observation*"[19]; "*Common goods are not such by some ontological, objective or mechanical feature, but due to the contexts in which they become relevant as such. Hence the extreme broadness and flexibility of the notion, and the difficulty in subsuming it within traditional legal (goods, or services?) or political (right or left?) classifications*"[20]. This leaves us without the allegedly sought after "viable definition" of common goods. Neither can we build one definition of common goods by finding shared features among the things he lists as common goods:

- "a railway, an airline company, the health service […], drinking water networks, the university" (p. V);

[17] Charlotte Hess and Elinor Ostrom have analyzed the results of a field research carried out by Robert Netting on a village irrigation system in the Swiss Alps, a long standing common usage system (Hess and Ostrom, 2007, pp. 18-24)
[18] U. Mattei, *Beni Comuni. Un manifesto*, p. XV.
[19] *Cit.*, pp. XIII, XIV.
[20] *Cit*. p. 53.

- In medieval times, “a forest, […],rivers and creeks, […], the city, […]. Also churches were common goods […]” (p. 27);
- “Earth” (p. 40);
- “the live earth: Gaia” (p. 47).
- “labor” (p.53);
- “natural common goods (the environment, water, clear air) and social common goods (the cultural heritage, historical memory, knowledge, or yet again material common goods (city squares, public gardens) or non-material common goods (the space within the web)” (p. 54);
- “law” (p. 60);
- “some of strictly local importance, like a small playground close to a number of condos, or a kindergarten; others with a broader scope, like land rent […]; others yet, with a national scope, […], like freedom of information; others, finally, of transnational scope, like academic research and internet governance” (p. 61);
- “the health service” (p. 64);
- “urban waste disposal service” (p. …);
- “urban snow plowing service” (p. …);
- “all the goods produced thanks to general fiscal financing” (p. …).

Common goods are even described as a new way of framing rights, or alternatively public interests. Thus, the physical goods mentioned are supposedly meant rather as the actual expression of such rights and interests. This leaves no space for the identification of a common framework, let alone a common regulation: once we are dealing with such a heterogeneous mix of things and concepts, the utility of any class or category is lost. Indeed, the only argument – insistently repeated – for their regulation is that they must be open-access, that people have to participate and that cooperation must be fostered: we are left to wonder through which strategies and institutions, and to what extent.

Mattei dismisses Elinor Ostrom as having done “*none other than challenged the crude application of the homo economicus model to problem of common goods*”[21], failing to “*generate in the scientific community full recognition, even political, of the revolutionary consequences of placing common goods in a place central between the categories of law and politics*”, because “*neoinstitutionalist critique, by trying to cure economics from its inner paradigm, has not drawn any political conclusion from the fact that the model of the greedy, bulimic actor indeed accurately describes the behavior of two of the most important institutions of our world*”[22], the modern limited company and the State. In this view, the award of the Nobel prize constitutes the blessing of mainstream, orthodox economic thought to her work, proof of the above failure.

From a broader point of view, Mattei doesn’t take time to discuss the differences between the various concepts on the plate, nor to specify what the claims made by the authors he mentions are, and where the boundary between their claims and his stays. This leaves the reader – the Italian reader who will

[21] Mattei, *cit*. p. XI. And later also, “to be honest, she reinvents what Engels had already written over a hundred years ago”, p. 5.
[22] *Cit*., p. XII.

seldom have a sufficient knowledge of English as to personally check sources – believing that Elinor Ostrom's claims are a weaker, cowardly equivalent of Mattei's claims, a belief that for the same reasons mentioned above, the reader will not care to confute. Reading on, we will find this happened also within scholarship.

The attention and subsequent confusion heaped upon Elinor Ostrom's work (which many legal scholars have known only through the words of Mattei) had and still has the effect of dispersing the meaning of her findings and claims, which are often identified as one with Mattei's claims and dismissed as "benecomunismo" (literally, "goodscommunism"/"commongoodism"). Clearly, this has nothing to do with Elinor Ostrom's work.

The main critic of this approach is political philosophy professor Ermanno Vitale, who published *Contro i beni comuni. Una critica illuminista*, Vitale's book is divided into two sections, a *pars destruens* and a *pars construens*. The first part consists of an offensive (sometimes too personal) analysis that openly mocks Mattei's claims in a successful attempt to put right most of the methodological shortcoming of his work. We must credit the author for his clarifications on the actual context of many of the works cited by Mattei. Yet this book comes short in two ways: the first, of lesser interest in this setting, is concerned with the promotion of the book by a fellow colleague and the message contained therein as a still hazy and very abstract alternative to Mattei's construction; the second regards precisely the understanding of Elinor Ostrom's work. Again, we are told that "*After all, Ostrom's criticism of Hardin is just a remainder that a "commons" is not necessarily devoid of rules or insufficiently regulated. Close to private property in its strict meaning, and to public institutions, also intermediate institutions may in certain cases and within certain limits contribute to an efficient regulation of the resources of the planet*" – and this, only in small scale communities and in respect to local resources[23].

Oscar Wilde once said that women have a wonderful instinct about things. They can discover everything except the obvious. I consider this a compliment, especially if applied to the case in point: it is so easy to state that something is obvious after someone else has pinpointed it; it is far more difficult to understand that something which is not obvious at all is going on, and find evidence to support it, and understand the reasons and conditions that make it work. Regardless, while insisting on how Elinor Ostrom's research and results have nothing to do with the aims of social justice Mattei allegedly advocates with his own notion of "common goods", Vitale ends up excluding Ostrom's research from the picture: this incompatibility ends up being the measure for the utility of her work in our system.

4.1.2 Other approaches

Despite their minor impact and fame, other approaches to the subject deserve a mention in the attempt to illustrate the reception of Elinor Ostrom's work in legal scholarship.

Another author who has brought the subject of common goods under his focus is private law scholar Gabriele Carapezza Figlia. His discourse on common goods is openly based on the international law notion of "common heritage of human-kind", which he mistakenly believes to have been first used in the Declaration of the United Nations Conference on the Human Environment held in Stockholm in

[23] Vitale, *Contro i beni comuni. Una critica illuminista*, p. 13, and also p. 10.

1972. His discourse does not acknowledge the differences between this notion and other concurring ones, i.e. the one used in Elinor Ostrom's work, which the author mentions, and assumes to be equivalent to his chosen one. Carapezza recognizes the existence in the Italian system of legal norms that conform or modify the traditional structure of private property by limitation of the powers of the owners of particular types of goods, such as movable objects which are part of the cultural heritage or land within a protected landscape area. In respect to these goods, the choice about the functional destination of the good or resource is made by the law, the number of rights within the proprietary bundle is reduced and the rights are modified, the alienation and circulation of the goods or resources is strictly constrained. In this author's view, the notion of common goods serves as the label to unify under one name all the instances in which private property's traditional structure is remodeled by the legislator towards the satisfaction of the public interest consisting in the "*maximum fulfillment of the value of the person*"[24]. It is clear that the notion used by this author does not correspond in any way, not even partially, to that of CPRs; it may be framed as an institution, but it is highly unlikely that Carapezza would know this. As to their regime, the Author claims that "*even though a strictly constrained private property regime is compatible with a lessened rivalry between the different uses of a good, aimed at favoring a higher accessibility to it, a certain normative structure of public property is particularly adequate to manage the fruition of the good according to rules inspired by constitutional solidarity and aimed at guaranteeing its optimal use. A well-devised public property regime can indeed overcome the economic efficiency of private ownership, because it can bot guarantee the intergenerational safeguard of collective resources* [and here a footnote links this statement to Governing the Commons, p. 269 ss.] *and avoid what has been defined as «the tragedy of the anticommons»"*[25]. A very general, apodictic claim – or rather an opinion – in favor of the relative superiority of public property in facing certain issues (but not in reference to specific resources) is made, a claim which is questionable both in respect to the comprehension of Elinor Ostrom's work, and in respect to rationality.

An initiative that gained much attention was led by Maria Rosaria Marella, professor of private law: in the course of 2012, she chaired a series of meetings to discuss the meaning and scope of the concept of common goods, gathering together scholars from different fields and backgrounds – philosophy, sociology, anthropology, and economics. The outcomes of this enterprise were then published in a collective work, divided into four parts, each exploring the following issues: Common goods v. Private property: ideology (and Genealogy); The explosion of common goods, from water to immaterial goods; Urban space as a commons; Labor=Common good?.

The workgroup acknowledged the impossibility to find a definition for common goods, given the broadness and diversity of the set they consider: Common goods are water, natural resources, and goods which have a physical layer but also evoke more complex scenarios, like the environment, the art heritage and the historic-cultural heritage of a Country; common goods are also, among other immaterial things, genes, images of other goods, traditional knowledge and customs; institutions which offer services which satisfy social rights like health or education; common goods are also the urban

[24] Carapezza Figlia, , "Premesse ricostruttive del concetto di beni comuni nella civilistica italiana degli anni Settanta" , p. 1072, and also p. 1084.
[25] Carapezza Figlia, *cit*., p. 1072, and also p. 1079.

space of the city and labor. Once admitted the impossibility of coming up with a definition, the focus is shifted to an attempt at identifying the common features of common goods, which according to Marella are the following: the fact that they cannot be regulated according to common rules; the fact that they are linked to a community; the fact that they must be managed collectively, with participation from the people. Apart from the whimsicality of the first feature for a legal class of goods, we are told, again, that collective management and participation are a "must". Rather than a spontaneous bottom-up strategy, this evokes an imposed top-down collaborative constraint.

Many contributors, including Marella who was the editor of the volume, refer to *Governing the commons.* In particular, in the introduction we read that the fact of identifying a common good with the community depending upon it may actually be a weakness, preventing the good from playing the role of social, economic and political transformation it may potentially play. In this view, "*given certain socio-economic starting conditions, stating that a resource or an institution is a common good does not necessarily trigger a redistributive process towards the broader community or other communities of users or citizens, but rather ensures a more equitable use of the utilities from that good within one's own community. This would seem to be at first glance the limit of the theory of Ostrom*."[26]. Once again, we are warned against the limits of Elinor Ostrom's theory: a limit which only appears as such owing to the superposition of a notion of common goods completely different from the notion of CPRs and common property regime she worked with, and of a purpose radically different from the aims of her research. Indeed, if I must take time to address this comment, I will say that the features of the community depending on any given resource, and on the way in which they affect the functioning of a collective strategy, have been taken into account and carefully analyzed by Elinor Ostrom throughout her life. More importantly, the results she reached and on which her theory was built were the outcome of fieldwork; they came from the observation and conceptualization of real-life systems and communities. So even from a logical point of view, to state that a theory is limited because it does not include normative claims, or because giving a certain label to a phenomenon does not trigger the desired results, is quite unreasonable.

Fabrizio Marinelli, a scholar expert in the field of common usage[27], has recently tried to connect the new wave of interest in common goods with his research. His synopsis for *Governing the Commons* raises doubts on his approach: "*following in-depth analyses of actual cases where the importance of common goods (goods in common property) manifests itself, this book insists on the need for an institutional approach based on self-organization and self-government*". The definition of what common goods (or rather, CPRs?) are is rushed: this Author actually believes Ostrom's common goods and common usages to be very different in their structure, based on Mattei's influence. Moreover, I strongly sense a confusion between the approach of institutional economics and the approach by government institutions. This suspicion is confirmed by the conclusions: if dissipation of common goods has to be avoided, "*it is necessary – as already stated – not only to reflect upon this issue, but also to draw a charter for these goods, to avoid the tragedy of the commons highlighted by Garrett Hardin in 1968, and later dealt with precisely by Elinor Ostrom in the essay quoted at the beginning of this paper*". He is thus

[26] Marella, in *Oltre il pubblico e il privato. Per un diritto dei beni comuni*, p. ….
[27] F. Marinelli, *Gli usi civici*, Giuffre, 2003.

advocating for top-down, uniform and standard, governmental regulation for both common goods (in Mattei's meaning) and common usages, a task that may be unlikely accomplished. What strikes me most is the fact that common usages are exactly the kind of institutions that by collective action strategies have managed, over very long stretches of time, to accomplish an optimal or adequate use and preservation of certain natural resources: the utility of Elinor Ostrom's work in a possible classification and analysis of these usages is completely overlooked.

4.2 Italian legislation

For a long, long time, *res communes* such as the sea or the air were mostly uninteresting to internal regulation, save for some minor aspects, because they were no issues of scarcity, depletion, or pollution[28] (). Indeed, scarcity is what definitely more than other circumstances, especially in past times, has made goods or resources relevant to law[29].

4.1.1. Legislative mish-mash

On july 15th 2012, I queried the expression "beni comuni" and the singular "bene comune" in the most complete database we have. I thus discovered that over the last ten years, a series of acts had been issued (five ministerial decrees, one legislative decree, one presidential decree and one law that ratifies a European convention, plus twelve regional laws, two provincial laws, twenty deliberations by regional executive bodies – "Giunta" – by regional Councils, or by the autonomous provinces of Trento and Bolzano, as well as four decrees by Council members), which make use of this expression in very diverse ways. Here is a list of the resources and goods listed as "common goods" in these texts. I have tried to group them as follows:

- Natural resources: water; air; wind; agricultural soil;
- Ensemble natural resources: environment; landscape; territory;
- Biological resources: fish; Mediterranean fish; wild animal species;
- Biological complex resources: ecosystems; essential resources of the territory; biodiversity; marine biodiversity;
- Artificial resources: cultural documents; objects part of the cultural heritage; infrastructures; landscape;
- Ensemble artificial resources: cities; settlement systems; infrastructure systems; technological systems;
- Aims or interests to pursue: legality; safety; health; national security;
- Services or activities: market regulation; education; civil service; public services; military defense; food safety; protection of the cultural heritage;
- Other instances:
    - common goods are referred to without further specification of the meaning of the class or of the goods or resources included therein;

[28] M. S. Giannini, 1977, p. …

[29] P. Rescigno, "Disciplina dei beni e situazioni della person, in *Quaderni fiorentini per* la *storia del pensiero giuridico moderno*, II, 5-6, p. …

- children and teenagers;
- family;
- people working in the defense service;
- any object or activity that held attaining the common good of the people.

Some of these may actually be CPRs, but others qualify rather as public goods, or even public interests, or general aims of government or administration, or as none of the above. Moreover, it is not possible to find a notion of "common goods", not even among the concurring concepts previously examined, that applies to such a heterogeneous list of things, or to envision a common regime or policy framework for it, or, still, to infer a single notion from this very varied set of things. They are at the same time the expression of different, overlapping concepts, and the outcome of the very fuzzy concept of common goods in use within scholarship and in the media.

On another level, these laws and acts could raise an issue of compliance with the Constitution, which sets precise boundaries as to the exclusive legislative power of the State on the one hand, and of Regions on the other. Art. 117 of the Constitution, as amended by the Reform of 2001, lists "civil law" among the subjects that fall within the exclusive legislative power of the State, thus preventing Regions (and even more so administrative units of a lower level) from modifying in any way the structure and types of property currently in force as to their regime, or even their label.

But this is not a real issue, because the regulation or treatment of all these objects remains unaffected by the statements contained in these laws! By qualifying something as a "common good" the legislator is just stating that it is something of relatively high importance within a broad constitutional frame, as compared with other things, some of which are constitutionally relevant, too. This is fortunate from a perspective concerned with consistency within the system, but is a really huge alarm bell on the state of our legislation and of our legislative process.

4.2***.2. A drafty draft***

When I refer to legislation, I also refer to the bill of delegation law drafted by the so called "Rodota Committee", from the name of its president, the eminent scholar Stefano Rodota. This Committee, which included Mattei, as well as many of the other scholars, was called by the Minister of Justice (Decree June 21, 2007) to draft a bill to delegate the Government[30] to reform the current layout of property in the Civil Code. Most of all, this Reform was aimed at overcoming the unsatisfying classification of property in force in our Code. *Demanio* (public domain), in particular, is a category which stands not by a unifying feature of the goods it encompasses, but just by normative decision that a certain good or resource is part of the list. Some goods listed therein can only be owned by the State or local administrations, others can either be owned by the State or local administrations (in which case they are regulated as public domain) or be owned by a private party (in which case they are regulated differently). Goods and resources within the public domain cannot be sold, nor can they be lost by adverse possession.

[30] It is odd that such a material reform of the Code and of the legal system as a whole would be delegated to the Government, especially given the instability that historically characterizes, affecting its duration and ability to function.

The Committee's commentary to the draft proposal expressly addresses the issue of the weakness of the public domain as a class of goods, perceived as very serious by some jurists, and describes the Committee's task as a "*quest for a taxonomy of public goods that reflects the economic and social reality of the different types of goods, in the belief that the mere legal status of the types existing in the Italian law in force, constituted an arbitrary criterion*" (…). It would be very difficult to argue that a legal criterion, like many other criteria, is not arbitrary. The quest led the Committee to the formulation of the category of common goods, meant as "*things that express utilities which are functional to the exercise of fundamental right as well as to the free development of the person*". This include, "*among others: rivers, streams, and their sources, lakes and other waters, the air; parks as defined by law, forests and wooded areas; mountain areas of high altitude, glaciers and permanent snow, beaches and coastlines declared environmental reserve, the protected wildlife and flora; the archaeological cultural, and environmental heritage, and other protected landscape areas*."

This list, which comprises a large number of natural resources, and some classes of artificial goods or resource, is meant to create a group of things that will be subject to the same regime: a regime that brings nothing new, in comparison to the current regime of each of the goods listed. Expectations on how the draft would address the issue of participation by the people in the management of these resources were not met, as the text does not mention the issue at all.

The link to Elinor Ostrom's work is not apparent: no mention of it is made in the commentary. Yet, Mattei and many of the members of the Committee such as Alberto Lucarelli and Edoardo Reviglio, have later published works in which they make reference to *Governing the Commons* as a source of their work, which they treated with the approach that by now we are familiar with.

4.3. Jurisprudence

I bring to your attention two twin rulings, issued in 2011 by the Corte di Cassazione – a last instance court which ensures the correct application of law (civil, penal) in the inferior and appeal courts and resolves disputes as to which lower court (penal, civil, administrative, military) has jurisdiction to hear a given case. In these rulings, the nature of the property over a fishing valley in the lagoon of Venice was debated: according to the law, this valley could either be private or part of the public domain.

Surprisingly, while answering this question and framing the valley as part of the public domain, due to features that make it ontologically functional to the fulfillment of a public interest, the Court took time to explain that the criteria used to include a resource into this class of property are insufficient and outdated. The *obiter dictum* of the ruling goes as follows: "*Today, when identifying public or public domain goods, we cannot limit our task to the examination of the code of 1942, being indispensable to complement it with other sources within the system and particularly with the (subsequent) constitutional norms*". Indeed, the Constitution contains provisions that give certain resources and goods a special status. More specifically, according to art. 9 of the Constitution "[the Italian Republic] protects the landscape and the historical and artistic heritage of the nation". In the view of the Court, this statement, together with the provision of art. 3 of the Constitution which compels the Republic to remove all the

obstacles that stand against the full development of the human being, must be read as an obligation of the Welfare State to protect the human being and his development, both in respect to goods and belonging to the State and to goods belonging to private parties. The Court states: "*a good is public not because it is part of one of the Code's abstract categories, but rather because it is the source of a benefit for the community, to the point that we can imagine the private management of public goods (such as their alienation and securitization)*". If it really were so, the inherent public destination of the fishing valley could well be preserved by the private owner (as it actually happened in this case).

Fulvio Cortese, author of a commentary on one of these rulings, believes – correctly – that the commonly accepted notion of "common goods" is based on the idea that the goods therein included, if treated according the classical legal taxonomy, would experience an unsatisfactory or insufficiently profitable use. Given that in the Court's decision the treatment of the disputed good was not affected in any way by this new and different interpretation of law, the Author of this commentary concludes that "*the actual purpose of the reference to the common goods is still, in this case, the reaffirmation of the public domain nature of a given good*"[31].

5. Conclusions

So what with all these different ideas, definitions, claims and examples?

Some of the misrepresentations I have described may be explained – though not justified – by reference to the other concept framed in the premises, that of "beni comuni". Still, there should be an awareness of the existence of these concurring concepts, and a clear distinction should be made and openly stated in the premises when using one concept or the other. The arguable the choice to mix them into a new notion should be explained both in the making and in the use[32].

But in any case, this does not account for most of the instances I have illustrated: indeed, most of the times a direct reference is made to Elinor Ostrom's work and her writings are quoted. Why is this? On a practical side, the Italian edition of *Governing the Commons* was published only in 2006, which shouldn't nevertheless justify the choice of quoting her work inaccurately for lack of a comprehension of a foreign text. Sometimes this happens because the author wants to justify, strengthen or even ennoble his or her own claims, other times because he or she truly assumes to be displaying a loyal representation of her work. Inaccurate, or even blatantly incorrect and unjust reference to her work and her claims is not justifiable.

The clamor and publicity raised on the issue of CPRs, especially after the award of the Nobel Prize, has gained the attention of Italian scholars and policymakers, at loss on what to do to fix many of the country's issues. But the way the subject was treated has compromised the understanding and use of

[31] Cortese, "Dalle valli da pesca ai beni comuni: la Cassazione rilegge lo statuto dei beni pubblici?", p. 1176.

[32] The newborn concept of "common goods" emerging from Italian scholarship, law and jurisprudence, which look to it as a panacea to all the shortcomings of our administration and policies, is a bubble that is going to burst. Let's hope it burst before material changes in the law are carried out.

Elinor Ostrom's work in legal policy making in Italy, and is ascribable precisely to law scholars(who seemingly refuse to seriously interact with political scientists).

As a sad excuse for this attitude, it may be said that Italy has a history of short-sighted reforms – which in the last years has probably reached its peak – and a habit of importing institutions from other Countries – the US in particular – without adequate analysis.

Today, in legal scholarship, Elinor Ostrom's work is considered:

- As the economic premise of Mattei's claims, or as a milder version of the latter;
- As a repetition of obvious truths already stated by other scholars;
- As a field of research that has nothing to offer to the Italian system;
- As a field of research that can offer a normative directions for structuring collective management systems by imposing a standardized models.

First of all, we need to rediscover Elinor Ostrom's work, place it in the correct scientific context and learn to use it as an heuristic tool.

Subsequently, the questions that need to be answered are: Are there goods that qualify as CPRs in Italy? Are there issues that qualify as CPR Dilemmas? Of course, today in Italy there are goods that can be labelled as CPRs, some of which are the still existing common usages illustrated above, or the fisheries in Sicily, or the radiofrequencies across the whole Peninsula. But at a first glance, the issues concerning these resources – or even different types of resources – are issues of corruption, lack of funds, lack of care, rather than the classic CPR or Public Goods Dilemma. Still, the application of the IAD framework, which is not designed to tackle only CPR issues, may be of great utility in the analysis of these issues.

A third question is: is the institutional setting open to accepting collective action strategies? Indeed, yes! The Italian administrative system was redesigned by the Constitutional Reform of 2001 mentioned before[33]: this Reform redesigned the territorial system according to the principles of vertical and horizontal subsidiarity and of participation, among others. As a result, in respect to our focus, the system is now characterized by:

- polycentric system
- attribution to municipalities of preeminent administrative action (*federalist administration*)
- Opening to participation by citizens – art. 118, c.4, "*The State, Regions, metropolitan cities, provinces and municipalities shall favor the autonomous initiatives of citizens, individually and in association, for the performance of activities of general interest, on the basis of the principle of subsidiarity*."

[33] This reform, carried out by the left party on the basis of a text agreed by the majority and the opposition in the Parliament Commission for Institutional Reforms, was not supported by the quorum of two thirds of Parliament: this has allowed the call for a referendum to ask voters approval or rejection. Through vote in the referendum was held on 7 October 2001, the 64.20% of voters (34.10% turnout) has expressed its willingness to confirm the reform, which then entered into force on 8 November 2001.

As long as the principles and theory conceived by Elinor Ostrom are understood, and therefore are not applied blindly and unconditionally, and as long as sufficient care and efforts are put into our research, and into our political and legislative processes, Italy might not miss this train.

In retrospective, maybe this paper should be titled "understating the commons".

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