

COMMONING FOR EUROPE

What is evident from the "glossary" is the homogeneity of terms concerning the activities that characterises the actions of volunteers in every part of the countries that participated in the *Commoning Europe* project. And it is our belief that this is also the case in every other part of Europe because, since "*the common good is the great chain that binds men together in society*," as Titus Livius wrote in his *Ab Urbe condita libri*, there can be no place where, even if with different intensities, methods and procedures, human beings do not solidarise in order to support each other by helping and assisting those in difficulty. Even if it is out of an apparent individual interest (I help in order to be helped in turn), the overall action results in an improvement of the collective well-being or, if you like, in actions of general interest.

In every period of history, even before the appearance of welfare as we understand it today, men have found themselves in the need to socialise or at any rate to unite among themselves in order to cope with the adversities they have to face and not succumb to famine, weather events, plagues, wars and persecutions, or to not surrender and bend to the will of those who have always sought profit by grabbing the exclusive management of resources and goods that are indispensable for the survival of the community.

And it is precisely the *commons*, as we have seen outside our borders too, wherever the 'project' has taken us, that are the object of care and promotion by thousands of volunteers who make their skills, knowledge, and time available, with nothing to ask in return except for recognition and perhaps support and sometimes a contribution from the institutions, as there is no doubt that, in the absence of concrete support from public bodies, there will not be the leap in quality and quantity of agreements, between citizens and institutions, that are necessary to deal with current problems and that the public administration alone cannot manage, or solve. At the same time, we also know that, in addition to the generality of social, economic and health problems, the state is in the need to manage, as owner, real estate worth billions (in our country -Italy- alone, according to a recent estimate, this would amount to 283 billion euros, of which 12 billion is under-utilised or not used at all, therefore, in turn, unproductive and burdensome for the public treasury), which it is unable to govern because it does not have the resources and means to do so, and sometimes it does not even have the option of entrusting its management to entrepreneurial subjects who, not detecting guarantees of an economic return in relation to the business risk required of them, avoid making an economic commitment.

The result is the presence of substantial public assets that citizens see devalued and degraded, in turn causing neighbourhoods, villages and cities to deteriorate and devalue. What to do? Let us quickly see what "Commoning Europe" has taught us, starting from Italy, about the experiences carried out in Romania, Holland, Turkey and Belgium, which, as we have said, are substantially identical in terms of purpose and content, and then come to represent what we want to be our contribution so that the **European institutions undertake a reflection** in order to arrive, this is our hope, to a **formal recognition** of what are defined as *common goods or assets* together with the activities and actors engaged in their protection, creating the necessary conditions to overcome the paradigm according to which an asset can only be managed by a public or private actor. In the following we will therefore

dwell on some of the words and concepts around which the **Commoning Europe project** 'revolves', starting with the 'Commons' we have already briefly mentioned.

In our country, the concept of the “common goods” is found, even historically dated¹, in various spheres: social, economic, legal, finding, with reference to the latter, an interesting and in some ways new affirmation in the proposed draft enabling act drawn up by the Rodotà Commission², established by decree of the Ministry of Justice in 2007 and then, subsequently, in the judgments of the Court of Cassation in unified sections no. 3665 /2011³ and no. 3813/2011, according to which, where an asset is, by its intrinsic connotations, intended for the realisation of the welfare state, that asset is to be considered '**common**', regardless of the title of ownership, instrumentally connected to the realisation of the interests of all citizens.

The novelty, the great novelty, with respect to the previous conceptual and legal definitions, is the reference to the definition of an asset, especially if and when it is an immovable asset, on the basis of its function and not on the basis of its 'ownership title'. A lake or a forest, even if privately owned, are to be considered common property in relation to and as a result of the function they assume or intrinsically possess to ensure the collective wellbeing through the individual. This is not to say that private property is deprived of its peculiarities, finding protection in Article 42 of the Constitution which, while providing that it is guaranteed by law, prescribes, however, that it shall determine 'the ways in which it may be acquired, enjoyed and its limits for the purpose of ensuring its social function and making it accessible to all'.

¹ With reference to this statement, we would like to recall Ambrogio Lorenzetti's work 'Allegoria ed effetti del buono e cattivo governo' ('Allegory and effects of good and bad government'), created in 1338-1339, in which a figure is called 'the common good'. URL consulted on 15-12-2022 at: https://it.wikipedia.org/wiki/Allegoria_ed_effetti_del_Buono_e_del_Cattivo_Governo

² Senate of the Republic: Delegation Bill No. 2031, submitted to the Presidency on 24 February 2010 <https://www.senato.it/serve/PDF/PDFServer/DF/217244.pdf>

³ URL consulted on 15-12-2022: <https://www.demaniocivico.it/public/public/886.pdf>
Constitutional Court U.S.S.C. No. 3665/2011. With this sentence the Court of Cassation confirmed the state ownership of the fishing valleys of the Venice Lagoon, sanctioning the principle of extending the regime of public governance to assets that are in any case characterised by collective enjoyment.

"[...] For some time now, legal doctrine, but also case law itself, has embraced the idea of a necessary functionality of public assets, with the consequent conviction that the asset is public not so much for the circumstance of falling into one of the abstract categories of the code as rather for being a source of a benefit for the community, [...]"

Constitutional Court United Sections. No. 3813/2011. URL consulted on 15-12-2022 : <https://www.demaniocivico.it/public/public/914.pdf>

In the judgment, the United Sections of the Italian Supreme Court effectively clarified that:

"disquisition in terms of the sole dichotomy between public (or State) and private property means, in a partial manner, limiting oneself to the mere identification of the ownership of the property, leaving aside the inescapable fact of the classification of the same by virtue of the relative function and the interests connected to such property.

It follows, therefore, that where immovable property, regardless of ownership, is, by virtue of its intrinsic connotations, in particular those of an environmental and landscape nature, intended for the realisation of the welfare state as outlined above, such property is to be considered, outside the now dated perspective of the dominium of Roman law and of 'common' codified property, that is to say, regardless of the title of ownership, instrumentally connected to the realisation of the interests of all citizens".

Rules on the protection of environmental, landscape, cultural, etc.⁴ assets certainly exist in every single country, and the **European Union** has also taken an interest in the matter, see the **European Landscape Convention signed in Florence in 2000**,⁵ but in Italy, **Constitutional Law No. 3** of 2001, with which Title V of the Constitution was reformed, made a choice that was in some ways unprecedented, establishing that citizens are '**favoured**' by public entities in carrying out activities in the general interest, implementing the principle of subsidiarity with Article 118, paragraph 4 of the Constitution, which states: "*State, Regions, Metropolitan Cities, Provinces and Municipalities favour the autonomous initiative of citizens, both individual and associated, to carry out activities in the general interest, on the basis of the principle of subsidiarity.*"

Analysing the type of activities carried out, we see that the recipients of voluntary actions are not only fragile persons but also citizens who, although not in difficulty, derive wellbeing from the mere observation of living in a well-kept environment, or walking in a well-kept public park, or seeing school children tending flowerbeds together with teachers and family members. All the experiences encountered during the project, but also present at home, turn out to be functional for the well-being of citizens: Taking care of a green area, be it large or small, recovering an abandoned or disused public building to use as a meeting place for the neighbourhood's inhabitants, for language lessons for foreigners, for discussing public authority projects on services, roads, structures, land management, for coordinating self-help interventions for and with elderly people who are alone or in financial difficulty, or as a place for coworking, are all activities and 'assets' - tangible and intangible - functional to people's wellbeing and therefore to be considered 'common'. Hence the need for a strong synergetic action between institutions and citizens, which is essential to recover a relationship that has deteriorated or is in danger of breaking down definitively, especially with the new generations, which are increasingly distant from political participation as we have known it since the middle of the last century, and which requires finding new forms of citizen involvement to train new administrators with a cultural education that is suited to the challenges of this millennium.

But what are the factors that come into play when citizens either as individuals or associated in committees, foundations, voluntary organisations, social cooperatives make themselves available to the community?

⁴ In our country, we need only recall Legislative Decree No 42 of 22 January 2004, better known as the Cultural Heritage and Landscape Code or Urbani Code (named after the Minister of Cultural Heritage and Activities Giuliano Urbani after whom it is named). The code identifies the need to preserve Italy's cultural heritage. It defines cultural heritage as immovable and movable property of artistic, historical, archaeological or ethno-anthropological interest. This also includes architectural heritage, collections of cultural institutions (such as museums, archives and libraries), natural heritage (such as mineralogical, petrographic, palaeontological and botanical heritage) and historical-scientific heritage, maps, as well as photographic (photography and negatives) and audio-visual (film) material.

Intangible assets and landscape assets are also considered to be of cultural interest[1]. URL consulted on 7-12-2022. https://it.wikipedia.org/wiki/Codice_dei_beni_culturali_e_del_paesaggio

⁵ From the point of view of European law, attention is drawn to the European Landscape Convention, or the Florence Convention. This is an international treaty promoted by the Council of Europe that promotes landscape protection, management and planning and fosters international cooperation on landscape policies. The convention covers all types of landscape (extraordinary, everyday and degraded) and applies to the entire territory of the signatory states. The convention[1] was adopted by the Committee of Ministers of Culture and the Environment on 19 July 2000 and officially signed in the Salone dei Cinquecento in Palazzo Vecchio in Florence on 20 October 2000. In June 2022, 40 member states of the Council of Europe signed and ratified the European Landscape Convention. URL consulted on 7-12-2022: https://it.wikipedia.org/wiki/Convenzione_europea_del_paesaggio

Can we limit ourselves to the definition of the commons, or do we need to broaden our vision and identify what other components come into play when men and women regardless of social class place themselves at the disposal of others? Is there, of this availability and mode of participation in the context of subsidiarity - to which we will return - a legal recognition by the European institutions?

If in Italy the current legal system, starting with the Constitution, provides us with a reference framework that, without further uncertainty, should allow citizens to commit themselves to the general interest insofar as the institutions are obliged to favour their activities, not all the EU states or candidates for membership find similar support in the existing rules in their countries.⁶

If, however, we consider that, in general, they all refer to the legal model of civil law (in Italy also referred to as continental law or Romano-Germanic law) with the exception of the Scandinavian systems, **this homogeneity may facilitate** the proposal that we are going to explain here.

We have seen that the '**glossary**' helps to identify the recurring terms for what is our subject of common goods or commons. Let us then look at some of the terms to be considered for a **uniform definition** to refer to in the European context, hoping, as already mentioned, **for legal recognition**:

the first word is obviously **commons** (tangible, intangible, digital);

then we will have to define the type of actions that can be traced back to the sphere of interventions **for the care** of the common, interventions aimed at protection, conservation recovery, valorisation, monitoring, maintenance of the commons (unless others).

Then it will be necessary to formally recognise both **active citizens** and **volunteers**⁷;

then to collaboration pacts (or agreements, however they are to be defined),⁸

last **but not least in terms of importance**, as we shall see, the three terms to be placed as the foundation of the overall activities:

- **subsidiarity**
- **participation,**
- **shared administration.**

⁶ What is meant is that administrators, managers and officials, in order to support and contribute concretely to the performance of voluntary activities, need the administrative acts they adopt to be clearly reflected in the law.

⁷ The definition of volunteer has undergone an important evolution from what was established by Law 266/91 "framework law on volunteering" that identified the volunteer only within associative structures, compared to the current definition in the Code of the Third Sector Legislative Decree 117/2017 art. 17 c.2 "A volunteer is a person who, of his or her own free will, carries out activities in favour of the community and the common good, including through a Third Sector entity, making available his or her time and skills to promote responses to the needs of the persons and communities benefiting from his or her action, in a personal, spontaneous and free manner, without any profit motive, not even indirect, and exclusively for the purposes of solidarity.

Note the conjunction 'also' not present in the previous rule, thereby legitimising the voluntary activity carried out by individual citizens with all that this entails in terms of liability and insurance for civil liability, accidents and illnesses.

⁸ The definition of pacts finds, in the legal system not only in Italy, a legal equivalence in relation to the object of the pact or agreement and to the subjects that sign it. In international law, for instance, these are agreements of special political relevance (alliance pacts) but also, for example, the 'Stability and Growth Pact', a protocol to the Maastricht Treaty that requires European Union countries joining the Monetary Union to keep the ratio of deficit to GDP below 3%. In the Italian context and as far as the commons are concerned, cooperation pacts are non-authoritative acts agreed upon jointly, on an equal footing, between the public administration and citizens, which are reflected in Law 241 art. 1 paragraph 1-bis: "The public administration, in adopting acts of a non-authoritative nature, acts according to the rules of private law unless the law provides otherwise."

Since all the definitions of words, procedures and concepts that emerged during the meetings between the participants are set out in the glossary, we have limited ourselves to recalling the most significant ones, postponing the identification of any further definitions to a later date.

But if it is true that the "glossary" was created as a result of shared experiences with the project's partner countries, **what emerges is the absence of their formal recognition through the adoption of an administrative act expressed by the bodies of the European Union** and which is not only supportive, but also stimulating and guiding for the public bodies of the E.U. countries, thus creating an important legal reference to support agreements (pacts) between citizens and public administrations agreed upon with different and simplified methods and procedures compared to the past.

We do not indicate which instrument would be more suitable, legitimate or opportune, we merely say that it seems to us that a deed at least of a '*reconnaissance*' nature is necessary to facilitate the strengthening of the legal position of these lemmas and/or concepts. We are convinced that recognising and incorporating the aforementioned definitions in an act of the European institutions would allow and facilitate the adoption by the countries belonging to the EU, and candidates to join it, of a legislative and/or regulatory framework suitable to encourage voluntary activities for the care of common goods in their territories. What we consider fundamental is the broadening of the **concept of subsidiarity** that, to date, seems to be confined in the EU treaties to vertical subsidiarity, from which '**horizontal subsidiarity would be excluded**, which instead is the keystone on which all the activities of individual and associated citizens who take care of common goods are based.

It is in this last part, then, **that the proposal we put forward** is contained:

that a debate be opened or resumed to recognise horizontal subsidiarity as a concrete form of citizen participation, thus moving from a participation of saying (which is essentially expressed in non-binding acts of a consultative and propositional nature), to a participation of doing, which is concrete, visible and tangible.

Horizontal subsidiarity, which we know to take place in the context of the relationship between authority and freedom, is based on the assumption that private citizens (either as individuals or as associates) take care of collective needs and activities of general interest, and public authorities intervene in a 'subsidiary', planning, coordinating and possibly managing function.⁹ It is worth noting that subsidiarity, citizens, public institutions and the general interest are all included in the wording of the oft-quoted Art. 118. C.4 of the Italian Constitution.

In our country, there is a further and recent recognition of subsidiarity by the **Constitutional Court** with sentence no. 131 of 2020, where, in the considerations and with reference to the Code of the Third Sector (Legislative Decree 117/2017), it makes an important statement on what is sustained by art.55 which¹⁰, according to the Court: [...], *represents ... one of the most significant implementations of the principle of horizontal subsidiarity promoted by art. 118, fourth paragraph, of the Constitution. The latter provision, in fact, has made explicit in the constitutional text the systemic implications deriving from the recognition of the 'profound sociality' that characterises the person*

⁹ URL consulted on 20-11-2022: <https://www.treccani.it/enciclopedia/principio-di-sussidiarieta-diritto-amministrativo>

¹⁰ Legislative Decree 117/2017 art.55: https://www.gazzettaufficiale.it/atto/serie_generale/caricaArticolo?art.progressivo=0&art.idArticolo=55&art.versione=1&art.codiceRedazionale=17G00128&art.dataPubblicazioneGazzetta=2017-08-02&art.idGruppo=14&art.idSottoArticoloI=10&art.idSottoArticolo=1&art.flagTipoArticolo=0

[...]" insofar as "... *solidarity relations have been at the origin of a dense network of free and autonomous mutuality which, by linking up with different cultural souls of our tradition, has profoundly affected the social, cultural and economic development of our country. [...] we therefore wanted to overcome the idea that only the action of the public system is intrinsically suited to carrying out activities of general interest and recognised that these activities can also be pursued by an 'autonomous initiative of citizens' [...].*

If we look closely, the European Treaties do, however, refer to subsidiarity as a necessary prerequisite for bringing the institutions closer to society by giving citizens "the right to participate in the democratic life of the Union", see Article 13 of the TEU.¹¹

Unfortunately, there is no overall legal reference in them that allows for the full implementation of this statement that relates participation and representative democracy, as instead happened in Italy with the oft-mentioned art. 118, last paragraph, of the Constitution, which "[...] *has given rise - also thanks to more precise norms (municipal regulations and regional laws) - to processes of regeneration of democratic action, 'favouring' in fact the potential creativity of citizens and civil society organisations in the action of caring for common goods in the general interest. This has led to the emergence of new forms of participation, some of which - such as shared governance - have enabled citizens to experience democracy in the form of 'active witness' to its fundamental principles and in active collaboration with local institutions and administrations in order to solve real problems in small communities, strengthening social cohesion (Collaboration Pacts). Collaboration or subsidiarity pacts are full expressions of democracy and political action, in the ancient sense of participation and caring for the life of the city. [...] expressions of (subsidiary) democracy,*" such as "[...] *strengthening the social fabric and the relationship with institutions, giving each citizen, willingness to collaborate for the general interest, the real and quantifiable power to act in terms of concrete results.*"¹²

Acknowledging horizontal subsidiarity, the step that follows, as a **direct consequence, is to recognise on a legal level the shared governance** that is realised through 'cooperation pacts', thus changing the traditional paradigm of the relationship between citizen and public administration based on administrative acts of a hierarchical nature in which, unlike the latter, all the conditions and modalities of implementation of activities, descend from the common will of the two 'contracting' subjects, or rather, signatories of the pact or agreement. Otherwise, it is or would be impossible to speak of 'shared governance'.

It is not a question of exporting the 'Italian model' tout court, which would not work due to the obvious social, economic, traditional, cultural and historical differences that characterise the various countries. However, starting from the assumption that the object, actions, recipients, objectives and goals constitute a **homogeneous whole in the European panorama**, we wanted here to propose a reflection on the need to go beyond **vertical subsidiarity**, since it is precisely the Italian Constitution's express reference to the principle of horizontal subsidiarity that has triggered a chain reaction that, since the early 2000s, has produced a more direct relationship between institutions and citizens¹³, elevating their role from passive to 'active' subjects, not so much because they 'perform activities' as

¹¹ (Art. 10.3 TEU): Every citizen has the right to participate in the democratic life of the Union. Decisions are taken as openly and as closely as possible to the citizens.

¹² Text consulted: : Filippo Maria Giordano. "Rethinking Horizontal Subsidiarity In The European Union Chapter I. Subsidiarity, a transformative principle for the future of European democracy"

¹³ At the end of 2022, there were almost 300 municipalities in Italy with specific regulations for the shared administration of common goods. These include many provincial and regional capitals (Bologna, Florence, Turin, Genoa, Verona...) with thousands of signed cooperation pacts involving hundreds of thousands of citizens and volunteers.

because of their active participation in the growth of the country, giving concrete expression to the principles not only of the oft-quoted art. 118 of the Constitution but also of articles:

- **3.2 Constitution:** "It is the duty of the Republic to remove obstacles of an economic and social nature, which, by effectively limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country."

- **and 4.2 Constitution:** "Every citizen has the duty to perform, according to his or her own possibilities and choice, an activity or a function that contributes to the material or spiritual progress of society."

These principles appear to be of universal value and can therefore be taken as a reference in the European context.

We have tried, we do not know how successful we have been, in highlighting "[...] *the role of the principle of horizontal subsidiarity in strengthening participatory democracy in the European Union, as a form of active democracy that does not invalidate but consolidates and strengthens representative democracy. Thus, to the involvement of citizens in the deliberative and decision-making process, one can add the power of direct action of behaviour in the construction of agreement-based (public/private) micro-communities - not 'voice' but 'action' -, based on the willingness to share common assets (tangible and intangible), expanding their use to facilitate the formation of institutional networks through structured dialogue. [...]*" (Filippo Maria Giordano. *ibid.*)

We therefore believe we can answer in the affirmative to the question Giordano poses, namely whether it is possible, starting from the Italian experience, to translate the power of those who have no power into the power of active citizens who find in subsidiarity an instrument of direct participation in democratic action, and whether this is possible on a European scale, taking Articles 10 and 11 of the Treaty on European Union as a reference. And finally whether the Italian model of shared administration could constitute a virtuous precedent exportable and replicable, albeit in a different way, in the rest of the European Union.

But to achieve this goal it is necessary for the European institutions to start a reflection in this direction. We believe it is possible. And perhaps the project in which we have participated together with many other friends can be, we hope, a small spark that will light a big fire.

For more details on our project process and outputs you can consult the website:
<https://commoning.eu>

See the video interviews on our youtube channel:
<https://www.youtube.com/@commoningeurope5018>