dirittifondamentali.it

Dirittifondamentali.it - Fascicolo 2/2024
Data di pubblicazione – 24 luglio 2024

Commons and Constitutionalism
(A Brief Overview)

di
Antonio Ignazio Arena*

1. The Aims of the Essay

In the pages of the *Discourse on the Origin of Inequalities*, Rousseau writes: 'The first man who, having enclosed a piece of ground, bethought himself of saying this is mine, and found people simple enough to believe him, was the real founder of civil society'. From this action, 'how many crimes, wars and murders […] how many horrors and misfortunes'[1]!

This passage is usually quoted in connection with the right to property[2]. In reality, Rousseau recognizes here the beginning of 'social evil' in two interrelated acts: a first that changes the environment and a second that privatises the community's resources.

One of the greatest challenges facing democracies today is the distinction between permissible and impermissible privatisation, between a virtuous use of natural

* Ricercatore (TD B) in Diritto costituzionale – Università degli Studi di Messina.

[1] J.-J. ROUSSEAU, *Discourse on the Origin of Inequality*, transl. G.D.H. Cole, International Relations and Security Network, 2008, 29.

[2] B. RUSSELL, *History of Western Philosophy*, Routledge, 2009, 626.

Contributo sottoposto a referaggio

resources and non-environmentally sound behaviours and laws that, as such, violate human rights. As suggested by Rousseau's *Discourse*, there is a connection between impermissible privatisation and the improper use of environmental resources.

Indiscriminate privatisation of public goods and services[3] and insufficient attention to environmental protection[4] are precisely the problems identified by the theory of the commons, and they are of crucial importance.

However, the premises from which the theory of the commons was developed can be criticized.

It is not true that there are no constitutional limits to privatisation in modern democracies. Nor is it true that environmental protection plays only a subordinate role in the context of modern constitutionalism. Moreover, the indiscriminate use of privatisation can have a negative impact on environmental protection. Nevertheless, not necessarily. And limiting privatisation can help create the economic conditions to protect the environment, but it is not enough.

To demonstrate this, paragraphs 2-3-4 examine various theoretical approaches to the limits of privatisation. Paragraphs 5-6 analyse 'transnational'[5] constitutional principles. Principles that can be invoked to limit the indiscriminate use of privatisation.

---

[3] See N. BRUNE, G. GARRETT, and B. KOGUT, *The international monetary fund and the global spread of privatization*, in *International Monetary Fund Staff Papers*, n. 2/2004, 195; H. OBINGER, C. SCHMITT, and S. TRAUB, *The Political Economy of Privatization in Rich Democracies*, Oxford University Press, Oxford, 2016; C. SCHMITT, *The diffusion of privatization in Europe: Political affinity or economic competition?*, in *Public Administration*, n. 3/2014, 615.

[4] With respect to the US, just think of the Supreme Court's decisions in two recent cases: the 2022 *Clean Power Plan* case, which limited the Environmental Protection Agency's authority to regulate emissions from power plant, and *Sackett* v. *EPA*, in which the Court curtailed the 1972 Clean Water Act.

[5] *Ex plurimis*, see S. BESSON, *Human Rights as Transnational Constitutional Law*, in A.F. LANG and A. WIENER (eds), *Handbook on Global Constitutionalism*, Elgar, Cheltenham, 2017, 234-47; R. COTTERRELL, *What is Transnational Law?*, in *Law & Social Inquiry*, n. 2/2012, 1; P.C. JESSUP, *Transnational Law*, Yale University Press, New Haven, 1950; O. PEREZ and O. STEGMANN, *Transnational Networked Constitutionalism*, in *Journal of Law and Society*, n. 1/2018, 135-162; C. SANTOS BOTELHO, *Transnational Constitutional Law*, in R. GROTE, F. LACHENMANN, and R. WOLFRUM (eds), *Max Planck Encyclopedia of Comparative Constitutional Law*, Oxford University Press, Oxford, 2020, 1-15; P. ZUMBANSEN, *Transnational Law*, in *Comparative Research in Law & Political Economy*, n. 2/2002, 738.

This paper therefore has a dual purpose: it discusses the problems underlying the commons theory and emphasizes its importance. At the same time, it seeks to put forward alternative arguments rooted in the traditional categories of constitutionalism, and derived from constitutional theory and the constitutional principles of contemporary democratic systems; principles that can be said to integrate a 'transnational constitutional law'.

2. Introductory Considerations

2.1. Commons: The Search for a Definition

The theory of the commons has been developed by scholars whose conceptions are not always entirely coincident[6].

As noted by Capra and Mattei, 'there is no recognized legal definition of the commons. However, scholars broadly agree that commons are neither private or public. Not are they understood as a commodity, as an object, or as a portion of the material or immaterial space that an owner, private or public, can put on the market to obtain their so-called exchange value. The commons are recognized as such by a community that engages in their management and care not only in its own interest but also in that of future generations. In fact […] the commons are the opposite of property'[7].

[6] L. FERRAJOLI, *Beni fondamentali*, in *Tempo di beni comuni. Studi multidisciplinari*, Fondazione Lelio e Lisli Basso – Issoco, Roma, 2013; P. GROSSI, *'Un altro modo di possedere'. L'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria*, Giuffrè, Milano, 1977; M. HARDT, A. NEGRI, *Commonwealth*, Belknap, Cambridge (Mass.), 2009; E. OSTROM, *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge University Press, Cambridge, 1990. For critiques of the category of "commons", between Italian scholars, see M. BARBERIS, *Tre narrazioni sui benicomuni*, in *Ragion pratica*, n. 2/2013, 381 ff.; L. D'ANDREA, *I beni comuni tra pubblico e private*, in S. STAIANO (ed), *Acqua. Bene pubblico. Risorsa non riproducibile. Fattore di Sviluppo*, Jovene, Napoli, 2017, 123 ff.; M. LUCIANI, *Una discussione sui beni comuni*, in S. Staiano (ed), *Acqua*, 75 ff.; A. SAITTA, *I beni comuni nella giurisprudenza costituzionale*, in L. D'ANDREA, G. MOSCHELLA, A. RUGGERI, A. SAITTA (eds), *Crisi dello Stato nazionale, dialogo inter-giurisprudenziale, tutela dei diritti fondamentali*, Giappichelli, Torino, 2015, 216.

[7] F. CAPRA and U. MATTEI, *The Ecology of Law. Toward a Legal System in Tune with Nature and Community*, Barrett-Koehler Publishers, Oakland (CA), 2015, 149.

Therefore, some goods (regardless of their ownership regime, whether public or private) should be considered 'commons'. This is because they are essential for the members of the political community, to be able to fully exercise their fundamental rights.

Since many goods can only be used through an organized service, the theory of the commons implies that a large number of services should also be removed from the 'proprietary logic' and, independently from their character as public or private services, be managed by the community in a way that is open and participatory for all.

However, it is not easy to determine which goods and services should belong to the commons.

In any case, under the theory of the commons, a public good or service is not constitutionally protected from privatisation. It is possible for the public good or service to become the property of private individuals/companies, by statute (or equivalent) or on the basis of statutory provisions. In this case, a good or service that should belong to the community is managed by private actors in order to satisfy particular interest. The community as a whole is thus deprived of an indispensable resource.

In this respect, Mattei is very clear[8]. While liberal democratic constitutions provide for strict safeguards and conditions (right to compensation, legal discipline, etc.) in the event of a nationalization, no guarantee is provided for the opposite case, namely privatisation.

The connection between the goal of an 'ecological understanding of law' and the limitation of privatisation can best be understood if one starts from the philosophical assumption of the theory of the commons.

Commons are defined on the basis of the overcoming the distinction between 'subject' and 'object'. This distinction is considered the fruit of modern thought (in particular, of Descartes' contrast between *res cogitans* and *res extensa*[9]). While nature

[8] U. MATTEI, *Beni comuni. Un manifesto*, Laterza, Roma-Bari, 2012, V.

[9] See F. CAPRA and U. MATTEI, *The Ecology of Law*, 40. On Descartes' thought see M. ROZEMOND, *Descartes's Dualism*, Harvard University Press, Cambridge (Mass.), 1998.

was understood in antiquity as a place of the sacred, in modernity it becomes an 'object' that human being (as a separate subject) wants to exploit[10]. And exploitation takes place in a way that does not respect nature itself, through processes of privatisation, i.e. of exclusion and subtraction of once collective resources from their common destination.

2.2. Other terminological Clarifications

The privatisation to which the theory of the commons refers is substantial ('hot privatisation'), i.e. it refers to the actual management of (the good and) the service, which involves the exit of the provider from the sphere of public finance (regardless of formal qualification of the ownership of the good/service or of the provider). Privatisation is not necessarily synonymous with deregulation or liberalization and does not inescapably imply a contraction of State activities, but it certainly means that they are carried out differently[11].

According to the theory of the commons, in contemporary democracies there are no limits to *substantial* privatisation.

Even scholars who are not in favour of the introduction of the category of 'commons' have supported the non-existence of constitutional limits to privatisation.

In some cases, they believe that these limits would be incompatible with the protection of fundamental freedoms in the economic sphere[12] and that privatisation is a process to be considered in a purely utilitarian term[13].

In other cases, they consider the absence of constitutional limits to privatisation problematic. Later in this paper the theory proposed by Cordelli is examined,

[10] See F. CAPRA and U. MATTEI, *The Ecology of Law*, 172-188.

[11] C. CORDELLI, *The Privatized State*, Princeton University Press, Princeton, 2020, 3.

[12] J. FLANIGAN, *Coercion and Privatization*, in J. KNIGHT and M. SCHWARTZBERG (eds), *Privatization*, New York University Press, New York, 2019, 145-164; J. FREEMAN, *Extending Public Law Norms through Privatization*, in *Harvard Law Review*, n. 5/2003, 1285.

[13] H. DEMSETZ, *Toward a Theory of Property Rights*, in *American Economic Review*, n. 2/1967, 347; J. HEATH, *Public-Sector Management Is Complicated*, in J. KNIGHT and M. SCHWARTZBERG (eds), *Privatization*, 200-220. See also J. HEATH, *Anodyne privatization*, in *Erasmus Journal for Philosophy and Economics*, n. 2/2023, 25–65.

according to which in contemporary democracies 'we need a constitutional amendment to limit the privatization of public functions'[14].

It is certainly true that the presence of these limits is not clearly established and it is not peaceful. In any case, it is possible to indicate which arguments can be developed within the framework of constitutionalism to limit the indiscriminate use of privatisation.

It is, however, necessary, preliminarily, to also clarify in what sense the word 'constitutionalism' is used here.

'Constitutionalism' can be defined as the historical and thought movement according to which every political community should have a 'constitution'. So, it becomes essential to agree on the use of this last word.

It is necessary to distinguish, first of all, between 'constitution in the formal sense' and 'constitution in the substantive sense'. A constitution in the formal sense is a document (or a set of documents) in which fundamental principles and rules for social coexistence are collected. A constitution in the substantive sense is the set of fundamental principles and rules of a political community, whether derived from written provisions or not. Every political community has a constitution in the substantive sense, not necessarily a constitution in the formal sense[15].

In any case, when the word 'constitutionalism' is used, and it is stated that every political community must have a 'constitution', it is not intended to ignore its contents. The word 'constitution', in fact, can be used to refer to a historical reality, that is, to a positive constitutional order, in force in a given space and time, or to an idea (constitution in the ideal sense).

In the case of 'constitutionalism' the reference is to the constitution in a substantive sense (because it does not matter that there is a constitution in the formal sense) and in an ideal sense (because, according to constitutionalism, not every positive constitution is a 'true constitution').

[14] See C. CORDELLI, *The Privatized State*, 283.

[15] See D. GRIMM, *Constitutionalism. Past, Present and Future*, Oxford University Press, Oxford, 2016, 44.

'Constitution', in the meaning this word assumes within constitutionalism, is only that which responds to certain principles of justice. They are usually indicated with a mention of the article 16 of the *Declaration of the Rights of Man and Citizen* of 1789: the political community in which the separation of powers is not established and the protection of fundamental rights is not ensured does not have a 'constitution'.

Therefore, 'constitution' is only that which is consistent with a specific conception of justice. This is an idea that developed in the modern era, especially starting from the 17th-18th century. Constitutionalism presupposes a concept of justice and the affirmation by which 'constitution' can truly be defined as that complex of principles and rules which, regardless of the historical peculiarities that distinguish it, is consistent with it.

It is very important to understand that in constitutionalism goods and services are conceived either public or private. There is no space for the category of 'commons'. This depends on historical and theoretical reasons.

From the point of view of the constitutional history, it must be observed that the discussion on the protection of fundamental rights develops essentially from the perspective of protecting the individual from public power[16]. This is also the reason why while the constitutional limits to nationalization are generally explicit[17], those to privatisation are not so clearly stated.

Furthermore, constitutionalism was born together with a modern thought that exalts the ability of human beings to improve their living conditions and in a historical context in which the negative impact of industrialization on the environment was not yet sufficiently considered; therefore, the fear of non-eco-compatible use of natural resources is not particularly present in classics of constitutionalism.

From a theoretical point of view, the constitutional protection of private property is considered sufficient to ensure the interests at stake. The power of the State is

[16] See C. TAYLOR, *What's Wrong with Negative Liberty*, in C. TAYLOR, *Philosophical Papers*, vol. 2, Cambridge University Press, Cambridge, 1985, 211-229.

[17] See D. GRIMM, *Constitutionalism*, 127-142.

limited, without imagining that the latter could succumb to large concentrations of 'private power'.

However, the inherence to public power of certain functions (and in a subsequent historical phase, of certain services) for a long time was not in question. In particular, in the aftermath of the Second World War, the idea that liberal democracy requires the provision of some fundamental services by public power is consolidated.

Therefore, constitutionalism is a concept 'expressing a specific philosophy of governing'[18], but it is not, as argued by Loughlin, a pernicious ideology that impedes democracy and social progress[19]. On the contrary, the 'democracy-of-opportunity tradition' is an important element of constitutionalism[20].

For these reasons, the theory of commons and constitutionalism are not easily reconcilable. However, from the perspective of constitutionalism, today, the social and political problems identified by the theory of the commons are of extraordinary importance.

3. The Theory of the Commons

The theory of the commons is based on a historical narrative. It is argued that 'until the end of the Middle Ages, cultures around the world observed nature very closely and adopted their way of life accordingly'[21]. In the modern era, however, there is a profound transformation in this regard, which can be grasped by taking into account the materialistic orientation and extractive mentality of the Industrial Age. In fact, 'ownership and State sovereignty, respectively championed by John Locke and Thomas Hobbes, are the two organizing principles of legal modernity'[22].

[18] M. LOUGHLIN, *Against Constitutionalism*, Harvard University Press, Cambridge (Mass.), 2022, 7.
[19] Ibid, 195-200.
[20] See J. FISHKIN and W.E. FORBATH, *The Anti-Oligarchy Constitution. Reconstructing the Economic Foundations of American Democracy*, Harvard University Press, Cambridge (Mass.), 2022, 419-88.
[21] See F. CAPRA and U. MATTEI, *The Ecology of Law*, 4.
[22] Ibid, 3.

From a nature conceived as κόσμος, nature alive, people move to a nature conceived as a machine, as an object, as an item to be used and exploited. And, at the same time, natural resources cease to be understood as commons and the 'logic of capital' asserts itself.

According to Mattei and Capra, jurists had a crucial role in determining this transformation:

Legal humanists prepared the intellectual foundations for a dramatic transformation from common-based folk legal institutions into legally formalized, concentrated private property and eventually into capital. Private ownership–individual dominion over land–became the most important legal concept, dividing the whole into individualistic components. The mechanism governing the relationship between these parts was found in what became the sovereign State[23].

In particular, in the modern era, the typical idea of ancient Roman law of resources belonging to no one (*res nullius*), and as such susceptible to appropriation, was revived. This idea would have operated both in civil law and common law traditions, so as to lead to a legal justification regarding the process of subtraction of resources from undivided commonwealth. This process is described in terms of 'enclosure', of legalized erosion of commons.

Not coincidentally, in this historical reconstruction, some of the symbolic documents and events of constitutionalism are severely criticized. By way of example:

- The *Magna Charta libertatum* (1215), which gave the barons' property rights constitutional protection against the King; it is contrasted with the (lesser known) *Charter of the Forest* (1217), aimed at protecting the common right of ordinary people to the forest against both the King and the barons. It is underlined that the logic espoused by the Charter of 1215 prevailed.

[23] Ibid, 45.

- It is noted that at the basis of the birth of US liberal democracy there was a process of appropriation; which, after all, would have characterized the history of many today's liberal democratic countries (think of colonisation).

Several revolts against enclosures are also mentioned, which generally failed due to the close alliance between a highly centralized political-institutional system (the sovereign State) and the capitalistic economic system (in this perspective, modern parliaments are born precisely for the purpose of representing the demands of the bourgeois economic system within the confines of public institutions).

This would also have determined a historical revision:

The organic community was defamed as a symbol of collective oppression over the individual and the medieval commons were denounced as places of no law, only of ignorance. Modern, legal institutions based on individual property rights successfully replaced the medieval holistic vision. The conception of the world as created by God and the common property of all was replaced with that of a fragmented land in which individual owners in competition with one another controlled resources[24].

In such a context, the enclosure of the commons would have led also to 'public property', conceived as the remission of the good at the mercy of the government in office, treated as the property of the sovereign State and not of the people; as such, the commons qualified as public goods can be freely sold or privatised (that is, taken from the common wealth) without judicial scrutiny of any kind.

Thus, the transition would be achieved from a system of 'legal pluralism', in which each social group internalised its law, to a top-down vision of the legal order, centred on the protection of property rights that were seen as both the guardian of all other rights and an indispensable vehicle to realize the pursuit of happiness in a capitalistic system.

It was written:

[24] Ibid, 58-59.

The relationship between private property and public sovereign was frozen in the legal protection of property against government appropriation, which was allowed only in the strictest circumstances of public interest, determined by general law, and after "just compensation", defined as market value. Government, on the contrary, was assumed to represent the common interest according to modern ideas of sovereignty. Thus, government could freely take from commons and was also free to transfer the commons to private property to ensure its "development" […] This protection of private property and lack of any protection of commons is a mark of modernity […] The sovereign can privatize the commons, freely transferring common resources from the public to the private sector. Trying to do the opposite, however (transferring resources from the private sector back to the public) can be done only under strict judicial scrutiny. This imbalance does not allow for a return of the commons to the public if privatization proves mistaken, except by proving public interest and paying just compensation to the private acquirers. The process thus produces a constant and practically irreversible flux of public resources into a few private hands[25].

The management of resources by 'private powers' is described as irresponsible and therefore as a determining factor in the main environmental problems, from pollution to deforestation. Furthermore, in the contemporary context, privatisation also concerns the school and healthcare system, the prison system and the administration of justice, the world of university and culture, infrastructures and essential services; 'corporations now manage many of these formerly public holdings in a purely short-term extractive fashion'[26].

In the theory of the commons, this historical narrative is followed by a series of proposals aimed at bringing about a new great transformation, leading to a new conception of the relationship between human beings and nature and to the transition, so to speak, 'from capital to commons'. This should be achieved through 'an ecological understanding of law, the only revolution possible through culture

[25] Ibid, 77-78.

[26] Ibid, 114.

and genuine civic engagement, [that] overcomes both hierarchy and competition as "correct" narratives of the legal order'[27].

At the same time, a new way of conceiving the economy would be needed, because 'the shadow side of our attempt to dominate and exploit nature has now become all too evident'[28].

In order to achieve these goals–it is argued–'government and private property would not necessarily disappear in the ecological legal order, but they would be limited and tamed by the commons', and common good is 'anything a community recognizes as capable of satisfying some real, fundamental need outside of market exchange'[29].

The commons regime would be based on shared community access and widespread decision making. This would allow the democratic ideal to pervade the economic sphere. In fact, 'the distinction between the public and the private serves only to mask the failure of current democracy. As a society, we locate democracy in the public sphere, where we equate it with electoral practices, and we simply do not care about democracy in the private sphere'[30].

Although the ideas of a law and an economy in harmony with the environment, of a renewed commitment to democracy and participation, of a limitation of privatisation processes are acceptable, the proposed solutions seems to lack concreteness and, for many verses, deliberately ignore those elements that have long been present in modern constitutionalism and are capable of offering solutions that do not imply the introduction of a category, such as that of 'commons', whose contours are at least difficult to define.

4. An Alternative rooted in constitutional Theory: Kantian and Lockean Arguments for limiting Privatisation

[27] Ibid, 134.
[28] Ibid, 172.
[29] Ibid, 150.
[30] Ibid, 151.

What was stated in the conclusions of the last paragraph can be shown first of all on the level of the theory of politics and of the theory of constitution.

In this sense, it seems useful to take Cordelli's theory into consideration. Following this approach, in fact, in contemporary democracies there are no constitutional limits to privatisation. However, such limits should exist, starting from the ethical premises on which coexistence in a liberal and democratic State rests.

Today, in many respects, the democratic State is a 'privatised State'. The twenty-first century has been the age of privatisation, which–as has already been observed–does not mean smaller governments, but rather bigger, yet privatised, ones.

Governments increasingly outsource the fighting of wars to private military corporations; the power of imprisonment is often exercised by for-profit corporations rather than by public officers. In some States (especially in the US) private organizations control up to 90 percent of overall service delivery. Consequently, 'although elected lawmakers, appointed judges, and executive agencies are still an important component of many contemporary democratic governments, a large part of the practice of governing is outsourced to private institutions, whether these be for-profit or nonprofit organization'[31].

However, government is not reducible to a provider of particular goods or services, on par with a business or charity, and so it is necessary to affirm, in a democratic context, the existence of constitutional limits to privatisation.

To understand the reasons for this, we must ask whether when private actors take the place of public power, they can act with the legitimacy that government claims.

The answer offered by a (Kantian-based) constitutional theory is negative when privatisation makes the components of the political community systematically dependent on the merely unilateral will of private actors.

To understand this, it is possible to focus on Kant's description of the state of nature. Privatisation is illegitimate when it brings people back to a 'pre-civil' condition of subjection to decisions taken by other private individuals. In Kant,

[31] See C. CORDELLI, *The Privatized State*, 4.

freedom is achieved only within the birth of the State and therefore with the submission solely to decisions taken by public power, by legitimate authority[32]. Freedom is consequently conceived as independence from the arbitrary will of others (other private actors), as subjection solely to an impersonal will[33].

In this regard, it has been written:

Kantians would seem to identify the solution to the problem of the state of nature with subjection to an impersonal, nonlateral will. After all, the Kantian solution rests on a sharp separation between the rule of law, quite literally understood, and the rule of particular persons. [However] a system of rules that defines fundamental rights and duties can then acquire authority only if it is itself the result of a process that is compatible with the fundamental equal normative authority of all[34].

Consequently, the nonlateral will must be expressed–as specified by Cordelli–by *democratically* legitimized institutions. Fundamental decisions that concern the life, health, education and freedom of the members of the political community cannot be taken by private individuals, but only by *democratically* legitimized public institutions.

For this reason, in a liberal democracy there must be constitutional limits to privatisation. Otherwise, it is as if citizens were returning to a pre-civilization condition, in which the enjoyment of rights is exposed to the arbitrary will of private individuals[35].

The aforementioned conception of freedom as independence is 'republican' and is based on the development of the theory proposed by Habermas[36].

---

[32] See P. HASSNER, *Immanuel Kant* in L. STRAUSS and J. CROPSEY (eds), *History of Political Philosophy*, vol. 2, University of Chicago Press, Chicago, 3rd edn, 1987, 581-621.

[33] See W. FRIEDMAN, *Legal Theory*, Stevens & Sons, London, 1960, 109.

[34] See C. CORDELLI, *The Privatized State*, 62-63.

[35] It will then be observed, later, that the recognition of the irreplaceable role of democratic public institutions for the protection of fundamental rights is, moreover, a precondition for policies aimed at safeguarding the environment.

[36] J. HABERMAS, *Between Facts and Norms: Contributions to a Discourse Theory on Law and Democracy*, transl. W. Rehg, MIT Press, Cambridge (Mass.), 1996.

The latter, moreover, had described the privatisation of the public sphere, reduced to a place for the manipulation of consensus, or forced consent[37]. Cordelli highlights, instead, the privatisation of the institutional sphere, of the State, with consequent loss of freedom (independence) on the part of the members of the political community.

This theoretical approach:

1) Presupposes a precise conception of 'fundamental rights' and of the 'state of nature'. In fact, following it, rights do not 'pre-exist' the State.
2) Entails a criticism of the so called 'neo-Lockean argument', by virtue of which whether a good or service is public or private is completely indifferent, as all that matters is the efficient management.
3) It not only presupposes that constitutional limits on privatisation must be introduced, but takes note of how, consequently, a particular significant role must fall to the public administration. The importance of extending popular participation in administrative decisions and making public officials more responsible for the decisions they are called upon to make is therefore underlined.

This theory has the merit of showing how, by reasoning in terms consistent with the constitutional tradition, one can reach the conclusion that in a liberal democracy privatisation cannot be considered in terms of mere efficiency. Far from abandoning or overturning the modern worldview, this theory develops the basic assumption of one of the key thinkers of the Enlightenment (to which the birth and spread of constitutionalism is closely linked).

There are some aspects of this approach which, however, need to be explored further here.

Firstly, the theory seems to deviate from the most common representation of constitutionalism due to the particular definition of fundamental rights proposed.

[37] J. HABERMAS, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, transl. T. Burger and F. Lawrence, Polity, Cambridge, 1989, 201.

In fact, following the theory in question, 'a right, definitionally, entails the legitimate authority to impose binding and enforceable obligations on other'[38]. Thus, the Kantian approach and the typical one of constitutionalism (think of Locke) are contrasted: 'Where Kantians depart from Lockeans is on the possibility of acquiring conclusive rights in the state of nature (rights that impose binding and enforceable obligations on others)'[39].

In this regard, however, could be useful to distinguish between ownership/recognition of fundamental rights, on the one hand, and protection of fundamental rights on the other.

The ownership of fundamental rights is inherent in the human person, regardless the recognition of others.

The recognition at community level of the inherence of the ownership of fundamental rights in the human person is, moreover, the indispensable social condition for the institutions to be legally (and constitutionally) bound to respect and protect the rights themselves.

Indeed, in Locke's theory, public and private subjects are not interchangeable. In fact, the birth of the State is considered by Locke to be the only possible response to the inconveniences of the state of nature and this is not simply on the basis of utilitarian considerations. Even in the libertarian interpretation of Locke this is fully recognized[40].

In Locke, then, the limitation of fundamental rights is distinguished from their violation precisely because it comes from decisions taken by public institutions through procedures that respect the equal freedom of the members of the political community[41]. Even in the framework of Locke's theory, there are therefore functions (and services) that cannot be privatised without violating (natural) fundamental rights.

[38] See C. CORDELLI, *The Privatized State*, 58.
[39] Ibid, 49.
[40] See R. NOZICK, *Anarchy, State, and Utopia*, Basic Books, New York, 1974, 30-33.
[41] See M.J. SANDEL, *Liberalism and the Limits of Justice*, Cambridge University Press, Cambridge, 2nd edn, 2010, 117.

In any case, both by taking up Kant's thought and by referring to that of Locke, constitutionalism seems to host the theoretical premises for a constitutional limitation of privatisation.

It is then necessary to try to verify the possibility of identifying principles of constitutional law from which to support this conclusion, i.e. the existence of constitutional limits to privatisation. As will be seen, the reference to these principles also leads to have arguments available to propose a development of constitutionalism in tune with the need to safeguard the environment.

5. Transnational constitutional Principles and Limits to massive Privatisation

In liberal democratic States, the belief that certain functions or services are by their nature (ontologically) or by their purposes (teleologically) public is quite widespread.

This argument is not the most convincing, however the public characterization of certain activities can well be included among the elements capable of integrating the constitutional identity of a political community.

For example, this is what emerges from the rulings of the Supreme Court of Israel, in relation to the penitentiary system. The Supreme Court proscribed the privatisation of a prison on the grounds that such privatisation violates the dignity of prisoners. But 'it is not that private prisons are less humane or less effective in rehabilitating prisoners […] Publicness is not merely a vehicle for safeguarding impartiality, accountability, equality, or other values. Publicness is an essential feature of State institutions; the public character of the institutions matters as such, whether or not it improves the quality of decision-making or increases the prospects of promoting public values'[42]. According to the Israeli judges, 'the special constitutional status of the right to personal liberty and the fact that it constitutes a condition for exercising many other human rights mean that the legitimacy of denying that liberty depends to a large extent on the identity of the party that is

[42] A. HAREL, *Why Privatization Matters. The Democratic Case against Privatization*, in J. KNIGHT and M. SCHWARTZBERG (eds), *Privatization*, 59.

competent to deny that liberty and on the manner in which that liberty is denied'[43]. From this judicial orientation, Harel deduced that there are goods and services which in a democracy cannot be privatised because only where public can they be managed/provided in the name of all the members of the political community.

According to Harel, privatization severs the link between decision-making process and citizens, eroding the prospect of meaningful political engagement and civic shared responsibility. The privatization debate is not only about the quality of the decisions which private entities make on behalf of the State. At times, the identity of the decision-maker (public or private) is significant independently of the justness or correctness of her decision. Therefore, concerns about privatization are not only empirical or pragmatic. There is more at stake than a positive or negative appraisal of the performance of a particular decision-maker. In fact, privatization is, at least sometimes, *necessarily* undesirable, not merely contingently undesirable (such as where private decision-makers are shown to perform poorly)[44].

An analogous reasoning has been developed by the Supreme Court of India. The latter emphasized that policing is an essential State function and 'cannot be divested or discharged'[45].

Similar orientations are also found in the United States of America. They are based on the provisions of the FAIR (Federal Activities Inventory Reform) Act 1998. In particular, the latter provides for 'inherently governmental functions', functions that are so intimately related to the public interest as to require performance by Federal Government employees[46].

---

[43] The Supreme Court of Israel (sitting as the High Court of Justice), *Academic Center of Law and Business* v. *Minister of Finance*, 19 November 2009 (HCJ 2605/05). See B. MEDINA, *Constitutional Limits to Privatization: the Israeli Supreme Court Decision to Invalidate Prison Privatization*, in *International Journal of Constitutional Law*, n. 4/2010, 690.

[44] See A. HAREL, *Why Privatization Matters*, 53.

[45] The Supreme Court of India, Nandini Sundar & Ors v. State of Chattisgarh, 5 July 2011 (AIR 2011 Supreme Court 2839).

[46] According to the FAIR Act 1998, inherently governmental functions 'includes activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements. An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as— (i) to bind the United States to take or not to take some action by contract,

Also focusing on this concept, an extensive interpretation of the 'State action doctrine' has been proposed, with application of the Administrative Procedure Act (APA) and Freedom of Information Act (FOIA) to private contractors [47].

Furthermore, it may be remembered that in France, within the set of public services, the subcategory of 'constitutional public services' is identified, 'with reference to those public services of an administrative nature falling within the typical functions of sovereignty (national defence, justice, foreign affair, police). In reality, it is believed that the category is broader, as it would also extend to teaching, health and social assistance, which, however, can also be offered by private individuals, provided that a minimum level of provision is guaranteed by the public sector'[48].

Among the other constitutional law arguments that it seems useful to recall in order to support the existence of limits to privatisation, are then those based on political responsibility, on freedom in the economic sphere and on the presence of constitutional rules which provide, in particular cases, for express and necessary publicness of the good/service.

All these arguments can be traced back, as supported in the conclusions, to the concept of democracy.

As for the argument based on responsibility, the most congenial reference is to constitutionalism in the United Kingdom. This is due to the importance that, in this context, the notion of 'accountability' assumes in the framework of the so-called 'political constitutionalism', that is, a conception of the constitution in which a

---

policy, regulation, authorization, order, or otherwise; (ii) to determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise; (iii) to significantly affect the life, liberty, or property of private persons; (iv) to commission, appoint, direct, or control officers or employees of the United States; or (v) to exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.

[47] G.E. METZGER, *Private Delegations, Due Process, and the Duty to Supervise*, in J. FREEMAN and M. MINOW (eds), *Government by Contract. Outsourcing and American Democracy*, Harvard University Press, Cambridge (Mass.), 2009, 291-309.

[48] D. ZECCA, *Privatizzazioni e Costituzione nella Francia di Macron: la* Loi Pacte *alla prova del* bloc de constitutionnalité, in *Diritto pubblico comparato europeo Online*, n. 2/2019, 1277.

'greater faith must be placed in the capacity of the political process to guard against the misuse of public power and the enactment of oppressive legislation'[49].

Privatisation implies the elimination of *political* responsibility for certain activities. If an activity is (substantially) public, it may become subject to political criticism from the public opinion. If the same activity is (substantially) privatised, the responsibility of private actors who carry it out cannot be configured in the same terms[50].

This means that privatisation could be considerate illegitimate when it causes a loss of political control by people, unacceptable under the constitution.

Not surprisingly, this can apply to the typical functions of the legislative power. Even in the United Kingdom, although it is not clear that (other) limits can be identified to what the Parliament can decide, it is possible to argue that the legislative power cannot abdicate its role: 'Nothing in the Constitution (*except the principle of parliamentary sovereignty*) is fixed'[51].

Also, with reference to the United States legal system, it has been argued that privatisation, in some cases, takes away from Congress the power to approve or not the appointments of public officials according to the Appointments Clause and, if the notion of public official is maintained obtainable from *Buckley* v. *Valeo*, privatisation therefore eliminates the responsibility associated with intrinsically public activities[52]. In this sense, privatisation has been considered illegitimate if capable of altering the balance between powers (to the detriment of Congress) and the internal equilibrium of the administration itself[53].

Furthermore, the argument based on responsibility can also be invoked in relation to the judiciary. In fact, the very sovereignty of the legislative cannot be separated

[49] M. ELLIOTT and R. THOMAS, *Public Law*, Oxford University Press, Oxford, 2017, 32.

[50] A.C.L. DAVIES, *Accountability: A Public Law Analysis of Government by Contract*, Oxford University Press, Oxford, 2011, 73-88.

[51] See M. ELLIOTT and R. THOMAS, *Public Law*, 78.

[52] P.R. VERKUIL, *Outsourcing and the Duty to Govern* in J. FREEMAN and M. MINOW (eds), *Government by Contract. Outsourcing and American Democracy*, 314.

[53] J.D. MICHAELS, *Constitutional Coup: Privatization's Threat to the American Republic*, Harvard University Press, Cambridge (Mass.), 2017, 106.

from the rule of law and the latter implies the existence of a public (autonomous) judiciary, even if not necessarily a public monopoly on the resolution of disputes[54].

As for the argument based on freedom in the economic sphere, it can be recalled from the experiences of the US constitutional law[55] and European Union Law[56], both of which are particularly sensitive to the need to guarantee market freedom[57].

Undoubtedly for a long time the legal (and constitutional) regulation of economic relations in the US and in European States was very different.

Indeed, 'the American regulatory State has consisted in public intervention which has not substituted private economic actors with public ones. The purpose of economic regulation has been to prevent the formation and use of monopolistic powers in the market […] Nothing comparable to American regulation has come about in the European nation-States', and 'in no European nation-State did the judiciary play an autonomous policymaking role for the same purpose and in the same period'[58]. However, in the second half of the twentieth century important changes took place, especially in Europe […] In fact, the process of European integration […] has progressively turned the EU into a regulatory regime. It is through regulation that the EU has promoted a single common market: regulation largely motivated by decisions of the ECJ which have systematically removed national barriers to the free circulation of capital, services, goods, and workers. At the same time, global competition has obliged individual EU member-States to dramatically reduce their political control over the national economy. At least since

[54] M. ELLIOTT and R. THOMAS, *Public Law*, 71-77.

[55] As is known, the three main U.S. antitrust statutes are the *Sherman Act* of 1890, the *Clayton Act* of 1914, and the *Federal Trade Commission Act* of 1914.

[56] It may be remembered, for example, how the Court of Justice of the European Union, in the Essent case (sentence of 22 October 2013, joined cases C-105/12, C-106/12, C-107/12), found it compatible with the EU Law the prohibition on privatisation of electricity and gas distribution companies established by Dutch Law.

[57] See, with reference to the European Union legal system, R. SCHÜTZE, *European Constitutional Law*, Oxford University Press, Oxford, 3rd edn, 2021, 234 (who observes that starting from the decision Spain v. Council-Case C-350/92 – of 1995, the European legislator was «entitled to prevent *future* obstacles to trade or a *potential* fragmentation of the internal market».

[58] S. FABBRINI, *Compound Democracies. Why the United States and Europe Are Becoming Similar*, Oxford University Press, Oxford, 2010, 96-97.

the beginning of the 1980s […] each European nation-State has been forced to liberalize and privatise its economy[59].

In a liberal democracy, the economic sphere must be free. And this freedom implies that at least non-contestable monopolies or oligopolies are excluded[60]: 'Where monopoly rests on man-made obstacles to entry into a market, there is every case for removing them'[61].

When a legislative act, determining or allowing privatisation of public goods or services, leads (or is reasonably presumed to lead) to the formation of non-contestable private monopolies or oligopolies, there are suitable arguments to consider the privatisation itself illegitimate.

This does not imply any prejudicial selection or identification of public services that cannot be privatised, but involves an evaluation to be carried out from time to time, case by case.

Finally, the argument based on rules that provide for express or necessary publicness of goods/services can be understood as follows: in all cases in which there is a constitutional duty to nationalize certain goods or activities, a prohibition on privatisation can be deduced from this duty.

Of course, in some cases it may be argued that duties to nationalize are constitutionally required.

An example, in this regard, can be taken from the Italian constitutional system[62]. The article 43 of the Italian Constitution provides that 'for the purposes of the

[59] Ibid, 106.

[60] See G. AMATO, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of Market*, Hart, Oxford, 1997, 113 ff.

[61] F.A. VON HAYEK, *The Constitution of Liberty*, Routledge, Abingdon, 2006, 231.

[62] On privatisation and nationalisation in Italy see F. BONELLI, *La privatizzazione delle imprese pubbliche*, Giuffrè, Milano, 1996; S. CASSESE, *Le imprese pubbliche dopo le privatizzazioni*, in *Stato e mercato*, n. 2/1992, 239 ff.; M. CLARICH, *Privatizzazioni*, in *Digesto discipline pubblicistiche*, vol. XI, Utet, Torino, 1996, 572 ff.; M. CLARICH, A. PISANESCHI, *Privatizzazioni*, in *Digesto discipline pubblicistiche (Aggiornamento)*, Utet, Torino, 2000, 432 ff.; P.G. JAEGER, *Privatizzazioni (Profili generali)*, in *Enciclopedia giuridica*, vol. XXIV, Treccani, Roma, 1995, 1 ff.; A. PREDIERI, *Collettivizzazione*, in *Enciclopedia del diritto*, vol. VII, Giuffrè, Milano, 1960, 423 ff. On property in the Italian constitutional system see S. MANGIAMELI, *La proprietà privata nella Costituzione*, Giuffrè, Milano, 1986. On private economic freedom see A. BALDASSARE, *Iniziativa economica privata*, in *Enciclopedia del diritto*, vol. XXI, Giuffrè, Milano, 1971, 586 ff. and M. LUCIANI, *La produzione economica privata nel sistema costituzionale*, Cedam, Padova, 1983, 582 ff.

common good, the law may establish that an enterprise or a category thereof be, through a pre-emptive decision or compulsory purchase authority with provision of compensation, reserved to the Government, a public agency, a workers' or users' association, provided that such enterprise operates in the field of essential public services, energy sources or monopolies and are of general public interest'.

It cannot be affirmed that on the basis of this article the legislator may be obliged to nationalize. Nationalization presupposes a determination to be made based on political evaluations. Nonetheless, the letter of the article 43 does not imply that nationalization cannot be considered dutiful, at least in the sense that if the conditions indicated in this article are met, if the actor providing the service is already public, its privatisation is constitutionally illegitimate[63].

6. Conclusions. Democracy, Privatisation, and environmental Law

The arguments that can be put forward to support the existence of constitutional limits to privatisation all refer to a more general conception of democracy to which attention must be drawn before concluding.

Democracy is based on the idea that every member of the political community can effectively take part in the exercise of public power. However, for participation in the dynamics of the institutional sphere to be effective, certain social conditions must be met. The possibility of effectively participating must first and foremost be realized on a social level, within the cultural sphere, the economic sphere and the political sphere.

If certain goods or services are privatised, the effective possibility for everyone to take part in community life is lost: not everyone, with private resources, can take advantage of the services offered by private entities. Without a suitable public

[63] On the article 43 of the Italian Constitution see F. GALGANO, *Art. 43*, in G. BRANCA, A. PIZZORUSSO (eds), *Commentario della Costituzione*, Zanichelli/Il Foro, Bologna-Roma, 1982, 193 ff. and C. LUCARELLI, *Art. 43*, in R. BIFULCO, A. CELOTTO, M. OLIVETTI (eds), *Commentario alla Costituzione*, vol. I, 884 ff. On the interpretation proposed in the text, *amplius* A.I. ARENA, *Un tentativo di individuare limiti alla privatizzazione nella Costituzione italiana*, in *Costituzionalismo.it*, n. 2/2020, 23. See also C. CORDELLI, *Privatocrazia. Perché privatizzare è un rischio per lo Stato democratico*, Mondadori, Milano, 2022, 101-105.

welfare system, many freedoms and rights risk remaining, at least for some members of the community, on paper.

This means that liberal democracy requires the presence of a public welfare system. Of course, public welfare system can also be significantly different from Country to Country. In any case, a political community committed to ensuring equal opportunities for all, 'so that people can make their own decisions about what lives are best for them, enforces rather than subverts proper principles of individual responsibility. It does accept that the intervention of government is sometimes necessary to provide the circumstances in which it is fair to ask all citizens to take responsibility for their own lives'[64].

Consequently, the use of privatisation must encounter limits, just as, more generally, the entire range of economic activities, public and private, must be compatible with 'social rights', that is, with the effective protection of everyone's fundamental rights.

Ensuring the social conditions for democracy is also vital for effective environmental protection.

There is still a widespread belief that environmental protection is a threat to economic development. On the contrary, it can be noted that the policies to make economic freedom effective for all are also policies that create the indispensable conditions for better protection of the environment. The request for a greater environmental justice is closely linked to the fight against the profound inequalities characterizing contemporary society[65].

It is no coincidence that sensitivity towards environmental protection has grown in contemporary democracies.

In fact, there is a connection between the realization of the democratic ideal and the protection of the environment. Where inequalities grow incompatible with the possibility for all members of the political community to participate in the

[64] R. DWORKIN, *Sovereign Virtue. The Theory and Practice of Equality*, Harvard University Press, Cambridge (Mass.), 2002, 319.

[65] K. SHRADER-FRECHETTE, *Environmental Justice: Creating Equality, Reclaiming Democracy*, Oxford University Press, Oxford, 2002, 6-17.

dynamics of social coexistence, the chances of safeguarding the environment are also lower. This means that environmental policies must be integrated into the broader context of legislative interventions aimed at creating the social conditions for the proper functioning of a democratic institutional system. As written by Solnit, 'phenomena often treated separately–ecology, democracy, culture […]–coexist. Environmental problems are thus problems about how we live together'[66].

For example, the intervention of public institutions in the cultural field is crucial, to raise awareness of the risk associated with non-eco-sustainable choices. Furthermore, the topic of environmental information has been at the centre of the political agenda for some time and has found its consecration, at an international level, in the Aarhus Convention (1998)[67].

Again, to give another example, public interventions which, in the economic field, are aimed at removing social and economic obstacles to the effective freedom and equality of all members of the political community are indispensable even to avoid situations of monopoly or oligopoly which make difficult to propose and embrace policies aimed at safeguarding environment.

In this sense, it must be believed that the goals outlined by the theory of the commons are not only serious and worthy of consideration, but are closely linked to the fullest realization of the democratic ideal. This ideal implies a limitation of large concentrations of economic power, when (*and only when*) they are incompatible with freedom and equality[68]. Consequently, it implies that limits to privatisation are recognized at a constitutional level and that environmental protection shapes the way of conceiving the protection of all fundamental rights.

---

[66] R. SOLNIT, *The Encyclopedia of Trouble and Spaciousness*, Trinity University Press, San Antonio, 2014, 1.

[67] See *Convention on access to information, public participation in decision-making and access to justice in environmental matters* done at Aarhus, Denmark, on 25 June 1998.

[68] In fact, if an indiscriminate *favor* for nationalisation, in the name of 'superior unit interest', were to be derived from the existence of constitutional limits on privatisation, the liberal and personalist characterisation of the democratic system would be at risk. See V. BALDINI, *La costituzione della persona e il costituzionalismo del mondo globale. Aspetti problematici di una tensione già esistente tra Costituzione della libertà ed esercizio del potere pubblico*, in *Dirittifondamentali.it*, n. 2/2023, 289 ff.

Naturally, environmental problems are largely global in scope, but this cannot lead to a de-responsibility of States. After all, as underlined by Eckersley, the (democratic) State remain 'the most *legitimate*, and not just the most powerful social institution'[69]. And the constitutional traditions of democratic States seem to moving ever more explicitly in this sense, also through formal revisions of constitutional documents aimed at establishing the centrality of environmental issue[70].

Despite of this, limiting the indiscriminate privatisation is not enough to protect the environment. And, of course, it is not enough that the existence of constitutional limits to privatisation and the need for an interpretation of economic freedoms compatible with the protection of environment is affirmed by legal scholars and judges. It is necessary that such a reading of the constitutional paradigm is supported by the political system and, more broadly, by the widespread social culture.

Indeed, according to part of the doctrine, an excessive protagonism of the courts would end up having negative impact on the protection of 'social rights'[71]. In any case, it is not by neglecting to outline the constitutional framework within which the legislator is called to operate that the democratic political and cultural processes are promoted.

From this point of view, even without the introduction of the category of 'commons' and without abandoning the theoretical coordinates typical of modern constitutionalism, an 'ecological understanding of law' is possible, and despite difficulties, at least in part, is already underway.

---

[69] R. ECKERSLEY, *The Green State: Rethinking Democracy and Sovereignty*, MIT Press, Cambridge (Mass.), 2004, 12-13.

[70] The choice to approve, or not, express constitutional amendments to expressly mention environmental protection in the constitution (generally not necessary for the more recently formed liberal democratic constitutions) depends on multiple factors, including the different 'amendment cultures', to take up what Richard Albert claimed: see R. ALBERT, *Constitutional Amendments. Making, Breaking, and Changing Constitutions*, Oxford University Press, Oxford, 2019, 111: «I have observed three types of amendment cultures, each with different kinds of observable effects on the difficulty of constitutional change. Amendment culture can accelerate, redirect, or incapacitate formal amendment in a given jurisdiction».

[71] M. TUSHNET, *Weak Courts, Strong Rights. Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, Princeton University Press, Princeton, 2009, 161-195.