RIVISTA DI
DIRITTI COMPARATI

Rights of commons in Italy: a different way of owning towards the recognition of an intangible cultural value*

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1. Introduction

Rights of commons (*usi civici*) are rights that in ancient times a specific community exercised (collectively and *uti singuli*) on its own or other people's land, to obtain the products necessary for its own survival. We refer to a period in which the use of assets could totally disregard the concept of land ownership, which was developed in an absolutizing way only later[1]. Currently, the legal status of rights of commons in Italy is relatively multifaceted[2]. On closer inspection, the same notion of rights of commons appears polysemic, having to properly distinguish between *iura in re aliena* (the right to enjoy benefits from other people's lands) and *iura in re propria*. The latter are in turn distinguishable in community lands (in use to a community composed of the descendants of the original users) and common lands (the enjoyment of which is intended for a wider community, represented by all those who reside nearby the area)[3].

With Law n. 1766/1927 and the Royal Decree n. 332/1928, the Italian legislator set two purposes: on the one hand, the winding up of the rights of commons *in re aliena*, in order to allow for free development of individual private property, and, on the other, the reform of the rights of commons *in*

* The submitted article has been double peer-reviewed, in compliance with the Editorial guidelines.

[1] G. Cervati, *Aspetti della legislazione vigente circa usi civici e terre di uso civico*, in *Rassegna trimestrale di diritto pubblico,* 1967, p. 88 ss.

[2] F. Marinelli - F. Politi (eds.), *Domini collettivi ed usi civici*, Pisa, 2019.

[3] A. Germanò, *Domini collettivi*, in *Diritto agroalimentare*, 2018, p. 83 ss.

re propria. In particular, for rights of commons *in re aliena*, it was provided for a well-structured winding up procedure in several stages: verification of the existence of rights of commons, assessment of the extent and value[4], winding up. Rights of commons on private lands, therefore, are destined to cease as a direct exercise of the members of the community and to be converted into the right of the original community to obtain a compensation in land or in a rent to be paid by the owner of the area[5].

As for the reorganization of common properties *in re propria*, the main purposes were the conservation of the woodland and grazing heritage, on the one hand, and the increase in agricultural production, on the other hand. To this aim, a distinction was introduced between the two categories: a) «land that can be conveniently used as a forest or as a permanent pasture»; b) «land that can be conveniently used for agricultural cultivation». The reformation, therefore, is carried out through three stages: the ascertaining of the common nature of the lands; the recovery and return to the owner community; the assignment of the area to one of the two aforementioned categories (a or b)[6].

Common properties *in re propria* (specific object of analysis of this essay) are, therefore, destined to last over time, and constitute real forms of collective ownership of the land[7]. However, the activity of identifying areas on which a right of common weighs is problematic since in Italy there is no system of formal knowledge of rights of commons able to guarantee legal certainty of their existence; in addition, the documentary evidence of these ancient rights is varied (and generally not easy to find)[8].

Lastly, in 2017 the Italian legislator made a partial attempt to reform the rights of commons discipline with Law n. 168/2017 (Rules on common properties)[9]. This law recognizes common properties as the primary legal order of the original communities, «characterized by the existence of a community whose members own land and together exercise more or less

[4] On the issues connected to the evaluation of collective lands, see F. Forte, *Alcuni aspetti valutativi nell'ambito dell'istituto delle terre collettive e ad usi civici*, in C. Gambardella (ed.) *Molise, usi civici e paesaggio*, Napoli, 2008, p. 125 ss.

[5] M. A. Lorizio, *Usi civici*, in *Enc. Giur.*, XXXII, Roma, 1994.

[6] S. Carmignani, *Disciplina dell'esercizio delle funzioni in materia di demanio collettivo civico e diritti di uso civico*, in *Le nuove leggi civili commentate*, 2015, p. 235 ss.

[7] G. Pugliatti, *La proprietà e le proprietà (con riguardo particolare alle proprietà terriere)*, in *La proprietà nel nuovo diritto*, Milano, 1964, p. 145 ss.

[8] D. Porraro, *Natura e struttura dei diritti di uso civico*, in L. Principato (ed.), *Usi civici ed attività negoziale nella legalità costituzionale*, Torino, 2018, p. 135 ss.

[9] E. Buoso, *La disciplina dei terreni gravati da usi civici e delle terre collettive tra paesaggio e ordinamento civile*, in *Le Regioni*, 2018, p. 1074 ss.

extensive rights of enjoyment, individually or collectively, on land that the municipality or another institution administers»[10]. In light of this approach, it is possible to frame common properties within the Italian Constitution taking into account three fundamental elements: the community, the land, the functional constraint[11]. This is clear from the explicit reference made by Law n. 168/2017 to art. 9 of the Italian Constitution (due to the importance of common properties as social formations expression of human culture[12]) and to art. 2 and art. 43 of the Italian Constitution (through which the common properties are connected to that social formations in which the personality of each man takes place, enhancing the solidarity[13] and social dimension that can be drawn from their history)[14].

This constitutional framework imposes the duty of the State and local authorities to protect and enhance the common properties, as significant in the ecological, economic and socio-cultural fields. In this regard, Law n. 168/2017 qualifies assets encumbered by rights of commons as «primary tools to ensure the conservation and enhancement of the national natural heritage», «permanent elements of the environmental system», «eco-landscape structures of the agro-forestry-pastoral ecosystem», as well as «a source of renewable resources to be exploited for the benefit of local communities»[15]. In this perspective, the same Italian legislator had long since included common properties in the list of restricted areas from a landscape point of view: first of all, with Law n. 431/1985 (so-called Galasso Law), then with the Code of Cultural Heritage and Landscape (Legislative Decree n. 42/2004), whose art. 142, par. h) declares areas protected by law «that areas assigned to agricultural universities and areas encumbered by rights of commons»[16].

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[10] G. Spoto, *Usi civici e domini collettivi: "un altro modo" di gestire il territorio*, in *Rivista giuridica dell'edilizia*, 2020, p. 3 ss.

[11] P. Nervi, *La gestione patrimoniale dei domini collettivi,* in *Atti del XXXI Incontro di Studio C.S.E.T., Analisi degli aspetti economico-estimativi e giuridici delle terre soggette al diritto di godimento collettivo*, Firenze, 2001, 43 ss.

[12] G. Pagliari, *"Prime note" sulla l. 20 novembre 2017, n. 168 ("norme in materia di domini collettivi")*, in *Il diritto dell'economia*, 2019, p. 11 ss.

[13] F. Marinelli, *Assetti fondiari collettivi*, in *Enciclopedia del diritto*, Annali X, Milano, 2017, p. 72 ss.

[14] Constitutional Court, 18 July 2014, n. 210, in *www.cortecostituzionale.it*.

[15] M.A. Lorizio, *I domini collettivi e la legge n. 168/2017*, in *Diritto agroalimentare*, 2019, p. 239 ss.

[16] M. Brocca, *Paesaggio e agricoltura a confronto. Riflessioni sulla categoria del "paesaggio agrario"*, in *Rivista giuridica dell'edilizia*, 1-2, 2016, p. 3 ss.

An overall picture emerges that recognizes a central role to rights of commons, certainly no longer in its traditional productive sense, but in terms of an asset of considerable landscape, environmental and (as we will see below) cultural value. In this perspective, both the State and local authorities and the reference community are obviously directly involved[17].

However, although common properties are inalienable, not subject to acquisitive prescription and unavailable, it is a fact that in the last two centuries their area has been significantly reduced. It can be assumed that at the end of the eighteenth-century rights of commons constituted 80% of the Italian territory, while today they are reduced to about 10%. This phenomenon can be explained by the uncertainty of the measurement of areas encumbered by rights of commons, as well as by their being located in peripheral areas, in the sense of marginal (hilly or mountainous) and therefore not very significant for the liberal economic model still prevalent in Italy.

Nevertheless - considering the outlined regulatory framework and the evolution of the rights of commons conception - rights of commons can represent a resource, a model for a step change in function of a more sustainable governance of territories, also due to the social and environmental crisis that is affecting our planet. Hereinafter this paper will examine how – in order to enhance common properties also from a cultural point of view – this model is based on very specific elements: collective ownership; self-governance, according to rules identified through participatory processes; use of traditional working land techniques; moderate exploitation of natural resources.

2. The controversial legal nature of rights of commons

The heterogeneity of the phenomenon of rights of commons is also evidently reflected in the subject of the identification of their legal nature.

Rights of commons *in re aliena* undoubtedly consist in rights of enjoyment on goods owned by others; this has led some of the literature to link them to the rights of use, pursuant to art. 1021 et seq. of the Italian civil code[18]. This classification is based on the fact that a right of commons gives

[17] L. De Lucia, *Gli usi civici tra autonomia delle collettività e accentramento statale*, in *Giurisprudenza costituzionale*, 2018, p. 1284 ss.

[18] A. Paire, *Contributo allo studio degli usi civici. Profili di diritto pubblico (tra procedimento amministrativo, ambiente, paesaggio e governo del territorio)*, Napoli, 2020, p. 60.

the beneficiary the power to use the good and, if it bears fruit, to reap the benefits. However, the following elements of the rights of commons legislation do not allow to endorse this reconstruction: a) the perpetuity of right of commons and the transferability to future generations, in conflict with the necessary temporariness of the right of use; b) the specific content of right of commons, which attributes to the holder the right to enjoy only one or more specific utilities, compatible with the preservation of the land, in conflict with the right of the user to make all the benefits that the property can offer his own, albeit limited to his and his family's needs and in compliance with the economic destination of the land; c) the shared exercise of rights of commons by the members of the community, in conflict with the exclusivity of the user's right.

A different theory in literature qualifies rights of commons *in re aliena* as predial servitude, pursuant to art. 1027 of the Italian civil code[19], due to the common nature of the tendential perpetuity of the right. However, this thesis is clearly contrasted by the lack of a relationship between a serving area (which is subjected to the exercise of the right) and a dominant area (which benefits from utility). Nor can rights of common be assimilated to the category of the so-called personal servitude, where the utility refers to an individual rather than to an area; in the case of right of commons, the utilization of the land is not an external limit to the right of ownership of a third party, but rather a complex ownership model.

The only convincing legal framework of rights of commons *in re aliena* is, then, that of atypical rights *in rem*, that is, not previously regulated within the Italian civil code. This conclusion is not hindered by the principle of *numerus clausus* of rights *in rem*, according to which the conception by individuals of rights *in rem* other than those strictly provided by law is not allowed[20]. Law n. 1766/1927, introducing the right of commons, had «typified» it, and the typicality of rights *in rem*, as aimed at protecting legal rights circulation, represents a limit for private autonomy, but not for the legislator. It is, therefore, a matter of *sui generis* rights, characterized by a peculiar regulatory statute: the element of the close relation with the land is intertwined with other aspects provided for by the specific discipline, such us – from a structural point of view – the collective dimension of the right[21].

[19] F. Marinelli, *Gli usi civici*, Milano, 2003.

[20] G. Musolino, *Le servitù irregolari (l'autonomia negoziale e la questione della tipicità dei diritti reali)*, in *Rivista del notariato*, 6, 2010, p. 1517 ss.

[21] S. Orrù, *Usi civici*, in *Digesto delle discipline privatistiche*, agg. XI, Torino, 2018, p. 479 ss.

Focusing on rights of commons *in re propria*, we firstly need to emphasize that the co-owners benefit from the good not *uti singuli* but *uti cives*, as it is precisely being part of the community that legitimizes the individual to consider himself co-owner of that right. At a first analysis, it would seem possible to assimilate this right to the model of «legal community», but on closer inspection, this option would prove to be incorrect. Unlike legal communion, the right of commons *in re propria* is not only unsplittable into shares, but it is not even transferable or purchasable by a derivative title. In this sense, it represents a sort of «external ownership»[22]: the community of *cives* has no legal personality and the legal representation of its interests is entrusted to an external body with a legal personality, generally the Municipality. Therefore, it would be a «special» model of legal community, whose main characteristic feature is evidently represented by the centrality of the functional element, symptom of a strong link between the members of the community and the territory[23].

The right of ownership connected to rights of commons *in re propria* is therefore characterized by the elimination of any element of individualism (it is no coincidence that Law n. 168/2017 expressly defines the common properties «inter-generational co-ownership»), and by a peculiar «identity value» of the relationship between the owners and the land, object of that right. This theory, moreover, is fully consistent with the landscape constraint, which - as already observed - weighs by law on all the areas affected by rights of commons. The reason for the inclusion of rights of commons *in re propria* among landscape heritage lies in the traditional and non-intensive production system, compliance with which implies the conservation of the natural characteristics and the traditional aspects of the national territory. As clarified by the Italian Constitutional Court, in this case the landscape constraint goes behind the interest of the reference community, rather being aimed at ensuring «the interest of the local community in general, in the conservation of rights of commons to contribute to the environmental and landscape protection»[24].

[22] F. Preite, *La commerciabilità dei terreni gravati da uso civico*, in *Sanzioni amministrative in materia di usi civici*, Torino, 2013, p. 59.

[23] A. Paire, *Contributo allo studio degli usi civici. Profili di diritto pubblico (tra procedimento amministrativo, ambiente, paesaggio e governo del territorio)*, cit.

[24] Constitutional Court, 11 May 2017, n. 103, in *www.cortecostituzionale.it*.

3. Land transfer restrictions related to rights of commons

The distinction between rights of commons *in re aliena* and *in re propria* also affects land transfer regulation. Concerning the rights of commons *in re aliena*, the owner can freely dispose of the land, due to the absence of rules that prohibit or hinder conveyance. However, the existence of a right of commons weighing on the area is not entirely without consequences: the transfer of the land obviously does not extinguish the right of commons (which «circulates» with the area), but it forces the seller to notify the buyer about the limitations that will characterize his property right[25].

On the contrary, the law expressly states that common properties *in re propria* are neither alienable, nor divisible, nor subject to acquisition by prescription[26]. The rationale underlying this particularly restrictive regime has received multiple interpretation in the literature. A first orientation justifies the limits to the transfer regime by stating that in the present case there would be no ownership situation, but rather a peculiar right of enjoyment, «another way of possessing»[27]. This would exclude *ex se* any right to dispose of the area.

A different address justifies the aforementioned restrictions on the transfer of the areas on which a right of commons is burdened because in this case it would be configured a model of common properties, not comparable to a legal community. This would prevent the fragmentation of the area, also due to an intergenerational obligation[28].

What is indubitable is that the legislation expresses a clear prevalence of the public interest (to the continuation of the function that originally justified the affixing of right of commons) over the private interest in being able to dispose of the property (transferring it). Coherently, the majority opinion in judicial decisions is that right of commons is an expression of a public interest of such relevance as to prevail even over transfer acts made in good faith. Consequently, judges declare the nullity of any transfer of an area burdened by right of commons between private individuals, even regardless of evaluations about the elapsed time[29].

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[25] F. Parente, *La liquidazione degli usi civici e il controllo sui vincoli alla circolazione*, in *Rivista di diritto civile*, 2011, p. 83 ss.

[26] M. Calabrò – G. Mari, *Rilevanza degli usi civici nella circolazione degli immobili*, in *Rivista giuridica dell'edilizia*, 4, 2021, p.143 ss.

[27] P. Grossi, *Un altro modo di possedere*, Milano, 1977.

[28] V. Cerulli Irelli, *Proprietà pubblica e diritti collettivi*, Padova, 1983.

[29] T.A.R. Lazio, Roma, I-ter, 7 February 2013, n. 1369, in *www.giustizia-amministrativa.it*.

Neither in literature, nor in judicial decisions, is there any form of unanimity on the typology of nullity proper to the hypotheses *de quibus*. A first theory refers to the figure of nullity due to the impossibility of the object: the area is not saleable because no one have its full ownership, in the light of the peculiar common property model[30]. On the other hand, other judgments support the thesis of nullity for contrary to mandatory rules: the transfer deeds would be in violation of an express imperative prohibition, due to the lack of the conditions that the law prescribes for the deed to be effective[31].

In current literature there is a minority opinion, which more recently questions the thesis that automatically speaks of nullity in case of violation of the transfer prohibitions provided for by law. In this regard, some authors have noted how judges tend to apodictically affirm the primacy of the public interest to the availability of right of commons by the community, without providing for a case-by-case verification of the real consistency of that interest (e.g., the hypothesis of an area by now largely urbanized, with respect to which the exercise of right of commons is no longer objectively conceivable)[32]. This theory, therefore, concludes for the rejection of the dominant thesis of the nullity of transfer contracts and leans towards their ineffectiveness, also due to the fact that nullity would generally be inferred from an erroneous assimilation of the lands encumbered by a right of commons to the State property[33].

4. An alternative interpretation of rights of commons: the functional perspective

An alternative approach to analyse rights of commons relates to the evolution of their institutional function: this analysis has the advantage of bringing out profiles that characterize rights of commons, additional to the issue of the rights of co-owners, and could facilitate the process of necessary updating of the regulation of common properties.

[30] Cass. Civ., II, 22 January 2018, n. 1534.

[31] Cass. Civ., III, 3 February 2004, n. 1940.

[32] A. Masaracchia, *L'efficacia del procedimento e del provvedimento di accertamento dell'esistenza degli usi civici*, in L. Principato (ed.) *Usi civici ed attività negoziale nella legalità costituzionale*, Torino, 2018, p. 81 ss.

[33] G. De Matteis, *Alienazione dei beni civici. Invalidità e responsabilità notarile*, in *Vita notarile*, 2004, p. 1745 ss.

The original predominantly productive function of rights of commons has now radically changed, due to the social and economic transformations that have occurred in the meantime[34]. Therefore, nowadays their protection must take into account the tendency that has emerged in the literature and jurisprudence of the Constitutional Court, which attributes to common properties burdened by rights of commons the quality of ecological assets, protected by art. 9 of the Italian Constitution[35]. For some time, some authors have pointed out that common properties *in re propria* are subject to landscape protection in a broad sense, that is, not as landscape beauties, but by virtue of their ability to express collective values and identities[36]. The model of traditional economic use, not intensive, respectful of the natural characteristics of the landscape, directly refers to the history of that territory.

Already from this first consideration, clues emerge that could support the legitimacy of a rights of commons legal framework not only in the context of landscape heritage, but also of cultural heritage. In particular, we refer to that idea of cultural heritage – endorsed by the Italian legislator – related to not only historical-artistic interests, but also demo-anthropological ones (see art.2, Legislative Decree 22 January 2004, n. 42, Code of Cultural Heritage and Landscape). In this perspective, the rights of commons intended as cultural heritage could represent the necessary synthesis between the productive and the conservative function.

The idea of combining landscape qualification with a cultural one finds a first reference in some regional laws, where common properties are traced back to cultural heritage. This legal framework is somehow endorsed by the Constitutional Court itself, where, in 2007, it states «the concept of landscape indicates, first, the urban morphology, that is, it concerns the environment in its visual aspect […]. Basically, it is the same aspect of the territory, for the environmental and cultural contents it contains, which is in itself a constitutional value»[37].

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[34] O. Fanelli (ed.), *Gli usi civici. Realtà attuali e prospettive*, Milano, 1991.

[35] Constitutional Court, 18 April 2008, n. 104, in *www.cortecostituzionale.it*; Constitutional Court, 1 April 1993, n. 133, in *www.cortecostituzionale.it*. A. Simonati, *Gli usi civici nelle regioni a statuto speciale, fra tutela delle autonomie e salvaguardia dell'interesse nazionale*, in *Le regioni*, 2015, p. 411 ss.

[36] A. Germanò, *Usi civici, terre civiche, terre collettive: punti fermi per le future leggi regionali in materia*, in *demaniocivico.it* (access on 2 December 2022).

[37] Constitutional Court, 7 November 2007, n. 367, in *www.cortecostituzionale.it*. M. Immordino, *La dimensione "forte" della esclusività della potestà legislativa statale sulla tutela del paesaggio nella sentenza della Corte costituzionale n. 367 del 2007*, in *Aedon*, 2008, p. 1 ss.

However, rather than viewing collective properties as material cultural heritage, it seems more correct to place them within the context of intangible cultural heritage[38]. In recent years, literature has made numerous attempts - not yet fully agreed upon by the Italian legislator - to recognize the intangible cultural value of some non-physical realities, such as languages and dialects, rituals, habits and customs, knowledge handed down orally[39]. As part of this process, the discipline of common properties burdened by rights of commons can represent a valuable field of testing: the significant materiality of the substratum on which the asset stands (the products of the land subject to common properties and the lands themselves), is accompanied by an undisputed socio-cultural relevance[40]. Adhering to the thesis according to which the areas burdened by right of commons are subject to landscape protection especially by virtue of their collective governance (expression of the tradition of a local community[41]), it is undeniable that they have a historical value and allow young and future generations to rediscover and protect ancient traditions.

In a more strictly legal dimension, collective properties have an additional cultural value. On the one hand, they represent an alternative ownership model to the traditional one; on the other, collective governance modalities of natural resources have the aim of ecological compatibility, also in view of a sustainable and non-intensive exploitation of the land. However, this entails the existence of some conditions, both of a finalistic type (sustainable development objectives) and of a governance type (involvement and empowerment of the local community in decision-making processes), modelled on English common lands, as regulated by the Commons Act of 2006[42].

In particular, there is the need to avoid what was affirmed by the «tragedy of commons» theory: common properties would inevitably be destined to deteriorate, to the extent that their destiny would depend on individual uncoordinated choices, all aimed at maximizing one's own

[38] A. Gualdani, *I beni culturali immateriali: una categoria in cerca di autonomia,* in *Aedon*, 2019, p. 1 ss.

[39] G. Morbidelli, *Il valore immateriale dei beni culturali*, in *Aedon,* 2014, p. 1 ss.

[40] M. Calabrò – A. Simonati, *Gli usi civici nel contesto del patrimonio culturale (immateriale): per un nuovo paradigma giuridico dei demani collettivi*, in G. Cerrina Ferroni – T. Frosini – L. Mezzetti – P.L. Petrillo (eds.), *Ambiente, Energia, Alimentazione. Modelli giuridici comparati per lo sviluppo sostenibile*, Firenze, 2013, p. 119 ss.

[41] F. Carletti, *Demani civici e risorse ambientali*, Napoli, 1993.

[42] See par 5.

advantage, without any concern for the simultaneous exercise of the rights of others, nor for the sustainability of the common good itself[43].

Elinor Ostrom, one of the main theorists of the rediscovery of common goods, has identified the essential conditions for the sustainability and correct governance of common properties: a) the recognition of the right of co-owners to organize and manage themselves; b) a system with several levels of government (local and national) for the common properties; c) the adoption of models of participatory democracy in identifying the rules of land exploitation and protection[44].

In this regard, it is interesting to examine some provisions of the aforementioned Law no. 168/2017. First, we refer to the capacity for self-regulation granted to common properties community, through which the co-owners have the chance to put into writing customs that have been operating in that area for some time, as well as to identify the most suitable ways of organization and collective governance. Also relevant is that the Law no. 168/2017, on the one hand, affirms the main role of the State, already recognized for some time by the Constitutional Court[45], and, on the other, at the same time it enhances the link between rights of commons and the protection of local collective identities[46].

Compared to the conditions theorized by Ostrom, the profile essentially absent within the aforementioned Law is that of the provision of models of participatory democracy. Nevertheless, it is undeniable that the implementation of participatory decision-making processes would bring out the «voices» of the different groups who benefit and, at the same time, are responsible for the common properties. Furthermore, as Habermas teaches, a participatory decision-making process would not involve simply listening to the positions of the various stakeholders, but also moments of debate,

[43] G. Hardin, *The tragedy of commons*, in *Science*, 1968, p. 1243 ss.

[44] E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge, 1990.

[45] Constitutional Court, 18 July 2014, n. 210, in *www.cortecostituzionale.it*.

[46] «Today, as the agricultural significance of the commons wanes, and as the urbanized populace expands, we are faced with a conflict between what might be perceived as a "new" recreative and symbolic commons, versus an "old" productive commons. […] These tensions are nothing new. They reproduce in new form, rather, centuries of conflict surrounding the commons as a locus of community identity and cultural capital within a changing and evolving historical relationship between the symbolic and economic dimensions of the commons» (K.R. Olwig, *Commons & Landscape*, in *Landscape, Law & Justice: Proceedings from a workshop on old and new commons*, Oslo, 2003, p. 19-20).

suitable to provide everyone with the tools to go beyond their individual position, in a solidarity dimension of common goods governance[47].

An adequate involvement of communities rooted in the area presents an intrinsic and ineliminable link with the same cultural consistency of common properties, helping to avoid the risk of loosening the genetic relationship with the reference social group. In this context, a fundamental role is assumed by the principle of horizontal subsidiarity (see art. 118 of the Italian Constitution), according to which the State has the duty to promote the autonomous initiative of citizens, both as individuals and as members of associations, relating to activities of general interest. Thus, the facilitation of models of self-administration and associated land management expresses the realization of a meta-individual and, therefore, solidarity vision of the governance of common goods[48].

Having said that, it is interesting to observe how Law no. 168/2017 also contains some elements suitable to justify the legal framework of rights of commons as part of the intangible cultural heritage. We refer, in particular, to: art. 1, par. 1, lett. c), where there is a reference to «natural, economic and cultural heritage»; art. 2, par. 1, lett. d), where common properties are qualified as «territorial bases of historical institutions for the protection of cultural and natural heritage»; art. 3, par. 2, where it is stated that common properties «constitute the ancient heritage of the community».

It is clear, however, that the constitutional foundation of the cultural value of rights of commons must essentially be sought in art. 9 of the Italian Constitution. This provision protects culture understood as a set of values, traditions and customs that characterize the social life of a people and express a message of meta-individual relevance[49]. In this perspective, the State - also through the recognition of rights of commons - has the duty to «feed the memory» of the community, not only as a place of remembrance, but also as a founding element of national identity.

[47] J. Habermas, *The Inclusion of the Other. Studies in Political Theory*, Milano - London, 2000.

[48] R. Lombardi, *Ambiente e mercato: note minime per una nuova prospettiva d'indagine sui beni comuni*, in *Diritto dell'economia*, 2014, p. 209 ss.

[49] M. Ainis, *Cultura e politica. Il modello costituzionale*, Padova, 1991.

5. A confirmation of the benefits deriving from the functional perspective: the experience of the English common lands

In this context, it is worth mentioning the English common lands, which represent one of the oldest (and still operative) management models of common lands in Europe, dating from the late Middle Ages. Created as an institution aimed at allowing the joint exercise of activities related to the survival and the management of lands for rent within the feud[50], the common lands were subsequently evolved through their development in a non-economic/productive sense, but rather a landscape/environmental one[51].

According to the traditional legal regime of the common lands, originated in England and Wales before the Norman Conquest[52], the local population (commoners) had the possibility of using land which - although belonging to the feudal lord - was considered manor waste, as it was not arable[53]. The exploitation of these areas by the feudal lords was partly limited by the exercise of the rights of use by the commoners, concerning activities related to the survival and management of the rented estates within the feud. The correct exercise of these rights was ensured by feudal courts and by rules of customary law, aimed at reconciling the privileges of the feudal lords with the needs of personal exploitation by the population and sustainability of the land.

The aim was to regulate the exploitation of the land in such a way as to guarantee peaceful coexistence between the commoners and the feudal lord, as well as between the commoners themselves. At the same time, however, the intention was to avoid what - as has already been observed - many years later was defined as «the tragedy of commons»[54]. From this point of view,

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[50] C.P. Rodgers – E.A. Straughton – A.J.L. Winchester – M. Pieraccini, *Contested Common Land. Environmental, Governance, Past and Present*, London, 2011.

[51] «As generally unfenced and largely unimproved 'islands' in the modern farm landscape, commons form important wildlife habitats and thus serve an increasingly important conservation function. Commons have also acquired an amenity function as the popularity of countryside recreation has grown» (O.J. Wilson – G.A. Wilson, *Common cause or common concern? The role of common lands in the post-productivist countryside*, in *Area*, 1997, p. 45).

[52] L.D. Stamp – W.D. Hoskins, *The common lands of England and Wales*, London, 1963.

[53] M. Pieraccini, *La sostenibilità delle common lands: (sotto)sviluppo storico dei meccanismi di governance*, in *Archivio Scialoja Bolla: Annali di studio sulla proprietà collettiva*, I, 2008, p. 183 ss.

[54] «The commons, if justifiable at all, is justifiable only under conditions of low-population density. As the human population has increased, the commons has had to be abandoned in one aspect after another», G. Hardin, *The tragedy of commons*, cit., p. 1248.

it is possible to read the phenomenon that occurred in England and Wales between the 16th and 19th centuries, which goes by the name of enclosures, and which includes a series of measures aimed at privatizing a large part of the common lands existing until then[55]. Access to common grazing or wasteland was extremely restricted, and this produced immiseration among tenant farmers and labouring poor[56].

Therefore, the idea of the common lands as a local economic model aimed at guaranteeing an adequate subsistence to the peasant population was overcome; this, however, did not lead to the total disappearance of the English common lands, as some of them were perceived as no longer (only) economic, but environmental resources: not man-altered areas and, therefore, lands to be protected[57].

The condition of substantial uncertainty in relation to the management of non-privatized commons subsequently prompted the English legislator to issue the Common Registration Act (1965), with which a Register of rights of use affecting each common was established. Each local authorities were required to register data related to location, area, ownership and common rights of all common lands existing within their respective administrative territory. The set of information entered in that Register should have led to a complete database and, therefore, to an adequate level of certainty of the rights associated with the management of common lands[58].

The aim was mainly to bring order to a sector still substantially governed by customary rules, finally clarifying «who» could do «what» and «where». Furthermore, in the light of the landscape/environmental evolution described, the mentioned Register of rights of use should have allowed easier monitoring of the exploitation of common lands, while guaranteeing their sustainability. But this did not happen. The absence of a valid verification procedure has pushed most of the commoners to declare rights of use that were quantitatively higher than the actual ones, which has

[55] J. Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, in *Law and contemporary problems*, 2003, p. 33 ss.

[56] H.R. French, *Urban common rights, enclosure and the market: Clitheroe Town Moors,1764-1802*, in *The Agricultural History Review*, 1, 2003, p. 40 ss.

[57] M. Pieraccini, *A Comparative Legal and Historical Study of the Commons in Italy and England and Wales*, in *Agricoltura, Istituzioni, Mercati,* 2008, p. 101.

[58] J.W. Aitchison – G. Gadsden, *Common land*, in W. Howarth – C. Rodgers (eds.), *Agriculture, Conservation and Land Use*, Cardiff, 1992, p. 165 ss.

led to conditions of overexploitation that were completely antithetical to the original objectives of sustainable development[59].

Therefore, in order to resolve the aforementioned critical issues, the English legislator intervened again, with the Commons Act (2006), which represents the current regulation on common lands. With this Act, the English legislator modified the common lands governance system by opting for a local level management model, bottom-up[60]. Thus, it provides for the allocation of programming and administration tasks to be carried out by Commons Councils, authorized private associations, made up of representatives of the various categories of stakeholders in the common lands, interested in the rational, sustainable and peaceful management of common lands (holders of rights of use, environmental associations, local development committees)[61].

The emphasis on a bottom-up governance model responds to multiple needs. For example, with regard to the issue of the quantitative limits to the exploitation of land, the decentralization at the local level of the regulatory competences through the approval of a statute by each Council is able to guarantee more easily not only the identification of shared rules (and, therefore, respectful of everyone's rights, including the right to environmental health of non-commoners), but also their effective respect. Common Councils, amongst other things, are precisely called upon to define shared rules of common lands use, which primarily ensure their environmental protection: to this end, they subscribe environmental agreements aimed at shaping the different rights to common lands and the manner of their exercise, so as to ensure the achievement of high standards of environmental protection[62]. The content of these agreements – this is the profile of greater importance – is determined by means of participatory democracy mechanisms, so as to make the commoners not only more aware, but actual protagonists of the environmental protection policies of the areas of interest to them.

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[59] J.W. Aitchison – E.J. Hughes, *The commons land registers of England and Wales: a problematic data source*, in *Area*, 1982, p. 151 ss.

[60] C. Rodgers, *Reversing the tragedy of the commons? Sustainable management and the Commons Act 2006*, in *Modern Law Review*, 2010, p. 461 ss.

[61] M. Pieraccini, *Sustainability and the English Commons: a Legal Pluralist Analysis*, in *Environmental Law Review*, 2010, p. 94 ss.

[62] In this regard, literature uses the term «stewardship», defined as the responsible management of resources, to guarantee at the same time public and private interests, current and of future generations, also through the enhancement of the contributions of civil society. D.A. Fuchs, *An Institutional Basis for Environmental Stewardship*, London, 2003.

In other words, the main objective of public policies is to identify legal instruments capable of integrating natural heritage conservation needs with sustainable agriculture models, also through the introduction of so-called agri-environmental schemes. «These schemes aim to encourage farmers to adopt environmentally-friendly farming practices through offering financial compensation for specified environmental management practices (eg reduction of stockingrates; reduced pesticide and fertiliser use)»[63].

The experience of the English common lands makes it possible to claim that it is not only still possible to have functional collective land management models – as an alternative to the exclusionary regime of private property – but also that, in some cases, this type of governance can also be more efficient, in terms of pursuing better public interests. It is obvious that we are not referring to an economic/productive efficiency, but rather to an easier achievement of high levels of landscape valorisation and environmental protection. There are, furthermore, arguments in favour of a valorisation of the cultural profiles of common lands[64]: the continuing application of ancient customary law rules; the use of traditional land exploitation methods; the maintaining of a natural condition, almost wild, of entire areas due to their status of common lands (not individually transformed by man), are all elements that also give a historical and cultural value to these territories, making them «a locus of community identity and cultural capital»[65]. This, however, presupposes the existence of certain elements, both purposive (sustainable development objectives) and managerial (involvement and empowerment of local communities in the decision-making processes), fully in keeping, moreover, with findings by theorists of the recent «rediscovery» of the commons.

6. Conclusions

In conclusion – also in the light of examining the experience of the English common lands – we can affirm that the field of rights of commons, on the one hand, still shows profiles of uncertainty and, on the other, is subject to interesting developments. The total amount of common properties is considerable: the last General Agricultural Census, carried out

[63] O.J. Wilson – G.A. Wilson, *Common cause or common concern? The role of common lands in the post-productivist countryside*, cit., p. 46.

[64] M. Calabrò – A. Simonati, *Gli usi civici nel contesto del patrimonio culturale (immateriale): per un nuovo paradigma giuridico dei demani collettivi*, cit., p. 123.

[65] K. Olwig, *Commons & Landscape*, cit., p. 15 ss.

by ISTAT (Italian National Institute of Statistics), dates back to 2010 (an update was started in 2020, but has only partially been completed to date) and it provides an overview made up of about one and a half million hectares of common properties burdened by rights of commons, as much as 10% of the total national agricultural area. However, many things have changed over the last few decades.

Nowadays, the strictly economic-productive function, linked to their original nature of «existential rights»[66] (related to the self-sufficiency of local community), it has almost completely lost its vigour (but it could partially recover it, for example in the sense of enhancing the tourist vocation). Nevertheless, the aim of landscape protection is accompanied by that of contributing to the survival of the cultural heritage, expressed by the traditions and specific governance model related to rights of commons.

Moreover, the perception of the (also) cultural relevance of rights of commons is well rooted in the awareness of the communities that have always been their custodians. The Common Declaration of Collective Properties (Rome, 7 March 2006)[67] gives broad proof of this. With this act the administrators of family communions and common lands define themselves as «heirs of the ancient village democracies» and expressly recognizes that communities are an expression of legal pluralism, as well as «social entity rooted in history, in work and in the coexistence among individuals».

Therefore, in the near future we can presume an evolutionary process of the rights of commons regulation, which takes into account the multiple functional aspects that can be traced back to their use. The enhancement of the cultural meaning in the sense indicated – moving away from an aesthetic, static, purely conservative way of protection, such as that linked to landscape protection – would allow, among other things, to implement local public policies that simultaneously have cultural and economic repercussions. In particular, we refer to access to land policies, through the assignment of abandoned or inadequately valued common properties. This access to land should concern those who are willing to commit themselves to preserve traditional ways of use and cultivation, as well as to implement cooperative rural development models.

The cultural/functional approach inevitably requires a further departure from the ownership perspective, through the implementation of

[66] C. Calisse, *Per il riordinamento degli usi civici*, Roma, 1927.

[67] Dichiarazione comune delle proprietà collettive, Roma, Palazzo Madama, 7 marzo 2006, in *asuctrentine.it* (access on 2 December 2022).

open communities. It postulates the need to allow access to the use of common properties even to individuals not originally residing in those places, but willing to embrace a traditional, rural, cooperative and shared approach to land governance and use.

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ABSTRACT: The expression rights of commons in Italy historically dates back to the feudal system and refers to the rights of enjoyment of one's own property or those of others owned by a specific community, with the content including the use of specific benefits coming from the land, woods or waters. The Italian legislator has intervened several times, even recently, in order to provide a clear and complete discipline to these rights, the most important element of which is undoubtedly the shared model of land governance, as an alternative to those generally recognized (public property and private property). However, there are still many critical issues in this sector. First, this paper aims to examine the controversial legal nature of rights of commons – also in the light of their legislative assimilation to landscape assets – as well as the serious state of uncertainty that characterizes the regime for the legal transfer of land burdened by rights of commons. Lastly – also in the light of examining the experience of the English common lands – the author intends to envisage a partially innovative interpretation of rights of commons, as an intangible cultural asset, through the valorisation of the profile of shared use and the protection of local traditions.

KEYWORDS: rights of commons - common lands - land transfer restrictions - intangible cultural value - community participation.

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