

GLORIA PETTINARI

Assegnista di ricerca presso il Dipartimento delle Arti dell'Università di Bologna  
*gloria.pettinari2@unibo.it*

**THE PUBLIC FUNCTIONING CHALLENGE:  
COLLABORATIVE MANAGEMENT AS A  
GOVERNANCE STRATEGY. THE CASE OF  
«COMMONS» AND THE ITALIAN  
ADMINISTRATIVE SOLUTION**

ABSTRACT

Public activity is called to address public interest and general needs. To respond, today more than ever, the complexity of society calls for multi-level governance, so the public authority is not the only actor in that game. However, reasoning on the newest complex challenge for the public authorities, there may lead to new solution, that is administrative instruments, coming from the practical need approach to answer general interest differently. This kind of approach, from the bottom to the top, may challenge the current legal system.

Following the «commons» issues, this paper seeks inspiring solutions to manage its complexity. This is because, in the «commons» experiences, we can find more groups of interests and new solutions willing to overcome some traditional boundaries between public and private power and their means: collective actions.

The activities implemented for «commons» define a proper collaborative management strategy, particularly important to manage the complexity, such as the multidimensionality framework of relationships among people and authorities, their needs, and their legal instruments. To show how the Italian case of «commons» practices has come to find legal tools to manage the complexity means to show how to involve both citizens, private, and public authorities in a joint agreement, defining a common project.

So, commons and collaborative governance combine in a legal system to change the traditional relationship between actors in the 'public sphere', where the public power has traditionally been mainly authoritative.

The paradigm shifts to a collaborative relationship (from a separate one in a bipolar configuration) thanks to a proper collaborative legal regulation system, starting to recognise «subsidiarity» as a constitutional principle. This also means a cultural change or a development of values that implies legal and administrative formal solutions and organisational strategy.

It can be seen as a good governance strategy for a democracy. Commons management implies dealing with complex interests, powers, and actors' systems. So, on the one side, involving more people in conflicts with each other and on the other side finding a collaborative solution; is the best democratic way to find a *tertium genus* good solution (neither authoritative nor private). There is still a long way to go, but we have started to find legal methods such as administrative agreement, defining goals and responsibilities to share with more subjects in a multi-players context. The practice stimulates some legal solutions only in a democratic context where participation can be guaranteed. It seems to have become a new administration model, an organisation solution for Public Law.

KEYWORDS: commons – subsidiarity – shared administration – cooperative administration – collective action.

INDEX: 1. Preface: pluralism, complexity and administration – 2. Subsidiarity and «shared administration» – 3. From an economic theory to a legal idea of «commons» – 4. Co-operative (management) system and decision-making process – 5. The innovative Italian administrative model – 6. Some conclusion: collaborative governance as a solution strategy.

## **1. Preface: pluralism, complexity and administration**

New public challenges are so wide-ranging that they encompass a multitude of actors in the various field of decision-making and public actions.

Analyse examples of complex processes are useful to understand how to involve many actors focusing on the mechanisms of adaptation that often originated from the bottom<sup>1</sup>.

At the local level characterised from the closest to people needs, can help finding solutions that can address legal tools from an experimental and adaptive method (adaptive management).

Today, more than ever, the complexity of society calls for a pluralism of the decision-making process. Maybe looking for this process can illuminate features of the legal landscape tools.

It is useful to see for example the case of collective actions (that comes from mechanisms of adaptation)<sup>2</sup> relating to collaborative governance of «commons», a *tertium genus* good (neither public nor private)<sup>3</sup>, that defines a method to respond to general needs, including the pluralism of the communities involved that can autonomously act for the common good.

In that case of plurality there are more subjects in different positions, everyone can participate to respond general interests in a multi-level governance, as part of a co-operative strategy.

That is also a method to administrate the complexity in a multi-players system, where authorities still hold the public function, despite they are not the only or main actors in the ('shared') decision «arena»<sup>4</sup>. They play along with civil societies guarantying the impartiality of the action, such as ensuring an equal opportunity to participate to everyone<sup>5</sup>.

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1 See D. T. HORNSTEIN, *Complexity Theory, Adaptation, and Administrative Law*, Duke Law Journal, Feb. 2005, 54, 4, 917.

2 Action strictly connected to the action of repetition, through which people became expert and found the best solution from an adaptive reaction, see *ibidem*.

3 S. RODOTÀ, *Beni comuni e categorie giuridiche. Una rivisitazione necessaria*, in *Questione giustizia*, 2011/5.

4 E. OSTROM, *Understanding Institutional Diversity*, Princeton, Princeton University Press, 2006.

5 I. PIAZZA, *L'imparzialità amministrativa come diritto. Osservazioni sul rapporto complesso tra cittadini e pubblica amministrazione*, in *Persona e Amministrazione*, 10. 2022..

At the centre of this participation method, there is the idea that no supremacy exists in the definition of the public needs (for anyone<sup>6</sup>) even for the authorities, which can collaborate in the definition of solutions<sup>7</sup>, namely they can co-operate with the civil society in a participating proceeding<sup>8</sup>. This passage allows to elaborate organizational means to manage general needs in a public sphere open to the pluralism of subjects, guarantying the participation of all third parties' actors interested<sup>9</sup>, till the definition of collaboration governance as a human right<sup>10</sup>.

Following the Italian «commons» practices<sup>11</sup>, this paper seeks some inspiring solutions to manage the complexity, following mechanisms of adaptation within complex systems.

So, starting from showing the activities, we can define the concept of «collaborative governance» and, on the other hand, understand how to manage a multiplayer framework based on «subsidiarity paradigm<sup>12</sup>» and «collective action<sup>13</sup>» linked together. By describing the phenomenon, we also met the case and concept of «commons» as practised in Italy (where we find traces of some strategies to manage its complexity).

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6 G. ARENA, *Cittadini attivi. Un altro modo di pensare all'Italia*, Bari, 2006.

7 P. FORTE, *Enzimi personalisti nel diritto amministrativo*, in this Review, 1/2017 and a. pioggia, *Le persone come risorsa strategica nell'amministrazione dello sviluppo sostenibile*, in Riv. it. dir. pubbl. com., 2002.

8 U. ALLEGRETTI, *Procedura, procedimento e processo. Un'ottica di democrazia partecipativa*, in Dir. amm., 2007.

9 In the complexity discretionary decisions, assessments, perceptions, and judgment instructions for the formulation of the participating procedural is up to the administrative body as its function, in this sense see P. FORTE, *Diritto amministrativo e data science. Appunti di Intelligenza Amministrativa Artificiale (AAI)*, *Persona e amministrazione*, 2/2020.

10 S. RODOTÀ, *Il diritto di avere diritti*, Bari, Laterza, 2012.

11 Please, for an exhaustive reading refer to M. BOMBARDELLI, *L'organizzazione dell'amministrazione condivisa*, in G. ARENA, M. BOMBARDELLI (eds.), *L'amministrazione condivisa*, Quaderni della Facoltà di giurisprudenza, Trento, 2022; M. BOMBARDELLI, *La cura dei beni comuni: esperienze e prospettive*, in *Gior. dir. amm.*, 2018.

12 For a clear explanation, please refer to G. ARENA, *Le diverse finalità della trasparenza amministrativa*, in F. MERLONI, G. ARENA (eds.), *La trasparenza amministrativa*, Milano, Giuffrè, 2008.

13 E. OSTROM, *Collective Action Theory*, *The Oxford Handbook of Comparative Politics*, CARLES BOIX AND SUSAN C. STOKES (eds.), 2009.

It implies a new approach (collaborative paradigm<sup>14</sup>) and a new method of the decision-making process that implies participation at all phases from the decision to the planning till the action, sharing responsibilities among the subjects involved, changing the traditional bipolar paradigm: public or private sphere. It has become a new organisation system that overcome some traditional boundaries between public and civil power<sup>15</sup>.

In the next pages, we analyse the principle of «shared administration» and the application field of «commons» and the principle of «subsidiarity<sup>16</sup> » that finally represents an organisational method to face complexity, which meets constitutional recognition<sup>17</sup>.

This changeset is the result of a cultural evolution and become a practice finding legal solutions. The shared responsibility approach can be seen as a better governance strategy for a democracy to deal with complexity, where collaboration can overcome different power roles<sup>18</sup>. Even though, the method involves more people in turn, more rights, and so responsibilities that create new complexity again, at the same time, collaboration arbitrate conflicts, turning

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14 M. OLSON, *The Logic of Collective Action*, 1965.

15 F. DE TOFFOL, A. VALASTRO, *Dizionario di democrazia partecipativa*, Centro studi giuridici e politici, Regione Umbria, 2012; A. VALASTRO (eds.), *Le regole della democrazia partecipativa. Itinerari per la costruzione di un metodo di governo*, Napoli, Jovene, 2010, pp. 141 – 188; A. VALASTRO, *La democrazia partecipativa alla prova dei territori: il ruolo delle amministrazioni locali nell'epoca delle fragilità*, in Id. (eds), *Le regole locali della democrazia partecipativa. Tendenze e prospettive dei regolamenti comunali*, Napoli, 2016.

16 D. DONATI, *Il paradigma sussidiario. Interpretazioni, estensione, garanzie*, Bologna, 2013; ID., *Le città collaborative: forme, garanzie e limiti delle relazioni orizzontali*, in *Istituzioni del federalismo*, 2019; F. GIGLIONI, *Principi e ricadute sistemiche di diritto pubblico nella recente riforma del terzo settore*, in *Munus*, 2019; C. TUBERTINI, *Sviluppare l'amministrazione condivisa attraverso i principi di sussidiarietà (verticale) e leale collaborazione: riflessioni e proposte*, in *Istituzioni del federalismo*, 2019.

17 V. CERULLI IRELLI, voce *Sussidiarietà (dir. amm.)*, in *Enc. dir.*, VII, 2003; D. DONATI, *Il paradigma sussidiario: interpretazioni, estensioni e garanzie*; ID., *Partecipazione come categoria, identità e rappresentanza. Ruolo e contraddizioni delle nuove forme associative*, A. Valastro (eds), *Le regole della democrazia partecipativa. Itinerari per la costruzione di un metodo di governo*, Napoli, Jovene, 2010.

18 OECD, *Local Partnerships for Better Governance*, 2001.

into a *tertium genus* relation between public authorities and society that is a collective action<sup>19</sup>.

## 2. Subsidiarity and «shared administration»<sup>20</sup>

To understand the meaning of «shared administration», we should go back to the first time of its comparison in an essay, written in 1997, by Gregorio Arena<sup>21</sup>. Quoting the words of the theorist: «it is based first and foremost on the assumption that at the current stage of development of Italian society, the conditions exist for structuring the relationship between the administration and citizens in such a way that the latter leave behind the passive role and become co-administrators; by integrating the resources they possess with those of the administration, they take on a share of responsibility in solving problems of general interest<sup>22</sup>».

It means that in a system of power civil society and public authorities can jointly express new energy and resources and put them together at the service of the generality, so everyone (authorities and society) can benefit from it (reciprocity relationship<sup>23</sup>).

The «shared administration» is a different action model to face general interest activities. It is a complex proceeding to answer the (even more) com-

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19 S. RODOTÀ, *Il diritto di avere diritti*, Bari, Laterza, 2012; E. OSTROM, *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge University Press, eds. 2015. ID, *Governing the Commons. The evolution of institution for collective action*, Cambridge, 1990.

20 Translation used by F. CORTESE, *What Are “Common Goods” (beni comuni)? Pictures from the Italian Debate*, *Revista da Faculdade de Direito da UFMG*, n. 2, 2017. For the meaning see G. ARENA, *Introduzione all'amministrazione condivisa*, in *St. parlam. e pol. cost.*, 1997.

21 This is also the suggestion of F. GIGLIONI, *Forme e strumenti dell'amministrazione condivisa*, in G. ARENA, M. BOMBARDELLI (eds), *L'amministrazione condivisa*, Quaderni della Facoltà di giurisprudenza, Trento, 2022, 65-66.

22 The translation is from the author of G. ARENA, *Introduzione all'amministrazione condivisa*, cit.

23 The constitutional jurisprudence (recently sent. 131/2020) deals with social freedoms that are ascribable neither to the state nor to the market, but rather to those forms of solidarity expressing a relationship of reciprocity. It must be included among the founding values of the legal system, human rights and the basis of social coexistence. See D. DE PRETIS, *Principi costituzionali e amministrazione condivisa*, in G. ARENA, M. BOMBARDELLI (eds), *L'amministrazione condivisa*, 54.

plex question of society, having as a result not an authoritative act, not a synallagmatic relation but a co-operation process and so eventually the sign of an agreement<sup>24</sup>, based on deal among the parties' will.

The proper feature lies in identifying a new function of the administration that consist of sharing its decision-making, planning and design spaces of co-administration with civil society and its actors. alternately, even they, in a sense respond to a public function, they have not only a passive role<sup>25</sup>.

The system allows to involve people to define general interests based on their needs, in lots of topics; for instance, it is typically useful for re- thinking spaces of cities, make urban regeneration, manage and provide different services to child, or otherwise for cultural purposes, and so on. General interest<sup>26</sup> activities can be defined as a care purpose identified as an action that respond to the needs of citizens that they represent participating. This overcome the supremacy of authorities to define the interests to be pursued, based on the authoritative power and its supremacy in defining public interests<sup>27</sup>.

Tuscany regional law defined in the art. 1 'common goods' as «things understood as tangible, intangible and digital goods, expressing utilities functional to the exercise of the fundamental rights of the person, to individual and collective well-being, to social cohesion and to the life of future generations, for

24 This is the idea of the main approach of case law and literature, in this sense also the Corte Cost., sent. 131/2020, even if there is no lack of critical readings, that points out the need to continue reasoning on the value of the agreement, the relationship that is created between administration and citizens, see V. CERULLI IRELLI, *L'amministrazione condivisa nel sistema del diritto amministrativo*, Quaderni della Facoltà di giurisprudenza, Trento, 2022, 21.

25 See F. BENVENUTI, *Il nuovo cittadino. Tra libertà garantita e libertà attiva*, Venezia, 1994; G. ARENA, *Cittadini attivi*, Roma-Bari, 2006.

26 According to the liberal theorist Constant, authority derives its power from sovereignty. With this power it is possible to shape the interests to be pursued - political power to identify public choices or the public interest. The nature of this power is collective, but it is in the hands of the authority, in relation to which freedom remains as something essentially individual. Finally, political rights are not conceived by Constant as an actual freedom, but they enable individuals to participate in the formation of the general will; however, the real freedom is able to clash with others to bring out the general interest that will always be the result of a comparison. It is a sort of majority will, the position of the majority. For Rousseau there is much difference between the will of all and the general will: this concerns only the common interest, the other the private and the sum of particular wills. See B. CONSTANT, *Principes de politique applicables à tous les gouvernements*, 1806; J.-J. ROUSSEAU, *Le contrat social*, 1762.

27 F. BENVENUTI, *L'amministrazione oggettivata: un nuovo modello*, in Riv. trim. sc. amm., 1978.

which citizens take action to guarantee and improve their collective enjoyment and share with the administration the responsibility for their care, shared management or regeneration; 'care' as an actions and interventions aimed at the protection, conservation, management and maintenance of common goods; and 'shared management' as public use and collective action for the management of the commons, with inclusiveness and integration». To frame the concept of general interest, refers to State Law on third social sector<sup>28</sup>: «activities carried out on a non-profit basis with civic, solidarity and socially useful purposes and defined pursuant to article 5 of Legislative Decree 117/2017».

In fact, the main regulatory reference in the definition of activities of general interest is the last-mentioned 2017 State of law, which lists these kind of activities: social interventions and services, education, environment condition, interventions for the protection and enhancement of the cultural heritage and landscape, tourism activities, university and post-graduate education, scientific research relevant for social interest; organisation and management of culture, arts, and sport, humanitarian reception and social integration of migrants, social agriculture, and so on other activities; Even though this is not an exhaustive list, it can provide a framework<sup>29</sup>.

Basically, what the law mention is about the function of third sector entities, rather than social enterprises including social cooperatives carry out more activities of general interest for the non-profit pursuit of civic and fair solidarity and social utility. The «shared administration» instruments allow all citizens to contribute, through legal administrative decision to general interest.

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<sup>28</sup> In the same way also the Emilia Romagna (L. R. 3/2023), Umbria (L.R. 2/2023) and Lazio Region Law (L.R. 10/2019). This latter specifies that commons good is understood as goods, tangible and intangible, functional to individual and collective well-being and to the interests of future generations.

<sup>29</sup> Please, refers to A. SANTUARI, C. GOLINO, *Gli enti del terzo settore e la co- amministrazione: ruolo della giurisprudenza e proposte de jure condendo*, in *Istituzioni del Federalismo*, 3/2022; F. GIGLIONI, *principi e ricadute sistemiche di diritto pubblico nella recente riforma del terzo settore*, in *Munus* 2/2019; A. GUALDANI, *Il sistema delle esternalizzazioni nei servizi sociali: antiche questioni e nuove prospettive*, in *Federalismi.it* 12/2018; M.V. FERRONI, *L'affidamento agli enti del terzo settore ed il codice dei contratti pubblici*, in *Nomos* 2/2018.



The item achieves the fullness of the person, the development of human, the affirmation of his or her dignity as an individual, as established by the first part of the Italian Constitution regards to fundamental right<sup>30</sup>. Thus, the main elements of the system include solidarity and participation. Following the «subsidiarity<sup>31</sup> paradigm<sup>32</sup>» citizens can decide to make themselves available to implement responses (with their own job) they feel they need, and they promote a solution for which the public administration had not thought of, organised, or implemented yet. It is an additional action to that one already planned in the administrative activity, without replacing it<sup>33</sup>.

This capacity for involvement civil society, to give the opportunity to participate and contribute becomes possible, rightful and a proper 'administrative function' thank to the tools of the «shared administration» - creating the necessity to balance with the other features.

This finds direct constitutional legitimisation in the article 118 of the Constitution, which recognises «subsidiarity» as a mean to distributing administrative, decision and action power involving the exponentiality of the community<sup>34</sup>. This legal principle recognises the favour to proximity to firstly be le-

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30 G. ARENA, *Interesse generale, solidarietà, sussidiarietà*, Labsus, 2015, <https://www.labsus.org/2015/02/interesse-generale-solidarieta-sussidiarieta/>.

31 Italian Constitution forecasts the 'subsidiarity' principle in art. 118, par. 4, according to which active citizens can take care of a general interest, that does not entirely coincide with the public, private or collective interest or with the interest of a specific group. Essentially arises from the participation of the community thanks to the willingness of the parties motivated to collaborate; they take an initiative that implies collaborating with administrative bodies, which can even leave complete 'space' to citizens (principle of horizontal subsidiarity) C. IAIONE, *The CO-City: Sharing, Collaborating, Cooperating, and Commoning in the City*, *American Journal of Economics and Sociology*, 2016.

32 The subsidiarity paradigm is connected to the shared administration, and it is realised through a sphere of rights and freedoms that make up administrative citizenship and the relationship between the state and the administered based on the principle of subsidiarity, G. ARENA, *Le diverse finalità della trasparenza amministrativa*, in F. MERLONI E G. ARENA (eds.), *La trasparenza amministrativa*, Milano, Giuffrè, 2008.

33 G. PAVANI, S. PROFETI and C. TUBERTINI, *Le città collaborative ed eco-sostenibili. Strumenti per un percorso multidisciplinare*, Bologna, Il Mulino, 2023.

34 It is the valorisation of proximity F. MERLONI, *Introduzione al diritto amministrativo e ai suoi principi*, Torino, Giappichelli, Iv ed., 2022., V. CERULLI IRELLI, *Sussidiarietà (dir. amm.)*, in *Enc. dir.*, agg. ed. VII, 2003, he minds the qualification of general interest as also the product of political social process; D. DONATI, *Il paradigma sussidiario*, Bologna, Il Mulino, 2013. Please, to the 'vertical' concept refer also to F. MERLONI, *Il titolo V, le Regioni e le riforme delle autonomie territoriali*, 1 Ist. del federali-

gitimate to respond to citizen's needs, enhancing the country's autonomies. It regulates relations among the different levels of government, but also those between public territorial authorities and private<sup>35</sup>. «Subsidiarity» dates to the Italian law approved in 2001<sup>36</sup> in revising the Constitution to allocate function, according to the organisational criteria of «subsidiarity, differentiation and adequacy».

This has found recognition by the European Union in the article 5 of the European Union Treaty, that states: «1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality [...] 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level [...] ».

This is basically the same favour expressed to the local level action, the so-called «vertical subsidiarity<sup>37</sup>» (and we will see it again later on) but additionally the Italian Constitution added the concept of «horizontal subsidiarity» expressed by the paragraph 4 of the article 118 of the Constitution: «the State, regions, metropolitan cities, provinces and municipalities shall promote the autonomous initiatives of citizens, both as individuals and as members of associations,

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simo, 2021; L. VANDELLI, G. GARDINI, C. TUBERTINI (eds), *Le autonomie territoriali: trasformazioni e innovazioni dopo la crisi*, Rimini, 2017; G. FALCON, *Funzioni amministrative ed enti locali nei nuovi artt. 118 e 117 della Costituzione*, in *Le Regioni*, 2002; M.P. VIPIANA, *Il principio di sussidiarietà verticale*, Milano, 2002; E. FOLLIERI, *Le funzioni amministrative nel nuovo Titolo V della parte seconda della Costituzione*, in *Le Regioni*, 2003; G. FALCON (eds), *Lo Stato autonomista*, Bologna, 1998.

35 F. MERLONI, *Introduzione al diritto amministrativo e ai suoi principi*, Torino, Giappichelli, IV ed., 2022.

36 Art. 4, l. cost. 18 ottobre 2001, n. 3, Modifiche al titolo V Cost.

37 D. DONATI, *Le città strategiche. L'amministrazione dell'area metropolitana*, St. di diritto Pubblico, Milano, Franco Angeli; E. CARLONI, *Lo Stato differenziato. Contributo allo studio dei principi di uniformità e differenziazione*, Torino, Giappichelli, 2004; I. TORCHI (eds), *Il sistema amministrativo italiano*, Bologna, 2009; L. VANDELLI, G. GARDINI, C. TUBERTINI (eds), *Le autonomie territoriali: trasformazioni e innovazioni dopo la crisi*, Sant'Arcangelo di Romagna, 2017; E. CARLONI, F. CORTESE, *Dir. delle autonomie territoriali*, Padova, 2020.

relating to activities of general interest, on the basis of the principle of subsidiarity<sup>38</sup>».

This provision is preceptive, in other words, it requires that public authorities foster the participation - «shall promote» - to define general interest, general needs: «autonomous initiatives of citizens [...] relating to activities of general interest».

It means not only to not obstruct initiative that arrive from the 'bottom' but also to promote them<sup>39</sup>. How to do this? As we will see later, it is the case of recognising to everyone all the possibilities through transparency and publicity of the opportunities and put in place, after evaluation<sup>40</sup>, initiatives through the administrative tools of «shared administration» that become an organisational tool of public authorities<sup>41</sup>. The administration represents various action models that are integrated with each other<sup>42</sup>, such as regulation, procurement, and other administration performances; «shared administration» is a distinctive model, different from authoritative or private (think about the access to the global services marketplace) which is added the others. To understand it better, we should focus on its main purpose: the general interest as a goal to achieve non-profit action with the participation capability from the bottom.

In a «shared administration» model there is a convergence of objectives between the public and the private social actors, and this is what the Constitutional Court at the sentence 131 of 2020 has recognised<sup>43</sup>. For the Court the

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38 Signed in Maastricht 7 February 1992, European Union, Consolidated version of Treaty on European Union, 2016, Official Journal of the European Union C 202/1, [http://data.europa.eu/eli/treaty/teu\\_2016/oj](http://data.europa.eu/eli/treaty/teu_2016/oj). c. magnani, *Sussidiarietà e Costituzione: pluralismo e diritti. Beni pubblici e servizi sociali in tempi di sussidiarietà*, Torino, Giappichelli, 2007, 121-139. See also CE, White Paper on governance, 2001.

39 See Corte Cost. n. 52/2021.

40 An evaluation that is neutral respect of the assessment of public value of the proposal. See F. GIGLIONI, *Forme e strumenti dell'amministrazione condivisa*, in G. ARENA, M. BOMBARDELLI (eds).

41 M. BOMBARDELLI, *L'organizzazione dell'amministrazione condivisa*, in G. ARENA, M. BOMBARDELLI (eds).

42 G. PAVANI, S. PROFETI and C. TUBERTINI, *Le città collaborative ed eco- sostenibili. Strumenti per un percorso multidisciplinare*, Bologna, Il Mulino, 2023, 66.

43 See G. ARENA, *L'amministrazione condivisa ed i suoi sviluppi nel rapporto con cittadini ed enti del terzo settore*, in *Giur. cost.*, 2020.

spontaneous civic collaboration is an enabling condition to activate «shared administration», instead of the other models, because of the disposition is more likely to have preference for subsidiarity approach, as expresses by the Constitution. And it is possible in case of solidary actions and in place characterised for «solidary society» that can offer a response made by their capabilities for the «society of needs»<sup>44</sup>.

The sentence recognise that the Constitution made a systemic implication presenting the «shared administration» as a model, starting from the recognition of the profound sociality of the human person and its possibility for a positive and responsible action for the public.

This, defined as the freedom of post-moderns, is peculiar of a «new citizen» who does not merely participate to the formation and exercise of sovereign power. It allows its holder to express himself or herself actively with personal participation in those occasions of common living, common life that directly and individually may interest and involve him but for the community, following the principle of solidarity<sup>45</sup>.

It was intended to overcome the idea that only the action of the public system is intrinsically suited to perform activities for the general interest. It can be pursued by an autonomous initiative of citizens, identifying a proper sphere of organisation for social freedoms that can be attributed neither to the State nor to the market, but to those forms of solidarity that has been expressed as a relationship of reciprocity<sup>46</sup>. «[...] shared administration, alternative to that of profit and the market: ‘co-planning’, ‘co-design’ and “partnership” (which can

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44 See Corte Cost. n. 131/2020. See also G. PAVANI, S. PROFETI and C. TUBERTINI, *Le città collaborative ed eco-sostenibili. Strumenti per un percorso multidisciplinare*

45 This freedom remains closely linked to the assumption of responsibility, like the attitude to respond to general needs because he trusts the community people and counts on the fact that they will adopt the same attitude, recognised to the law – defined reciprocity effect, see M. BOMBARDELLI, *L'organizzazione dell'amministrazione condivisa*, in G. ARENA, M. BOMBARDELLI (eds.), 117. Reference to F. BENVENUTI, *Il nuovo cittadino. Tra libertà garantita e libertà attiva*, Venezia, 1994; S. CASSESE, *L'arena pubblica. Nuovi paradigmi per lo Stato*, in *Riv. trim. dir. pubbl.*, 2001, 601 ss.; G. ARENA, *Cittadini attivi. Un altro modo di pensare all'Italia*, Bari, 2006, 3.

46 This is the point expressed by Corte Cost. n. 131/2020.

also lead to forms of “accreditation”) are configured as phases of a complex procedure that express a different relationship between the public and private sectors. As phases of a complex process expressing a different relationship between the public and the «private social», so not simply based on a synallagmatic relationship<sup>47</sup>».

The European Union’s case law, he also recognised that in the context of activities with a marked social value, the principle of solidarity, rather than the principle of competition, must be favoured in the awarding of contracts<sup>48</sup>. The social value become a criteria for this organisational model, inspired not by the principle of competition but by the principle of solidarity (provided that non-profit organisations and citizens contribute, under conditions of equal treatment, in an effective and transparent manner for the pursuit of social aims)<sup>49</sup>.

This model is inspired by the so defined «paradigm of subsidiarity<sup>50</sup>», according to which the public sphere is redefined embedding citizens’ participation for definition of general interest. It is linked to the egalitarian principle and the respect of human rights<sup>51</sup>. Article 3 of the Constitution establishes the equality of people and the necessity for the Republic to remove the limits to the same possibilities and to strengthen their capability to participate in the social-political life<sup>52</sup>. The valorisation of citizens’ and thus their contributions, as

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47 The translation is from the author, see Corte Cost. n. 131/2020, 9.

48 As stated to the mentioned Corte Cost. n. 131/2020 and recently to the Regional Administrative Court (TAR) of Trento, sez. I, 23 May 2023, n.77.

49 «Shared administration» is to achieve the general public interest pursued, see, e.g., TAR Lombardy, Milan, sez. Lombardy Milan, sec. IV, 2 March 2023, n. 538; TAR Lazio Roma sez. III, 8 February 2021, n. 1594.

50 G. ARENA, *Le diverse finalità della trasparenza amministrativa*, in F. Merloni e G. Arena (eds.), *La trasparenza amministrativa*, Milano, Giuffrè, 2008; D. DONATI, *Il paradigma sussidiario*, Bologna, Il Mulino, 2013.

51 Art. 2 «The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups, where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity will be fulfilled», Senato della Repubblica, [https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf).

52 Art. 3.2 of Constitution: «It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country» Senato della Repubblica,

we mentioned, configure as a proper function, welcoming participation and giving equal opportunities<sup>53</sup>: by organizing themselves can respond to general needs left unmet. The authorities shall internalise participation means as part of the «enabling state<sup>54</sup>»: a model that is the result of a democratic State; its origin comes from the capability of people and organization composing the society, their resources, and the power of organizations of citizens. It originated from the crisis of the Welfare State and caused the diminishing of social protection systems and the capability of local authorities to face all needs<sup>55</sup>. At the same time, the growth of the complexity of society calls for more energy<sup>56</sup>. Therefore, transformation of the Welfare State does not mean its demolition, but maybe its remodelling. The «shared administration» can represent an alternative, or a resilience to manage this ‘transition’. What Niel Gilbert said in 1989<sup>57</sup> can, even if only in part, help to clarify this point, he thoughts the Wel-

Cost. in inglese [https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf).

53 Around the theme of equal opportunities please, refer also to G. PETTINARI, *Gender and corruption, a matter of public integrity. Systematic approaches starting with the international framework*, IusPublicum, 2. 2022.

54 In this sense, see S. CASSESE, *Le prospettive*, in L. Torchia (eds) *Il sistema amministrativo italiano*, Bologna, Il Mulino, 2009, 515; E. CHITI, *La rigenerazione di spazi e beni pubblici: una nuova funzione amministrativa?*, in F. DI LASCIO AND F. GIGLIONI, *La rigenerazione di beni e spazi urbani*, Bologna, Il Mulino, 2017. See also F. GIGLIONI, *Forme e strumenti dell'amministrazione condivisa*, in G. ARENA, M. BOMBARDELLI (eds), foot note n. 4.

55 The various interests that will be proposed necessarily need protecting and the administration is called upon to protect, that has led to a proliferating of the centres of allocation of responsibilities and the corresponding administrative functions. F. DI LASCIO, *Public Administration as a Complex Adaptive System between Crisis and Conflict*, F. DI LASCIO, M. DE DONNO (eds), *Public Authorities and Complexity. An Italian Overview*, Napoli, Edizioni Scientifiche Italiane, 2023, 82. Refer also to G. Rossi, *Potere amministrativo e interessi a soddisfazione necessaria*, Torino, Giappichelli, 2011.

56 While social goals are harder to reach, the functionalities and the extent of social spending depend on lots of conditions, demographic changes, economic market supremacy, the role of the State, the level of resources, of poverty, technology, the development of the Country, etc. F. BASSANINI, T. TREU E G. VITTADINI (eds), *Una società di persone?. I corpi intermedi nella democrazia di oggi e di domani*, Bologna, Il Mulino, 2021.

57 The theories of the author have met much criticism because of research method: his criticism to the egalitarianism and his position in favour of the «progressive conservatism. See A. CERRATO, *Never Enough: Capitalism and the Progressive Spirit di Neil Gilbert (2016)*, in B. MAGNI and F. LIVERIERO (eds), *Quaderni di Biblioteca della libertà*, 1/2019. Anyway, in our point of view the approach of the author is useful to build the theme of «Enabling State». See, Neil Gilbert, *The Enabling State*, New York, Oxford University Press, 1, 1989, 171-86. The author said that since the mid-1970s there has been a fundamental change in social welfare in the

fare State were changing to another one, a State of opportunities, the so called «Enabling state». This idea then has found further development and theorists, but it is important to bear in mind the focus on decentralized governance, supported by the State. This is a way for to suggest authorities for advancing a dialogue with civil society actors to shared goals and social policies, coordinated by a multi- level governance, based on a collaboration strategy<sup>58</sup>.

In our reasoning is crucial to focus on the promotion and the bringing together forces of all society especially for individuals. It is possible to guarantee equal opportunities for shared responsibility through a collaborative approach. For this point, «shared administration model» can be a pathway to make social responses accessible to anyone through a co-operation action.

### **3. From an economic theory to a legal idea of «commons»**

The general interest is the main feature of «shared administration model», finding a natural field of application in the management of «common good». There are two main ways to define what are «common goods»: first, it is thinking about what kind of good it is, reasoning on the characteristics of things involved. On the other hand, focus on the action and process, which activates a different administrative model from the «traditional one». From this point is possible to get a reflection on the nature of the resources themselves<sup>59</sup>. The first approach of this classification of goods is applicable in every discipline but most of all followed in the economic approach. The legal science has done both, and we will mention them, but we do finish with the Administrative Law studies of Gregorio Arena that define the status of «things» starting from the practice<sup>60</sup>. We opt mostly for this second approach.

United States. It has shifted from the direct public production of welfare goods and services to the indirect one. This has been accompanied by decentralization and commercialization and it is being transformed into the Enabling State.

58 M. Reijo, *Innovation, Human Capabilities, and Democracy: Towards an Enabling Welfare State*, Oxford, 2013.

59 F. CORTESE, *What Are "Common Goods" (beni comuni)? Pictures from the Italian Debate*, 124.

60 G. ARENA, *Un nuovo modo di amministrare*, in Riv. it. com. pub., 2004, 1, 23; G. ARENA, *I custodi della bellezza. Prendersi cura dei beni comuni. Un Patto per l'Italia fra cittadini e istituzioni*, Milano, 2020.



The main economic theory opposed to the collaboration, and from which basically flowed the idea of «commons» of Elinor Ostrom is «The Tragedy of the Commons». Biologist Garrett Hardin created a metaphor to describe human behaviour: where herdsmen sharing a common pasture put as many cattle as possible out to graze, acting in their own self-interest to run out of land resources.

In that way he wanted to demonstrate the selfishness of men can destroys available and free resources limiting the advantages of all the others.

«Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all» (Hardin, 1968<sup>61</sup>).

For Hardin, the problem of free access and free use of natural resources creates a situation like the one where shepherds feed their flock more than possible at the expense of the community whole. In that sense the metaphor of animals that consume grass faster than the ground can regenerate. The effect of overgrazing is shared by all users, while only one shepherd can benefit from adding extra sheep beyond the possibility of sustainable land usage, gaining an extra profit. Consequently, the depletion of resources is a problem that hampers every future user. After the damage, other herders can add only a few sheep once the grass is restored or preserved. For Hardin, this example explains the exploitation of the world and natural resources. His study wants to demonstrate the inclination of humans to take their own benefit, even at the expense of the common interest.

Hardin's theory has succeeded starting from the increasing interest in environmental conservation and sustainability problems in the 1960s<sup>62</sup>.

The solution that Hardin found to the problem of self-destruction was to put a price and to develop a third subject to monitor the use of the re-

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61 G. HARDIN, *The Tragedy of the Commons*, Science, 162, 1968, 1245.

62 Finally, he explained why overpopulation was causing so much damage to the environment J.M. ANDERIES, M.A. JANSSEN., *Sustaining the commons*, Centre for the study of institutional Diversity, Arizona University, Matthews Hall, 2013.



sources. And this throughout privatisation, to limit just one or few users (the only ones who take benefits) or the public property solution to develop an authorised system to access the land and letting it manage by the authority able to limit any irrational opportunism. In other words, an external power: the «Leviathan» or the market; in that latter excluding some citizens from the use of the natural resources, while excluding them from the decision process or management.

That theory of a naturally selfish approach was already known by that time thanks to the «theory of prisoner»: another frequently non-cooperative model, famous for the “prisoner’s dilemma”, written by A. W. Tucker in 1950<sup>63</sup>. In that case, two prisoners suspected of committing robbery together, are isolated and interrogated to get a confession of guilt. Each one worries about getting the shortest possible prison sentence; they must decide whether to confess without knowing his partner’s decision. Both prisoners are aware of their decisions: (1) if both confess, they will both be sentenced to five years in prison (2) if neither confesses, they will both be sentenced to one year (3) if only one of the two confess and the other keeps silent, the first will be free from prison and the second will get the maximum sentence.

Therefore, the two people involved, who are interviewed separately, can confess to obtain the minimum sentence, but only if both do it. Both players are aware of each other situation, but no one knows what the other player will do<sup>64</sup>.

The players only have control on their own actions. So the evaluation is autonomous because isolated and based on the only benefits for the players.

They can inform the authority of the partner’s misconduct and not reveal about themselves: the most selfish option and this is exactly the one they choose.

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<sup>63</sup> A. W. TUCKER, *The Mathematics of Tucker: A Sampler*, *The Two-Year College Mathematics Journal*, 14, 3, 1983, 228–232.

<sup>64</sup> Davis M.D., S. J. Brams, *Game theory*, Britannica encyclopaedia, consulted Jan. 2023.

In these cases, we can find the fundamental of «common dilemmas»<sup>65</sup>: noncooperative behaviour, where a no-cooperative solution is the worst for everybody. In fact, in the prisoner dilemma they report to the police the partner's involvement in the crime, imagining that the other one will do the same. So, they were opting for the more individualistic solution rather than the best solution, the collaborative and rational one: confessing. As a result, they mistrust each other, leading to disadvantageous choices.

The two parables can demonstrate that isolation, the impossibility of communication hinder trust in the players. Reciprocity needs relation and contact, so it should be based on common knowledge, and trust, to have some certainty over other people's behaviour and decision.

The challenge is to pass from an unpredictable situation to a predictable and foreseeable one.

Hardin, in his essay, uses the term «commons», referring to the open-field system that was a situation during the middle-age in Europe, and he took the example of England for his theory. Still, in that case, the meaning of commons is different compared to how we intend today in a democratic context for it. The context was very different. Far away in time, lands for a long period were part of the baron's property. The lands were open for some period of the year for a free using; anyway, none of the users had the right to take care of, manage or exclude other users from the natural resources. There was no involvement of people in the government of the resources, and they had no possibility to change knowledge, as we intend today<sup>66</sup>.

Following the comparison of the Commons dilemma and prisoner dilemma, those demand a social solution, an interaction, and the possibility of collaborating to take a common decision. Giving people the opportunity to

65 G. HARDIN, *The Tragedy of the Commons*, cit.

66 It is not easy and probably is not the point to compare to the concept of commons from the medieval with the current one (J-P. Genet, *La légitimité implicite*, Paris-Rome: Éditions de la Sorbonne, <http://books.openedition.org/psorbonne/6568>, 2015, 207-222) in the contemporary context, J.M. ANDERIES, M.A. JANSSEN., *Sustaining the commons*, Centre for the study of *institutional Diversity*, Arizona University, Matthews Hall, 2013.

share knowledge so that they can make a deal. The solution found by Elinor Ostrom follows this model to challenge the Hardin theory through a collaboration model to have collective benefit<sup>67</sup>.

The solution comes from a complex social system with instruments for having things in common, such as: choice a project, its goals, and rules; basically, a 'shared governance' or as we called: «shared administration».

Several Ostrom ideas come from real examples of communities which have been able to share and defend common resources. Usually, these are models based on the participation of their users that share common knowledge. They have the incentive to report contractual infractions, the functionality the success of their common project. And, on the other hand, some instruments to monitor.

Ostrom claims that neither the State nor the market can successfully enable users to sustain the long-term use of natural resources<sup>68</sup>. That is why there is a call for individuals to protect resources they know as fundamental to themselves and so finding a solution as communities of individuals organised to protect their lives through a collaborative practice.

The cooperative solution seems the most effective option. This is the reason why the best choice is opting for sharing common knowledge to face the future scenario state of scarcity of the resources through people practices. In «Governing the commons», Ostrom, set up a system for a «new institutionalism» where individuals find a role to manage commons that are subtractable, meaning that declines use over time<sup>69</sup>. In other words, there is a rivalry on the consumption, with no exclusion for the consumption. It is the case of overutilization and exhaustion<sup>70</sup>.

67 L. KISER, E. OSTROM, *The Three Words of Action: A Metatheoretical Synthesis of Institutional Approaches*, in E. Ostrom (eds.), *Strategies of Political Inquiry*, Beverly Hills, 1982.

68 E. OSTROM, *Governing the Commons. The evolution of institution for collective action*, Cambridge, 1990.

69 V. BODNIEKS. *The New Institutionalism: A tool for analysing defence and security institutions*, Security and Defence Quarterly. 2020.

70 R. MAYNTZ, *Common goods and governance, Common goods: Reinventing European and international governance*, 2002, 15-27.

Following the UNESCO declaration, commons are kind of a good available for anyone (no cost), non-excludable; all users can take advantage from them, but the resources can reduce over time, so is rivalrous<sup>71</sup>. Most of commons can refer to a broad set of natural and cultural resources, that are shared by many people. Examples are: «forests, fisheries, or groundwater», resources that are accessible to all members of the community<sup>72</sup>. Moreover, there are some intangible goods, so called «cultural commons»<sup>73</sup>.

We may also think about the example of collective properties in Italy, or the indigenous rights on land in North and South America, as well as collective rights of servitudes or use are currently granted by many national laws<sup>74</sup>. In

71 As we mentioned, in an economic point of view, «commons» are products from which consumption is possible to exclude no one, but its use is competitiveness. This means that everyone has access to use the good, but the use by one person limits the utilization of the other, K. PRANDECKI, *Common Goods and Sustainable Development*, European Journal of Sustainable Development, 6, 3, 2017.

72 J.M. ANDERIES, M.A. JANSSEN., *Sustaining the commons, Centre for the study of institutional Diversity*, Arizona University, Matthews Hall, 2013.

73 M.R. MARELLA, *The Commons as a Legal Concept*, Law critique, 2016.

74 To investigate the legal history, we should refer to *res extra commercium* in classical Roman law: «Public, sacred and religious things had in common with private things the fact that they fell into the sphere of procedural *res*. However, the trial (and exchange) did not ascribe value to private things. For public or sacred things or, more specifically, for those things whose public or religious purpose had been established as perpetual, sanctuaries and citizens' areas, founding places, their legal classification as *res* did not translate into any estimation of their value. (...) Since these "things" are strictly speaking inestimable (...), injunction proceedings only dealt with their use, and not their ownership». Cit. F. CORTESE, *What Are "Common Goods" (beni comuni)? Pictures from the Italian Debate*, 130.

It is also useful to mention another reference to the past Roman legal category of: *res in usu publico* ('things in the use of the public'), goods that people could use as *uti cives, res communes omnium*, based on the availability to the public, because is an asset of the State, or because the goods that are part of collective properties, or finally because the functionality of the good is of public interest. Moreover, the *res communes omnium* was appropriable, nevertheless to the extent that it did not prejudice the uses of the good by the others M. FIORENTINI., *Res communes omnium e commons: contro un equivoco*, *Bullettino dell'Istituto di diritto romano* V. SCIALOJA: quarta serie IX, 2019, pp. 153-181. For some issues concerning the legal management of common resources in the roman legal system, it is possible to find some indication of the status on the judicial remedies established for the protection of commons, T. DALLA MASSARA, A. SCHIAVON, *Remarks on Common Possession Between Law and History*, *Global Jurist*, 21, 3/2021, 561-570.

In the case of public usability of the public good, the judge (*praetor*) would grant the equivalent remedy to whoever made a plea (*quivis de populo*) and everyone (in that case citizen) could make an appeal because of the interest in using the good. In those brief indication we can find the base of the 'collective' nature of these goods, kind of collective co-possession for avoiding the 'monopolistic' paradigm (of property) (Dalla Massara, Schiavon, 2021). Since the paradigm

some cases, they are recognized as formal entitlements, in others they are governed through informal practices<sup>75</sup>.

A «common-pool resource» as Ostrom refers to, is a resource of the environment, something in public domain for which it is impossible to exclude other users altogether, going beyond the legal property status of good<sup>76</sup>.

Recently, in 2011 two important decisions: one made by the Supreme Court of India and the other refer to the Italian Supreme Court, both refers to a system to protect collective rights. The first case was made by a transformation from a public to a private area located in a village in the State of Punjab, which included a lake that was vital for local habitants as a source of water for their life. The Court condemned the widespread practice of the local government and recognise the need to protect common rights to defend the lives of communities (in that case maintaining the public domain).

The Italian decision concerns a case of private fishery willing to buy an area of the Venice Lagoon, and the Court avoid the claim, maintaining the state properties and adding that had to be considered «common goods» when they were for the achievement of people's fundamental rights.

It is evident the right to have benefit of all from the resources.

The first holders of commons in those cases were the public authorities - and in fact most of the cases the public domain is the form that characterise the contemporary commons status<sup>77</sup> - but following Ostrom's theory they can be public or private, this is not a crucial point, rather than their public functionality. It is useful to rethink the traditional dominical categories based on the dichotomy between private property and the public. The starting point for this

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of commons can also find recognition of legal titles for people concerning the resources involved, that might claim the co-management beyond the traditional property status, T. DALLA MASSARA, A. SCHIAVON, *Remarks on Common Possession Between Law and History*, 561-570.

<sup>75</sup> M.R. MARELLA, *The Commons as a Legal Concept*, Law critique, 2016.

<sup>76</sup> E. OSTROM, *Governing the Commons. The evolution of institution for collective action*, Cambridge, 1990.

<sup>77</sup> F. CORTESE, *What Are "Common Goods" (beni comuni)? Pictures from the Italian Debate*.

reflection could be identifying substantial interests, whose satisfaction is a priority to ensure a quality of life for the associate sustainable development<sup>78</sup>.

«In any case they should guarantee the collective fruition of common goods in the ways and within the limits established by the law. If the holders are public legal persons, common goods are managed by public bodies and are located out of trade and markets<sup>79</sup>».

In that framework, it is interesting to mention the proposal of Stefano Rodotà<sup>80</sup>. The Commission, of which, he was President had a mandate to review the legislation about the legal status of goods contained in the Civil Code. The Commission submitted a propose previewing a new good category: «commons». Inside the review has been include a proper new category, following the proper functionality of these goods, introducing a definition: the category of common goods includes things with functional utility for the exercise of fundamental rights and the free development of the person<sup>81</sup>. The Commission has defined them as part of critics of the legal status of goods because they do not follow the definition of public or private, but they can be instead. That defines commons as useful to exercise fundamental rights and to the free development of the individual. The principle of intergenerational preservation of utilities informs it<sup>82</sup>.

Finally, we should see the definition from an administrative point of view, as the one suggested by Gregorio Arena, which defines commons as all

78 A. SIMONATI, *Per la gestione "partecipata" dei beni comuni: una procedimentalizzazione di seconda generazione*, Prendersi circa dei beni comuni per uscire dalla crisi, Nuove risorse e nuovi modelli di amministrazione, Trento, Università degli Studi di Trento, 2016.

79 F. CORTESE, *What Are "Common Goods" (beni comuni)? Pictures from the Italian Debate*, 126.

80 The Documentation report is available at [https://www.giustizia.it/giustizia/it/mg\\_1\\_12\\_1.wp?facetNode\\_1=0\\_10&facetNode\\_2=0\\_10\\_21&previousPage\\_mg\\_1\\_12&contentId=SPS47617](https://www.giustizia.it/giustizia/it/mg_1_12_1.wp?facetNode_1=0_10&facetNode_2=0_10_21&previousPage_mg_1_12&contentId=SPS47617). See also U.MATTEI, E. REVIGLIO, S. RODOTÀ, (eds.). *Invertire la rotta. Idee per una riforma della proprietà pubblica*. Bologna, Il Mulino, 2007.

81 «They include, essentially, natural resources, such as rivers, streams, lakes and other waters; air; parks, forests and wooded areas; high-altitude mountain areas, glaciers and perennial snows; stretches of coastline declared an environmental reserve; protected wildlife and flora; other protected landscape areas. It also includes archaeological, cultural and environmental assets. These are assets that - as mentioned above - suffer from a highly critical situation, due to problems of scarcity and depletion and to the absolute inadequacy of legal guarantees».

82 M.R. MARELLA (EDS.), *Oltre il pubblico e il privato. Per un diritto dei beni comuni*, Roma 2012.

those goods for which citizens and administration choose to be together to take care of them, sharing their responsibility for it. This mechanism is sanctioned by their volunteer that finds space in a proper agreement<sup>83</sup>.

«Common goods, in this view, are all those entities - which we might call “catalysts” - that compel active citizens, as per Art. 118, par. 4, Constitution, to take care of a general interest: i.e. an interest that does not entirely coincide with a public, private or collective interest, or with the interest of a specific group, but essentially arises from an alliance of all the parties that are involved at different times and are motivated to protect and promote it<sup>84</sup>». In this case too, the theory of common goods is invoked as a solution to issues concerning the collective actions.

#### 4. Co- operative (management) system and decision- making process

The collaboration approach<sup>85</sup> as seen above, in legal studies and especially in public administration literature find a definition to the alliance agreement stipulated by citizens and authorities<sup>86</sup>.

As we see in par. 2, the shared administration model is a system to answer much ‘general needs’ emerging from the citizens and organizations. At the same time, it contributes to the complexity of public administration tools, where one of the more complex situations is managing the plurality. Since the subjective positions embedded in the claims have progressively assumed relevance in the legal system<sup>87</sup>, handling all the instances and the various souls of pluralism challenges democratic administration.

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83 If the property of the good is private, and if the owner agrees to the deal's object, the agreement shall be shared by all of them. G. ARENA, *Dai beni pubblici ai beni comuni*, Rivista Trimestrale di Diritto Pubblico, 3/2022, 647.

84 F. CORTESE, *What Are “Common Goods” (beni comuni)? Pictures from the Italian Debate*, 120.

85 E. OSTROM, *Building trust to solve commons dilemmas: Taking small steps to test an evolving theory of collective action*, Games, groups, and the global good, 2009, 207-228.

86 F. CORTESE, *What Are “Common Goods” (beni comuni)? Pictures from the Italian Debate*, 124.

87 F. DI LASCIO, *Public Administration as a Complex Adaptive System between Crisis and Conflict*, F. DI LASCIO, M. DE DONNO and F. DI LASCIO, *Public Authorities and Complexity. An Italian Overview*, Napoli, Edizioni Scientifiche Italiane, 2023, 81.

The challenge launched from Ostrom is to develop theories of human organization based on realistic condition and system of management instruments to put available human capabilities for sharing their richness.

To accomplish that, firstly, communities should share a common necessity (the open access and sustainability of a certain good) and establish the common values to 'translate' in a project of management, so through those guiding criteria, they can self-organizing to manage the good.

In order to do an analysis, Ostrom suggests using a framework adaptable to each single situation; the framework is called the Institutional Analysis and Development (IAD)<sup>88</sup>. The aspects of the social systems, that can be various, depend on the existence of types of social subjects, multiple levels of organization and rules, consequently we should expect differences for each type of context<sup>89</sup>.

Following the IAD model, it is considered important starting to find out: (1) the physical or immaterial subject of the policy, his dynamics that characterised an 'arena', the community involved, the rules used by participants to order their relationships.

Firstly, she suggests to identify community need and various possibilities to tackle the problems within an institutional agreement basing on the outcome to achieve (Ostrom, 2011)- the goal. Second, it is necessary guarantee to «shared understandings among those involved that refer to enforced prescriptions about what actions are required, prohibited, or permitted» and the third point is concentrate on the structure of the more general community within which the decision «arena» is placed.

These are means to evaluate the efficiency of an operating systems, including an overview of the administrative or organizational costs associated, based on set-up model of governance. Moreover, Ostrom define a list of prin-

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88 E. OSTROM, *Background on the Institutional Analysis and Development Framework*, The Policy Studies Journal, 1/2011.

89 J.M. ANDERIES, M.A. JANSSEN, *Sustaining the commons*, Centre for the study of institutional Diversity, Arizona University, Matthews Hall, 2013.



principle to support projects of «commons» and it comes from practical examples of success with the use of commons studied to inspire a model of governance; they are the following: (1) clearly defined action possible and not, the boundaries of the resource to have a sustainable system to share<sup>90</sup>, a quantitative of resources and proportional equivalence between benefits and costs of their use to an open access conditions. For a collective-choice practices: rather than the object and the condition of usability, it is useful establish 'instruments' of deliberative mechanism: rules and processes to respect and modify norms.

Furthermore, it aims to define individuals' role of responsibility and supervisor. A system of monitoring: choose the transparency and accountability rules. Some graduated sanctions, if users violate rules and so conflict-resolution mechanisms to solve conflicts among or between users and officials' organization. Last, the model should be guarantee how to organize and manage themselves - as organization or groups of citizens - having co-operation power with public authorities, so there are multiple layers of organisation for appropriation, delivery, monitoring, enforcement, conflict resolution and governance<sup>91</sup>.

Ostrom theory indicates where it is possible to create a new institutional system, and how to do it, starting from the community, that does consider its necessity according to the resource through a set of power. Actions and decisions on the commons involve a multiple level governance including in the phase of decisions and practice lots of subjects and potentially all the community. In this sense, it is important to highlight that most of all the main field of application is local level, where, as we mentioned, the closeness to the citizens and between citizens support the model of collaboration<sup>92</sup>.

90 E.g., natural such as the irrigation system or fishery or not material, such as data or knowledge and the individuals or people involved, with rights to resource are clearly defined.

91 For resources that are part of larger systems. That last point opens up the possibility to reflect on a global scale of commons, that is out of the edge of this paper. Please, refer to a E. Ostrom, *Governing the Commons. The evolution of institution for collective action*, Cambridge, 1990.

92 For a critic to the Ostrom theory please refer to A. KAUFFMANN, *Les limites de la généralisation du modèle d'Ostrom de gouvernance des biens communs: le cas du transport fluvial*, Logistique & Management, 2019.

This principle is reinforced by the subsidiarity one and so the explicit reference to the primary role of municipalities in responding to the interests of their citizens.

According to the principle of «horizontal subsidiarity», all administrative functions are primarily the responsibility of local authorities<sup>93</sup>.

In turn, local authorities must foster citizen participation and social self-organisation, the equilibrium is well described for the Decree 267/2000 art. 3, para. 5, Local Authorities Law: communities, organised into municipalities and provinces, are autonomous [...] hold their own functions and those conferred on them according to the principle of subsidiarity. They perform their functions also through the activities adequately exercised by the autonomous initiative of citizens and their social groups.

## **5. The innovative Italian administrative model**

«[W]hile legitimacy of the commons on legal grounds remains problematic» as a new category of goods, the Italian system offers an administrative set of rules for the collaboration management of commons between the public authorities and the private subject involved on the actions<sup>94</sup>.

Following the administrative practice participants can be formal organizations or informal organizations, including free and spontaneously interested citizens as «horizontal subsidiarity» previews through a promotion of autonomous initiative of citizens, both individuals and associated, to carry out activities of general interest.

In this sense, commons are goods that are recognized by society or community, but they are considered from the authority basing on their collective interest.

LABSUS, «Laboratory for Subsidiarity», a network to sustain the development of collaborative governance approach for municipalities and their cit-

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<sup>93</sup> C. TUBERTINI, *Gli strumenti del diritto*, in Id et al. (eds.), *Le città collaborative ed eco- sostenibili. Strumenti per un percorso multidisciplinare*, cit.

<sup>94</sup> M.R. MARELLA, *The Commons as a Legal Concept*, *Law critique*, 2016.

izens<sup>95</sup> - which has become a proper input for lots of municipalities, that joined the network for promoting collaboration – following some practises in the Country, de facto actions that respond to widespread will, suggested to legalised the proposal throughout: a ‘Collaboration Agreement’ («Patti di collaborazione»). A document to the definition of the agreement between the administration and citizens which falls within the scope of public law. Provided in article 11 of Law 241/1990 and titled: «supplementary or substitutive agreements of the measure».

In order to make an agreement the interested parties should sign a deal with the municipality, the institutional level where usually most of commons are situated. The agreement is made to define the subject of the goals to share.

LABSUS also promotes a type of «Regulation for common goods» («Regolamento beni comuni») for public authorities that aims to indicate the general and strategic policy line to develop relationships among various society subjects to develop initiative on commons.

It is the «sharing paradigm» for a collaborative system that involves public authorities and citizens and become an organization model.

Therefore, the spectrum of application goes beyond cities and involves non-urban areas<sup>96</sup>. Anyway, city and municipality found fertile ground in the field of urban regeneration; Bologna was the first city to approve the Regulation in 2014 (renewed in 2023<sup>97</sup>) and signed lots of various «agreement» for the urban regeneration, mutual utilities services, cultural projects, and so on<sup>98</sup>.

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95 See the concept of «amministrazione condivisa», G. ARENA, cit.

96 A. GRETTER, et al., *Trento Social Commons. Community Engagement as Tools for New Physical and Cultural Relationships Between Rural and Peripheral Spaces*, Journal of Alpine Research, Revue de géographie alpine, 2018.

97 A. ARCURI, *La dimensione territoriale dell'amministrazione condivisa, i casi del Comune di Bologna e della Regione Toscana*, in Istituzioni del Federalismo, 3/2022; D. DI MEMMO, *Commento al nuovo regolamento di Bologna sull'amministrazione condivisa*, in [www.labsus.org](http://www.labsus.org), 23 gennaio 2023.

98 See, article 1 of the new Regulation of Bologna published in January 2023 about the subject of the norm: «The care and regeneration of urban commons is a way of carrying out activities of general interest characterised by the active involvement of the community on the basis of the recognition by its actors of a functional link between the protection of these goods and the concrete conditions for the full expression of the human personality». Translated by the author.

Even though the debate on the nature of the agreement remains open, they are basically signed in base of art. 11 of L. 241/1990<sup>99</sup>, as mentioned, and 12, about provisions attributing economic advantages. Grants and subsidies, typically to implement the agreed objectives; for example, think of accident insurance or any materials for use out of the market logic, without any procurement processes or invitations to tender but it is made only through a proposal in accordance with transparency and publicity ruling, as accountability and participation guarantees.

The advantages that we can imagine are many; first, the social impact of involving the population in local policies, the evaluation of the asset to work for, the contrast effects of degradation, limiting the damage and negative externalities through ignorance of the issue, the consensus approved to manage the activity, the trustiness between the authorities and third parties able to collaborate. A new dimension of collective emerges from the theory, practical and regulation that defines the state of the relationship between public power and citizens, based on co-operative, causing the widening of the public sphere, encompassing new actors: citizens. So, it is a model that favours the participation of individuals through a collective project<sup>100</sup>. Anyway, the owner of the public function is the public administration entrusted, that should be organised for supporting «shared administration». That means the public administration should have an organisation structure to solve these problems, which, citizens choose to act. This way to foster the formation of appropriate frameworks to deal with the complexity of the problems ensure the expectations of the participants to look after<sup>101</sup> the general interest. So that supposed to base on a political choice and a proper direction too. For example, publicity and transparency

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<sup>99</sup> Fare riferimento a V. CERULLI IRELLI, *L'amministrazione condivisa nel sistema del diritto amministrativo*, in M. BOMBARDELLI, G. ARENA, cit.

<sup>100</sup> Here emerges the interpretative need to 'look' at the subject of public goods beyond a purely patrimonial - proprietary view to a personal - collectivist perspective. See Cass. civ. Sez. Unite, Sent., 14-02-2011, n. 3665.

<sup>101</sup> A. PIOGGIA, *La cura nella Costituzione. Prospettive per una amministrazione della cura*, in M. BOMBARDELLI, G. ARENA, cit.

must be ensured in order to make the widest possible amount of information acquired in the field of shared knowledge<sup>102</sup>, monitor the action and favour the equal participation – mostly online available information –, as collective action approach indicates<sup>103</sup>.

## **6. Some conclusion: collaborative governance as a solution strategy**

We saw the «commons», the Ostrom approach and the Italian administrative legal solution to find a new administrative model based on cooperative action and collaborative solutions.

The perspective outlined shows that increased participation and protection of interests leads to an increase in the complexity of the organisation and administrative activities<sup>104</sup>.

Because «shared administration system» are composed of heterogeneous subjects with their own willingness, connected in a multi-level processes and dynamics; where the interactions between components assume the value of a successful collaboration project and their agreement is the real base for their job. Collaboration as well as so co-operation is the key for manage this complex system<sup>105</sup>. The practice showed what can be considered good governance instruments<sup>106</sup>, capable of responding to the call for participatory democracy. With the aim of guaranteeing the legal translation of practice or the proposal

102 Lazio regional law, n. 10/2019, art. 5, co. 2.

103 See par. 4.

104 A. MOLITERNI, *Note minime in tema di complessità amministrativa*, in A. CARBONE (eds), *L'amministrazione nell'assetto costituzionale dei poteri pubblici*. Scritti per V. CERULLI IRELLI, Torino, Giappichelli, 2021, 813.

105 See F. DI LASCIO, *Public Administration as a Complex Adaptive System between Crisis and Conflict*, F. DI LASCIO, M. DE DONNO (eds). and her references in footnote 27, such as on administrative complexity M. BOMBARDELLI, *Semplificazione normativa e complessità del diritto amministrativo*, *Dir. Pubbl.*, 3/2015; G. ROSSI, *La complessità amministrativa*, *Ridiam.it*, 24 January 2018; M. BOMBARDELLI, *Alcune considerazioni sulla complessità amministrativa (...che è diverso dalla complicazione!)*, *Ridiam.it*, 9 March 2018; S. TORRICELLI, *La dinamica degli interessi a protezione necessaria e la complessità amministrativa*, *Ridiam.it*, 7 May 2019; F. MONCERI, *Complessità e semplificazione nell'azione amministrativa* Torino, 2020; A. MOLITERNI, *Note minime in tema di complessità amministrativa*, cit. at 21; I. PIAZZA, *L'imparzialità amministrativa come diritto: osservazioni sul "rapporto complesso" tra cittadini e pubblica amministrazione*, in *Pers. Amm.*, 2022.

106 C. ANSELL, *Collaborative Governance*, in D. LEVI-FAUR (eds.), *The Oxford Handbook of Governance*, Oxford University Press, 2009.

of citizens and so the assumption of responsibilities, the administration can sign an «agreement» with parties involved, regulate the question through a statutory and finally have a proper organization staff implements this collective action, starting from publish all the information as prerequisite for action.

The agreement contains the protection of public value (general interest pursuit) and whose contributions. This second phase therefore takes place starting by an assessment of the proposal and a comparison between a plurality of interests that maybe in conflicts. If there is any competition inside the project between more than one proposal, it will be necessary to find a compromise to a collaborative solution with the ability to reduce the number of conflicts to draft a deal.

In addition, the approval of a General Regulations is intended to impartially recognise to all residents the same right to participate, getting the same opportunities to collaborate with each other. In other words, guarantying «general rules of governance referable to each situation of interest<sup>107</sup>».

Even though the system is still linked and subject to a single decision of the entities (and their capabilities), the system of «shared administration» find anchorage into the article 118, para. 4 of the Constitution, that allows without legislative intermediation to be implemented directly by all levels of government by all institutional levels, first by the local one.

Citizens, through conscious adherence justifying the claim for general interest through a collective action and legitimise the role of the public power on that, still owner of the administrative function. The phenomenon, that born inside the society and its practice, is a systemic mechanism, starting for the affirmation of «horizontal subsidiarity»; extended to be a proper method alternative to the others, as recognised by the Constitutional Court.

«Shared administration» has been extended beyond the «commons» and the technicality for manage those goods, it becomes a principle, as stated at the

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107 F. DI LASCIO, *Public Administration as a Complex Adaptive System between Crisis and Conflict*, F. DI LASCIO, M. DE DONNO (eds), 85.

art. 1, paragraph 2-bis of Administrative Procedure Act which established, by amending the general law<sup>108</sup>, the cooperation and good faith<sup>109</sup> as new criterion for regulate the relations between citizens and administration.

The introduction has been made by Law on «Emergency Response to Digital Simplification and Innovation» (Simplification Order)<sup>110</sup>, in 2020.

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108 Art. 1, par. 2- bis of Law n. 241/1990, the Administrative Procedure Act.

109 G. VETTORI, La buona fede nella 'nuova' legalità plurale, in this Review, 11/2022.

110 Law n. 120/2020.