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Institutionalizing the Commons: An Italian Primer

PART I.: Political Background. *Indignados* Italian Style

This chapter is devoted to what I believe is a rather interesting and unique experiment in transforming indignation into new institutions of the commons. Perhaps this praxis “Italian style” could become an example for a global strategy.

[1]

1. A22

The complex and fascinating phenomenon of the political emergence of the commons movement in Italy is something akin to the more noted Spanish *Indignados*, known to the rest of the world as M15 (May 15, 2011), the date of the beginning of a long-term protest camp at Madrid’s Puerta del Sol.

In Italy, the symbolic date that evokes the three key moments in the recent history of the commons movement is April 22. For three times, by chance, something of crucial importance happened on that date. On April 22, 2008, the Rodotà Commission handed over an Enabling law bill[2] to the Minister of Justice at a conference held at the Accademia Nazionale dei Lincei in Rome which contained the first legal definitions of the commons to appear in an official document. Again on April 22, in 2010, the Committee for the referendum on “water as a common” collected the first signatures on the forms containing the question drafted by jurists of the aforementioned Rodotà Commission. Thirdly, on April 22 in 2013, the transformation of ARIN[3] S.p.A.[4] into ABC[5] Napoli as a special public “commons” company was finally registered with the Naples’ Chamber of Commerce, ending a long political and legal struggle. Thus, the name for Italy’s commons movement should be A22!

2. The Rodotà Commission

The triggering of indignation that gave a political soul to the discourse on the commons, until that moment relegated to the margins of political and juridical reflection, arrived on November 19, 2009. With a vote of confidence, the House of Representatives approved the DL 135-2009, popularly known as the Ronchi-Fitto decree from the names of the ministers of Berlusconi’s government who proposed it.[6] This measure, based on a presumed “European obligation,” determined that by the end of December 2011 all local public services and utilities of economic relevance (including the integrated water system) would be auctioned off on the market where private corporations could bid to manage them. This brutal attempt to perpetrate the most radical round of privatizations in Italian history, right at the beginning of the dramatic economic crisis (certainly not produced by the public sector!), generated political resistance far beyond the expectations of its promoters. It was not difficult to foresee that putting an enormous number of public services, mainly natural monopolies, on the market at the same time would cause a sharp drop in their purchase price. These assets, still mostly managed in Italy by companies owned 100% by the public sector, according to the so-called “in-house” model would be transferred at ridiculously low prices to privately owned corporations. The Italians could not and did swallow this new plunder of public resources (worth more than five hundred billion Euros according to estimates from the International Monetary Fund).

By chance, on that very same November day of 2009 when in the Chamber of Deputies the vote in favor of the Ronchi-Fitto Decree was taking place, in a room at the nearby Senate a ceremony was in progress. Numerous senators from both the government and the opposition parties were in attendance as well as the

President of the Accademia Nazionale dei Lincei, the Vice President of the Piedmont region, and many members of the Rodotà Commission, including its President. The Piedmont region was introducing a new bill, which reproduced the text of the Rodotà Commission verbatim. According to the Italian constitution, regions have the power to initiate legislation and Piedmont was exercising this power. The first legislative definition of the commons was officially beginning its protracted parliamentary itinerary to become a law of the State.

The Rodotà Commission directly descended from a 2005 scholarly project at the Accademia Nazionale dei Lincei. At that prestigious venue, scholars began to rethink the politics of wildcat privatization carried on since the 1990s in Italy. Technical governments dismissed assets worth about 140 billion Euros in a very short period of time, making Italy a more intense privatizer than Thatcher's Britain.[7] These privatizations have been denounced in vain even by the Corte dei Conti [the Italian Court of Auditors], the institution whose task is to safeguard public finances and guarantee that public patrimony is respected.[8] In fact, Italian centre-right and centre-left governments had taken it upon themselves to liquidate public holdings and place the ensuing capital in the hands of the usual "private" groups. They transferred from the public to the private goods and services worth billions without making any formal declaration of the public utility of these measures, using sub-primary sources of law such as ministerial decisions (no involvement of Parliament), and with no compensation whatsoever. Italian governments have *de facto* expropriated public and communal assets from the people (who owned them) without respecting any of the basic guarantees that would be due to a private owner in a case of expropriation.[9]

The very old legal framework (contained in II of Book III of the Civil Code) that remains essentially unchanged since the Napoleonic Code (1804), is too outdated to exert any effective legal control over the government. This legal situation explains the continuous dramatic mismanagement of public property carried on by Italian governments, captured by private interests. It explains also the impudent arrogance deployed by the current administration in plundering public assets, as well as the bipartisan refusal even to discuss the proposed legal remedies to this catastrophe.[10]

In an attempt to stop this plunder, which is documented in detail by studies undertaken at the Accademia dei Lincei,[11] Stefano Rodotà, Edoardo Reviglio, and this author were finally received by the Minister of Justice of Romano Prodi's government, Clemente Mastella.

It was June 14, 2007, the birthdate of the commission for reforming Article II of Book III of the Civil Code[12] which was set up by the Prodi government and known as the Rodotà Commission after its president, the eminent legal scholar and well-known politician Stefano Rodotà.[13] (June 14 is another lucky date for the commons movement. Exactly four years later the occupation of the Valle Theater in Rome was initiated).

The Commission completed its work in February 2008. It produced an Enabling Law bill to reform the Civil Code in matters of public property. On April 22, at the Accademia dei Lincei, it delivered its work to the new Minister of Justice Luigi Scotti, who succeeded Mastella just prior to the fall of the Prodi Government.[14] In the bill of the Rodotà Commission the commons (in Italian *beni comuni*) received the first technical-legislative definition in the following terms:

"[...]

(b) Classification of assets into three categories: commons, public properties, private properties.

(c) Definition of the commons as such goods whose utility is functional to the pursuit of fundamental rights and free development of the person. Commons must be upheld and safeguarded by law also for the benefit of future generations. The legal title to the commons can be held by private individuals, legal persons or by public entities. No matter their title, their collective fruition

must be safeguarded, within the limits of and according to the process of law. When the holders are public juridical persons the common properties are managed by public entities and are considered out of commerce; their concession to privates is admitted only in cases allowed by law and for a limited time, without the possibility of extension. Commons are: rivers, torrents and their springs; lakes and other waterways; the air; parks defined as such by law, forests and woodlands; high altitude mountain ranges, glaciers and snowlines; beaches and stretches of coastline declared natural reserves; the protected flora and fauna; protected archaeological, cultural, and environmental properties, and other protected landscapes. The commons legal regime must be coordinated with that of civic uses. Anyone may have access to the jurisdictional protection of the rights connected to the safeguard and use of commons. Except for cases prescribed by law for the protection of other rights and interests, only the State may take legal action for damages done to public properties. The State is also entitled to the reversion of profits. The requirements and modalities for legal action mentioned above will be defined by the delegated decree.[...]"[15]

It is enough to read the definition above to verify that water holds the top spot in the hit parade of the commons. Thanks to the contribution of Commissioner Lucarelli[16], a legal scholar from the University of Naples, the Commission adopted an approach coherent with that of a bill of popular initiative, backed by more than 400,000 signatures, on which the Italian water movement was working at the time.[17] This early definition of the commons by the Rodotà Commission became an exceptionally important legal concept in Italy that obtained the highest judicial recognition,[18] as well as at the local normative level, such as local Charters of a variety of municipalities (including the City of Naples). Nevertheless, and this is yet another piece of evidence of the terminally-ill state of Italian representative democracy, to date the bill of the Rodotà Commission has never been discussed in Parliament.

3. The Genesis of the Water Referendum

It is not difficult to imagine the satisfaction of the more motivated of the ex-commissioners when they were informed that the Piedmont region had adopted the Rodotà Enabling Law Bill as its own proposal to the Senate.[19] It is also easy to understand our outrage when, returning from Rome after the magnificent ceremony in the Senate's Nasiryah Room, we were informed of the passage of the Ronchi-Fitto Decree that prescribed the sale of public properties of unprecedented importance including the entire Italian water management system.

In just a matter of hours, after a few outraged phone calls within a small group of former commissioners, a first draft of the referendum proposal dealing with these points was ready. In only ten days, ex-commissioners Alberto Lucarelli, Ugo Mattei, Stefano Rodotà, and Luca Nivarra with the help of constitutionalists Gianni Ferrara and Geatano Lazzaretti finalized the text for being published online.[20] The referendum adventure had begun. The first signatures on the three questions regarding water as a common (fully shared and endorsed by the Italian Forum for the Water Movements) began to be collected in notarized form within a remarkable mobilization campaign.

The incredible number of signatures collected (over 1.5 million in three months from April 22, 2010 to July 13 the same year) on a very limited budget and with no help from the media remains legendary.[21] According to Italian law, once the signatures have been collected, the Constitutional Court rules on the admissibility of each single question of the referendum. Two of the three proposals passed, while the Constitutional Court disallowed the third (Decisions 23, 24, 25 2011). The contested issue of admissibility (especially of referendum no.1, the most important one) was the claim by the government attorneys that the Ronchi-Fitto Decree prescribing the auctioning off of public services was itself based on a prescription of European Law to member States. Because laws that carry out international obligations cannot be the

object of a referendum according to Article 75 of the Italian Constitution, the government argued that the referendum could not be held. The Court, however, completely accepted our argument, which this author personally articulated in front of it, (already articulated during the campaign of signature collection) that such an obligation did not exist under European law. The fact that a statute (such as the Ronchi-Fitto one) declares itself to be the execution of an obligation of European law is irrelevant if such an obligation does not actually exist in European law itself. A member State cannot make up its own obligation. The Court held that European law does not mandate member States to privatize or auction off local public services provided “in house;” it is actually indifferent to the form and the proprietary choices that the member States wish to pursue.

However, the Court rejected the third question (ban on the use of the stock corporation form in the managing of commons), mainly because of a “suicide question” put forward somewhat senselessly by the Italia dei Valori [Italy of Values]. This party, in retaliation for having been rejected (as all political parties) by the organizing committee of the referendum, presented its own referendum on water by means of a question whose admission could not be granted because of its inherent contradiction with our third question. The Court seized the opportunity to reject both questions to avoid the risk of contradictory results. However, this unfortunate political accident greatly distorted the original design of the entire package. Our idea was to ban the stock corporation (*spa* in Italian law) from the management of the commons, especially water. In fact, short-term profit is in the DNA of the stock corporation, an objective that is strongly at odds with the philosophy of commons management. As we shall see, the fact that the Court did not admit the third referendum has determined the current situation, with the City of Naples remaining unique in Italy in attempting genuine institutional experimentation for participatory public management of the commons.

4. The Outcome of the Referendum and the Political Strengths of the Commons

Equally unique in Italian history was the result of the referendum (almost 27 million voted YES to the abolition of the challenged laws) that was proclaimed on June 14, 2011. Despite the government’s strategy to postpone the referendum to when schools are closed, right after an administrative vote that had already brought Italians to the polls twice in the previous weeks, the referendum easily exceeded the turnout quorum of 50% of the electorate, a hurdle that is usually sufficient to defeat most referendums in Italy¹. Perhaps even more interesting on the political and cultural levels is that the notion of “commons” (*beni comuni*) and the movement surrounding it (sometimes known as “*benicomunismo*” that roughly translates as “commonism”) grabbed its place in the sun within the Italian political debate during the referendum’s preparation period to become a key-word of Italian politics.[22]

In early 2011 one of the most important trade unions, FIOM (Federazione Impiegati ed Operai Metalmeccanici – union of metalworkers, blue- and white-collar) organized a major demonstration under the slogan “Labor is a common.” The NO TAV[23] movement, whose twenty-year struggle against the 56 kilometer-tunnel perforating the Alps to Lyon, is legendary also organized its first major demonstration in Turin (attended by 25,000 people) under the slogan “NO TAV is a common.” Moreover, mass student protests were claiming the “University as a common.” Finally, on June 14, 2011, the Teatro Valle (a particularly generative[24] experience discussed in this publication as well) was occupied in Rome and declared a common which spawned a huge occupy movement labeled “Culture is a common.” All of these

¹ See for more details on the context, Ugo Mattei, Water, Culture and Nature: The Commons Movement in the Italian Struggle Against Neoliberal Governance, Vol. 112 South Atlantic Quarterly, p. 266, (2013); Saki Bailey & Ugo Mattei, Social Movement as Constituent Power. The Italian Struggle for the Commons, Vol. 20 Indiana J. Global Legal Studies, p. 965 (2013).

examples and other less well-known episodes have added to the awareness in Italy of the many ways in which the current phase of capitalist exploitation massively affects the commons and has produced a degree of social indignation that, despite its importance, is not enough by itself.

Many Italians have interpreted the notion of commons not only in theory. What emerged in 2010 and 2011 was a unifying political grammar for different actions opposed to different specific neoliberal views.^[25] The commons movement in Italy rejects the neoliberal vision of the water service (for profit); of work (as brute exploitation); of the university (as a place of corporate subculture); of rail transport (as a place of plunder founded on the logic of large public works); of the city (as a privatized place); of culture (as show business). After my small book *Beni comuni. Un Manifesto* [Commons. A Manifesto] was published at the right moment, reaching eight editions in a matter of a few months, I had the good fortune to experience first hand this very real “commonist” insurgence when I was invited all over the country. I witnessed the incredible number of ongoing struggles in Italy against plunder, exclusion, and concentration of power generated by the unholy alliance between the public and the private sector against the commons that characterizes the current European scenario. Thousands of committees all over the country have discovered that their single-issue struggles, having lasted perhaps for years (like, for example, NO TAV), are not isolated but connected to numerous others; different in appearance, yes, but in reality sharing objectives, enemies, and goals over long periods in their quest for a better world. Through the theory and praxis of the commons, single-issue indignation can finally see light at the end of the tunnel, something far greater to fight for.

Obviously, the totally unexpected “unofficial” political and cultural success of the theoretical grammar that originated with the Rodotà Commission was amplified by the worsening of the global economic crisis. The same economic issues behind the Spanish M15 and the American Occupy movement or perhaps the Arab Spring were also behind the Italian experience. However, the struggles in other Western countries proved on balance far more ephemeral than the Italian one, which was well entrenched in a solid relationship between theoretical-juridical elaboration and the praxis of movements.

5. The Suspension of the Constitutional System after the Referendum

Despite these clear signals of the resistance of a majority of the Italian people to the dominant neo-liberal rhetoric, various governments from 2011 onward – in cahoots with the President of the Republic – just responded by intensifying repression, and with pseudo-reformist rhetoric and authoritarian politics. Their implementation of aggressive neo-liberal policies and total indifference to the wishes of the people increased to the point of putting the constitutional legitimacy of the current Italian system of power very much in doubt. Attempts by Silvio Berlusconi and Mario Monti, twice halted by the Constitutional Court, to defy the result of the Referendum just a few weeks after its outcome was published by passing decrees which reproduced all the statutes that had just been abolished prove this point.

This first attack on the referendum’s outcome, the result of a joint letter sent to Berlusconi by the outgoing and the new President of the European Central Bank (Trichet and Draghi) happened a few days after the August break. It soon became clear that President Napolitano, who should be the Constitution’s supreme guarantor, would do nothing to block the Berlusconi decree (subsequently there was an even worse one by Monti), despite an appeal from some of the jurists, who had drafted the said referendum, and a petition with 10,000 signatures that the author collected personally in just a few days via an Internet website.

Eventually the Constitutional Court did justice to the commons movement, and

declared both the Berlusconi and the Monti decrees as unconstitutional (Decision 199-2012). However, this only happened a year later. The unconstitutional offensive against the commons thus continued for a year after the referendum with very little opposition.[26] The fall of the Berlusconi government in November 2011 did not help the commons movement; in fact, it created a certain vacillation amongst some of the jurists who to that point had sustained the commons. Some of them were so happy at the fall of Berlusconi they needed some time before realizing that, with the Monti administration and the incredible constitutional excess of Napolitano's power, Italy had jumped from the frying pan into the fire. Similarly, the commons movement was not helped by an unrealistic attempt to participate in political elections in April 2013 with a list containing some of its leaders (none of them were elected). Nor did the equally reckless use of the slogan "Italy as a common" to name a coalition help, also defeated, in which the lion's share of the candidates belonged to the PD (the Democratic Party), whose leadership has been traditionally cosy with the lobby of privatizers at both local and national levels. In reality, the party that captured much of the impetus emerging from the commons movement at the 2013 political elections was the M5S (Five Star Movement). This party, founded by a former comedian, had participated widely in many of the grass-roots battles of 2010 and 2011. It does not identify itself with either the right or the left, but expresses, at times with quite reactionary arguments, at times with remarkably advanced ecological and economic visions, a sense of indignation about the predatory nature of neo-liberal capitalism, of the European Union institutions, and of the Italian political élite. At the April 2013 general election the M5S became the first political party to get more than 24% of the vote, but because of the electoral law and the whim of the Italian President, Mr. Enrico Letta became the new prime minister, a favorite of Napolitano and of the European élite.

Since then, in spite of the Constitutional Court declaring the electoral law unconstitutional, a large coalition that nobody in Italy elected continues to govern the country in full continuity with the dominant European neo-liberal vision. Today, the leader of such a coalition is Matteo Renzi, a former mayor of Florence and a favorite of the section of the media industry that is an adversary of Berlusconi.

Meanwhile the de facto transformation of Italy into a semi-presidential constitutional order has been completed with the unprecedented re-election of Mr. Napolitano as president over the M5S candidate Stefano Rodotà (former President of the Commission), who was certainly supported by a very large proportion of the commons movement. The context outlined above provides an idea of the current suffering of democracy in a country that, after the European Elections of May 2014, plunged into a state of denial regarding the gravity of its current democracy sufferance with the privatization frenzy again high on the agenda of the Renzi government. Aggressive constitutional reforms are attempted by a government that was never elected and by a parliament that the Constitutional Court declared elected with an unconstitutional law.

Shocked by 27 million votes expressed against the will of all the political parties sitting in Parliament, the Italian power elite, under constant pressure from European technocracy, has launched a *constituent phase*, clearly beyond any constitutional legality, as a reaction to the commons referendum. What has been staged is a de facto attempt to constitutionalize an authoritarian transformation of our system, well evidenced by the flamboyant rhetoric of the current Prime minister.

6. The Repression Directed against the Commons Movement

This is not the place to expose the long list of "legal illegalities"[27] [...]. Suffice to consider the many instances of civil, administrative, and criminal violations perpetrated against the people by police, prosecutors, and authorities in the Susa Valley in order to defeat twenty years of struggle against a high-speed train (TAV). Or the affair of the Torre Galfa in Milan, a long abandoned and unfinished skyscraper, the

property of absentee and criminally indicted tycoon Salvatore Ligresti, which is located near the Central Station. This tower block was occupied by the Macao collective as part of the insurgence for culture as a common with a view to opening it up for an experience of urban commoning which would have included a refuge for homeless people. The occupation, involving hundreds of active citizens and artists, was cleared by police in just a few hours, all under the watchful eye of leftist-leaning “friendly” Mayor Giuliano Pisapia. It soon became known that the son of Interior Minister Annamaria Cancellieri was an executive of the Ligresti Group, which explains the hasty intervention of the police with the full political backing of the Mayor. Now, more than two years later, Ligresti is in jail, but thanks to the short-sightedness of the political leaders, the tower is still empty and hundreds of Syrian refugees, including women and children, sleep rough in Milan Central Station. Other Italian examples of recent illegal (and unpunished) uses of the law are found in L’Aquila. The historical center of this beautiful central Italian town was devastated by a major earthquake in 2009. To protest about the scandal of the inactivity by public agencies and against the “business of reconstruction” a number of activists have entered the “red zone” to physically remove debris using their own wheelbarrows. These activists, heroes of civic participation and of commoning, have been criminally charged while at the same time the public media were reporting on massive fraud involving the funds for reconstruction! Last but not least we should mention the criminal charges against the No dal Molin protesters of Vicenza – a movement opposed to the construction of a U.S. Army base at the local airport. In this beautiful city of northeastern Italy, world famous for its Palladian villas, the movement succeeded in stopping a project that would have transformed Vicenza into one of the biggest military bases in Western Europe. Rather than honoring these activists [...] they were prosecuted in large numbers!

PART II.: The Institutionalization of the Commons

7. The Constituent for the Commons

Once it became clear that the clash over the commons was of constitutional magnitude in Italy, the consequence was to shift the struggle at the constituent level. [28] On April 13, 2013, in what in retrospect can be seen as an inconsequential presidential bid by Stefano Rodotà, the commons movement launched the “Costituente dei beni comuni” [Constituent for the commons] at the Teatro Valle in Rome in a very crowded assembly. The Constituent as the political heir of the Rodotà Commission, was highly aware of the political transformation that the commons, both theoretically and practically, have accomplished since their introduction in the bill of 2007. It is no accident that the Constituent was launched at the Teatro Valle, the occupied theater which for three years has performed the role of national trailblazer in the fight for the institutionalization of the commons, generating a unique artistic, political, and juridical experience. It now entered a new phase [...]. The idea to “revive” the Rodotà Commission as an itinerant body that would meet in the venues of the most significant commons struggles, was also a move of indignation caused by the complete official neglect of its 2008 bill, which was never discussed in open parliamentary session in all these years despite the importance and the timely nature of the commission’s work. [...]

In the absence of a delegation by Parliament to draft a detailed law on the commons, the jurist of the Constituent decided to get the delegation directly from the people. Of course, this move has created some strain within the jurist’s group as some were openly opposed to this extra-parliamentary move while others have remained rather ambiguous. Nevertheless, the Constituent for the commons organized itself around two organisms: the Territorial Assemblies, in which itinerant jurists meet with territorial assemblies in which many local struggles for the commons present themselves, and the Redacting Commission that produces the actual textual proposals. At the territorial Assemblies, the jurists collect the materials and ascertain

the legal issues that emerge in the different fights for the commons. They interrogate the various commoners and receive opinions and reflections from the people involved. This information and the materials collected become one of the important **“law in action”** ingredients for the production, during redacting meetings, of a sort of “restatement of the commons.” This restatement details and follows up on the Rodotà Commission’s enabling bill, something that should have officially happened if, in working democratic conditions, Parliament was to take seriously and approve the work of the Ministerial Commission. From a much broader perspective, which justifies its Constituent claim, the itinerant work is a process of people’s alphabetization in the commons. Further, it is a process by which jurists, rather than receiving authority from an established constitutional setting, actually seek in their capacity to translate the active citizens’ vision of the commons into a formal legal language and grammar. *Si parva cum magna licet comparare*, we are seeking to formalize in jurist’s terminology a sort of adapted Savigny’s *Volksgeist*.

The Constituent’s work is slow but constant. Some jurists quit and some others come on board, which is a proof of the fact that nobody is indispensable, but everybody can be useful when it comes to collective enterprises. In its first year and a half there have been territorial assemblies with activists in L’Aquila, Pisa, Rome, Padua, Susa, Naples, and Macerata. Furthermore, the jurists involved have met at Rome’s Teatro Valle three times, and one meeting in Naples produced the first sections of the Commons restatement, which applies and interprets existing law and makes it evolve in a way that is coherent to the people’s claim to recover and generate new commons. The innovative working method and the unprecedented alliance between the jurists and the movements constitute a political factor of considerable importance. It is a genuine bottom-up process potentially extensible beyond the Italian borders.[...]

8. ABC Naples

The other front on which the struggle in defense of the commons, especially of the historical victory of the water referendum, is hot and fierce is in the more technical but not less political domain of public service management models. Despite the fact that referendum no. 3 was not admitted by the Constitutional Court (see above), it was crucial in the struggle for the commons to develop an institutional setting somewhere that is coherent with their nature. Such a setting must be capable of demonstrating the possibility of a viable alternative to disprove the mainstream claim that in running important industrial infrastructures, such as an aqueduct, there is no alternative to the stock corporation (SPA). Those who do not understand (or do not want to understand) the epistemological revolution of the commons often maintain that keeping a majority of its capital in public ownership is more than sufficient to respect the referendum results. This vision, however, does not go beyond the binary opposition private vs. public, and de facto reduces the issue of the commons to the need to protect the public sector from privatization of its ownership. Such a vision fails to distinguish the commons from public ownership.

The unexpected victory of an outsider, former prosecutor Luigi De Magistris, in the election for Mayor of Naples just a few weeks before the referendum of June 2011 provided an extraordinary political opportunity for the commons movement to experiment with a genuinely alternative model of governance of the commons. The mastermind of this political opportunity was Alberto Lucarelli, a member of the Rodotà Commission and one of the main architects of the water referendum, whom de Magistris appointed to the City administration in the new post of Assessor to the commons. De Magistris also appointed myself, a former vice president of the Rodotà Commission and drafter of the referendum, to serve on the board of directors of the municipal water company, ARIN S.p.A., a stock corporation group with around 500 employees and about 200 million Euros of business activity. The mission was to steer the first transformation of a major stock corporation into a new public legal entity

capable of shielding the water system from the risks of privatization, and at the same time to guarantee the degree of direct civic participation that the commons's nature requires.

It is crucial from the theoretical point of view when engineering new institutions of the commons to consider direct civic participation as an alternative to traditional hierarchical public control, which happens when the public authority simply owns the corporation. This philosophy of equidistance (the same radical distance) of the commons from the private *and* from the public is a concept that is very difficult to grasp, especially by the left, who still tend to believe the myth of the "good government." In Naples we started the experiment of a legal form of genuine respect of the referendum outcome grounded in such a philosophy. After Lucarelli left the local government to seek a parliamentary seat – unsuccessfully – it was very unclear to me whether the Naples administration had really understood what we were trying to do. In fact, constructing a genuine commons institution takes power away from the public. Any administration seriously committed to the commons has necessarily to engage in a *destituent* act, that is, a choice of returning direct power to the people.

Thus, a great deal of patience and research is required, both legally and politically. With regard to the first point, in order to do the formal transformation, it was necessary to interpret Italian law in a manner coherent with the referendum results. This required "forcing" a formal legal structure that includes recently introduced Civil Code provisions (Art. 2500 cc.) which are privatization-friendly and do not contemplate the possibility of changing the bylaws of a stock corporation to transform it into a public entity. It took almost a year of legal discussion, with the acquisition of many expert declarations on all relevant legal aspects (tax, labor law issues, welfare issues, issues of EU law, etc.), to persuade a notary to sign the proposed Board deliberation to transfer ARIN S.p.A. into ABC Naples Azienda Speciale based upon this interpretation. The turning point was the rendering of decision 199\2012 of the Constitutional Court, which offered the basis for a constitutionally oriented interpretation of the Civil Code. The Court, after hearings in which Lucarelli and myself argued against the Italian government and on behalf of the Puglia region, [30] declared the Berlusconi/Monti attempts to cancel the referendum results (see above) unconstitutional. That landmark decision declared that the referendum has a surplus of legitimacy compared to ordinary statute making, so that all relevant Italian law must be interpreted coherently to it.

On the political ground, resistance had to be overcome within the three member-Board of Directors where the sitting President, representing a variety of strong vested interests both at the city and at the national level, opposed the transformation. Eventually, after his quite dramatic resignation in July 2012, I took over the Presidency, a new Vice President was nominated, and the formal act of transformation could finally be entered upon on November 30, 2012. Following this act, duly recorded by the President of the National Notarial Council, the whole process was completed with the registration of the new entity at the Naples Chamber of Commerce on April 22, 2013.

From the formal point of view, this transformation into a public entity is a major victory. Stocks are easy to sell and especially to mortgage to a bank. Because of their legal nature they actually transform the water system into a tradable commodity which is de facto owned by the private sector (banks) also when it is formally in public hands. No such possibility to sell or to mortgage the capital is open to the public entity Azienda Speciale so that strictly speaking one can claim that the water in Naples is now shielded from privatization. Nevertheless, as is becoming clear during these two plus years since the transformation, this is not enough to claim "mission accomplished!" in the making of a new institution of the commons.

A commons institution requires a DNA (corporate bylaws) coherent with the mission of governing the commons in an ecologically sustainable, socially responsible,

long-term philosophy. Of course, this mission can only be accomplished if the entity is economically and financially well run, which depends not only on the quality of its management and of its workers, but also on the flexibility, adaptability, and efficacy granted by its bylaws. Some agency of control deploying some kind of standard must control the degree of accomplishment of the mission enshrined in the DNA of any organization. In the case of the stock corporation, whose DNA requires its officers to pursue profit and shareholder value, the market is such an agency of control. In the case of an organization belonging to a municipality, whose vocation is to serve the interest of the administration in office “as if” the administration was carrying on the activity directly (this is the so called *in house* providing method), the agency of control is the political process represented by the elected or appointed officials of the municipality. The standard which they apply, rather than long-term ecological interest of future generations, is their possibility of being re-elected, thus the running of the business very much depends on which political party is in office and what the politicians are trying to signal to their constituency.

In the case of a commons organization that serves the interests of ecology and of future generations, neither of these traditional agencies of control is appropriate. In Naples we have opted for a “Comitato di sorveglianza” [supervisory board], a sort of multi-stakeholder panel composed of five employees (elected by their peers), five customers (decided by random selection from those that signal their interest), five members of the City Council (politicians), and five activists from environmental movements. Oddly, this latter is the only component that has not yet selected its representation because of the usual infighting of the left which I do not wish to discuss here. The idea is that such a multi-stakeholder board can check the way in which the administrators (appointed by the Mayor) carry out their duty to be faithful to the generative DNA of ABC.[31]

This institutional solution in Naples is still in a phase of experimentation and many adjustments are possible. However, direct participation in the running of the commons can actually happen according to this model if we succeed in making the supervisory board strong, ecologically literate, and independent. In the future, maybe many “commons institutions” will take a similar organization form that experiments with governance which is neither the private corporate structure nor the obsolete direct political-administrative running of public services. Currently, there is a quite serious controversy because of an attempt by the municipality to change the bylaws of ABC incrementing rather than reducing hierarchical bureaucratic controls, and an attempt by the Campania region (run by the right) in the opposite direction to re-open an opportunity for privatization.[32]

A lot of experimentation must happen and it is not easy to carry it on in a very stormy political climate. For example, we can move some interesting steps in the right direction if the supervisory board at some point runs a “matrix of the commons,” a sort of balance-sheet of the commons capable to monitor the environmental and social impact, as suggested by the *Gemeinwohl-Ökonomie*, in its evaluation of the management’s performance. On this specific issue, a working group is in place, at the International University College in Turin.[33] Also crucial is to work on the correct division of power between the administrators and the supervisors. All of this can be experimented on in the future, when and if we are able to make ABC an institution that is actually emancipated by the intervention of a contingent political majority. This is not yet the case in practice in Naples, where recently I am experiencing quite some reluctance on the part of the municipality to actually hand over real power to the new commons institution. At any rate, ABC is the most advanced publicly owned commons institution that was possible to create thus far. [...] Numerous battles, both legal and political, still await us.

9. Towards Federcommons

Aware as it is of representing the desires of the vast majority of Italians (as became clear in the water referendum), the struggle for the commons tries to explore alternative institutions. ABC Naples, together with other companies in the domain of public utilities, is promoting the birth of *Federcommons*, an association aiming to link the more than 4000 public services companies, which are still 100% publicly owned, to prevent their privatization. The attempt is to try to propose, beyond water management, the exploration of legal forms progressively more suitable for running the commons. This organizational effort in its way is also an exciting challenge, because the current association of utility providers (in which private companies are very strong), *Federutility*, has de facto monopolized the work of lobbying and interpretation of an extremely complex legal system. Unfortunately, lawyers representing *Federutility* filed amicus briefs against the admissibility of the water referendum, so it is clear that a hard-nosed look at the matter of political representation of the public services is now in order. This requires, of course, the establishment of a robust study center as well as an organization devoted entirely to the commons in the public services, which is capable of authoritative, organized pressure on the legislator to change some of the many governance mandatory rules that still limit the viability of commons institutions in the crucial domain of public services.

In Italy the commons movement, thanks to a particularly productive alliance with jurists, has developed a quite sophisticated vision of a possible other path, neither private nor public, but common in the governance of deep fundamental interests such as water, transportation, culture, welfare, and much more. The Valle Theater Foundation in Rome and the ABC water company in Naples, different in both genesis, subject matter, and current condition, are important prototypes of this long-term vision of commons management, which is not a mere “third way,” but actually an emancipatory alternative against the unholy alliance of private capital and government institutions. Both these institutional experiments are embattled in different ways, but they are both proving quite resilient first examples of institutions of the commons. In Italy, and this is possibly the most important characteristic of our experience, despite the dramatic state of our democratic process, we are finding the energies to move from simple indignation to the patient, relentless reconstruction of an alternative system from the bottom up.[34]

Notes

[1] For an attempt to collect international energies for such a struggle, see: David Bollier and Silke Helfrich (eds.), *The Wealth of the Commons. A World Beyond Market and State*, Levellers Press, Amherst (MA), 2012.

[2] An English version of the Rodotà Commission Bill is available online at: http://iuccommonsproject.wikispaces.com/file/view/Rodota+Commission+Bill_+EN.pdf, accessed 08/13/2014.

[3] ARIN stands for Azienda Risorse Idriche di Napoli [Water Resources Company of Naples].

[4] The S.p.A (società per azioni) is the Italian equivalent of the public limited stock company. On this subject see, for example: Salvatore Settis, *Italia S.p.A.: L'assalto al patrimonio culturale* [Italy S.p.A.: The Assault on the Cultural Heritage], Einaudi, Turin, 2007.

[5] ABC stands for Acqua Bene Comune [water as a common good].

[6] The decree is available online in Italian at:

www.parlamento.it/parlam/leggi/decreti/09135d.htm, accessed 08/13/2014.

[7] See: Ugo Mattei, *Contro riforme* [Counter Reforms], Einaudi, Turin, 2013.

[8] See:

www.corteconti.it/export/sites/portalecdc/_documenti/controllo/sez_centrale_controllo_amm_sta_to/2010/delibera_3_2010_g_relazione.pdf, accessed 09/11/2014.

[9] See: Ugo Mattei, “Proprietà (nuove forme di),” in: *Enciclopedia del diritto*, vol. 5, Giuffrè Editore, Milan, 2012, pp. 1125–1131.

[10] See: Ugo Mattei, *Beni comuni. Un Manifesto* [Commons. A Manifesto], Laterza, Rome, 2011.

[11] See: Ugo Mattei, Edoardo Reviglio, and Stefano Rodotà, *Invertire la rotta. Idee per una riforma della proprietà pubblica* [Change Direction. Ideas for a Reform of Public Property], Il

Mulino, Bologna, 2007.

[12] See: www.giustizia.it/giustizia/it/mg_2_7_6_1.wp?previousPage=mg_7_7, accessed 09/11/2014.

[13] See: Stefano Rodotà, *Il terribile diritto. Studi sulla proprietà privata e i beni comuni* [The Terrible Right. Studies on Private Property and the Commons], 3. ed., Il Mulino, Bologna, 2013.

[14] See: Ugo Mattei, Edoardo Reviglio, and Stefano Rodotà (eds.), *Dal governo democratico dell'economia alla riforma del Codice Civile* [From the Democratic Government of Economy to the Reform of the Civil Code], Accademia Nazionale dei Lincei, Scienze e Lettere, Editore Commerciale, Roma, 2010.

[15] See: www.giustizia.it/giustizia/it/mg_2_7_6_1.wp?previousPage=mg_7_7, accessed 09/11/2014.

[16] See: Alberto Lucarelli, *La democrazia dei beni comuni* [The Democracy of Common Properties], Laterza, Rome, 2013.

[17] See: www.acquabenecomune.org/raccoltafirme/index.php?option=com_content&view=article&id=1060&Itemid=122, accessed 09/02/2014.

[18] See: Supreme Court of Cassation S.U. 14-2-2011 no. 3665, available online at: www.ricercagiuridica.com/sentenze/sentenza.php?num=3471, accessed 09/11/2014.

[19] Art. 121 of the Italian Constitution gives regions the power of legislative initiatives at the National Parliament.

[20] See: www.acquabenecomune.org/spip.php?article7196, accessed 09/02/2014.

[21] For a very recent detailed discussion of the legal issues involved in the referendum see: Ugo Mattei and Alessandra Quarta, *L'acqua e il suo diritto*, Ediesse, Rome, 2014.

[22] For a variety of experiences see: Paolo Cacciari, Nadia Carestiatto, and Daniela Passeri, *Viaggio nell'Italia dei Beni Comuni* [A Journey through the Italy of Common Properties], Marotta & Cafiero, Naples, 2012.; Gregorio Arena and Christian Iaione (eds.), *L'Italia dei beni comuni* [The Italy of Common Properties], Carocci, Rome, 2012.

[23] TAV stands for Treno Alta Velocità [High Speed Train].

[24] With regard to the use and explanation of the term “generative” in this context see: Marjorie Kelly, *Owning our Future. The Emerging Ownership Revolution. Journeys to a Generative Economy*, Berrett-Koehler, San Francisco (CA), 2012.

[25] See: Giovanna Ricoveri, *Beni comuni vs Merci* [Commons vs. Goods], Jaca Book, Milan, 2010.

[26] Carried on with the “spending review,” itself declared unconstitutional in the section opposed to the referendum in the very recent 229/2013 decision.

[27] See: Ugo Mattei, Laura Nader, *Plunder. When the Rule of Law is Illegal*, Blackwell Publishing, Malden (MA), 2008.

[28] On this dimension of the struggle for the commons see: Sandro Chignola (ed.), *Il diritto del comune. Crisi della sovranità, proprietà e nuovi poteri costituenti* [The Right of the Municipality. Crisis of Sovereignty, Ownership, and New Powers Constituents], Ombre Corte, Verona, 2012; Michael Hardt and Antonio Negri, *Comune. Oltre il privato e il pubblico* [Common. Besides the Private and the Public], Rizzoli, Milan, 2010.

[29] See: Antonello Ciervo, *I beni comuni* [Commons], Ediesse, Rome, 2013; Alberto Lucarelli, *Beni Comuni. Dalla teoria all'azione politica* [Commons. From Theory to Political Action], Dissensi, Viareggio, 2011; Maria Rosaria Marella, *Oltre il pubblico e il privato. Per un diritto dei beni comuni*, [Beyond Public and Private. For a Right of Commons], Ombre Corte, Verona, 2012.

[30] The Italian Constitution allows a region to directly challenge the constitutionality of a statute. Because the Campania region is run by a right-wing government, the constitutional challenge was made possible by the Puglia region whose president Nichi Vendola, a genuine supporter of the referendum results, appointed Lucarelli and myself as counsels for the region.

[31] I owe the distinction of extractive vs. generative DNA of a property arrangement to Marjorie Kelly's *Owning our Future* (2012).

[32] The discussion on the transformation of the bylaws of ABC was quite fierce in the summer of 2014. See amongst others:

<http://ricerca.repubblica.it/repubblica/archivio/repubblica/2014/08/11/mattei-scrive-al-sindaco-se-vuole-cambi-vertice-ma-prima-sinformi-beneNapoli02.html?ref=search>;

<http://ricerca.repubblica.it/repubblica/archivio/repubblica/2014/08/08/liscia-gassata-o-competitiva-e-scontro-sullacqua-pubblicaNapoli01.html?ref=search>;

<http://ricerca.repubblica.it/repubblica/archivio/repubblica/2014/08/07/cosi-lazienda-abc-e-destinata-a-fallireNapoli01.html?ref=search>, all accessed 09/03/2014.

[33] See: www.iuctorino.it/content/smart-watertech, accessed 09/11/2014.

[34] See: Salvatore Settis, *Azione popolare. Cittadini per il bene comune* [Popular Action. Citizens for Common Properties], Einaudi, Turin, 2012.