On The Critical Relationship Between Citizenship and Governance: The Case of Water Management in Italy [1]

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'*Extensive empirical research leads me to argue that instead, a core goal of public policy should be to facilitate the development of institutions that bring out the best in humans'.*
(Ostrom 2010: 665)

Over the past fifteen years, water management has been a highly problematic issue in Italy. With particular attention to the situation in Naples, this article addresses the sharp conflict that has emerged between citizens' politically-expressed will to keep water management under public control and the actions of Parliament and of various governments. The discussion looks at issues of legitimacy and the law, taking into account the effects of popular action that combines protest and legal action.
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Introduction

In the early 1930s two Americans, August A. Berle jr.[2] and Gardiner G. Means[3], concluded their outstanding study on *The Modern Corporation and Private Property* asserting that 'The future may see economic organism, now typified by the corporation, not only on an equal plane with the state, but possibly even superseding it as dominant form of social organization. The law of corporations, accordingly, might be well considered as a potential constitutional law for the new economic state, while business practice is increasingly assuming the aspect of economic statesmanship' (Berle and Means 1932: 357).

So, the question after the Great Depression of 1929 seemed to be, between the political organization of society and the economic one which would prevail? In the context of the current global financial crisis, this old question seems to have found a definitive answer in the predominance of economic organization; or, better, of economic organism, in the words of Berle and Means. I shall argue, however, that an alternative is still possible.

The case of water management in Italy will help to demonstrate that there exists in the country a kind of rationality regarding the use of such a common good as water that can at once constitute a form of resistance to the so-called economic rationality and become a fragment of a new, constituent power. In the discussion that follows I shall first outline the jurisprudence on the issue of water management in Italy; then, I shall briefly describe the

[1] This article expands on a paper that I presented at the Annual conference of the Commission on Urban Anthropology (University Jean Monnet, St Etienne, France, 8-11 July 2014) and, in revised form, at the Kent Law School Staff-Graduate Seminar, while on a Visiting Scholarship the University of Kent, UK. I am grateful to the participants to both events for their comments and criticism. In particular I wish to thank Italo Pardo for his encouragement and comments throughout the production of this article.
[2] A member of the US President Franklin D. Roosevelt's Brain Trust.
[3] An influential economist who worked at Harvard.

Naples situation. The analysis will then move on to the theoretical issues brought out by the water problematic; in particular, I shall examine the difficult relationship between citizenship and the powers-that-be, the private vs public conundrum and the critical issue of the legitimacy of the Law.

A Historical Outline

Over the past twenty-five years, a process of privatization of the main economic activities has taken place in Italy. The biggest state-owned companies — ENEL (National Board or Electric Energy), IRI (Italian Institute for Industrial Reconstruction), ENI (National Board for Petrol), FS (State Railways), Telecom Italia (Italian Telecommunication Company) and Highways — have first been transformed from totally public entities into limited companies and have later been sold on the international financial market. The Italian State has only retained control of those companies — like ENI, ENEL and the State Railways — which were considered to be strategic for the country, while others have been liquidated, as in the case of IRI, or sold to private entrepreneurs, as in the cases of Telecom Italia and Highways.

In other words, the privatization process has involved public services which are synonymous with citizenship itself — electricity, gas, water, public transport and telecommunications. From a political perspective, the technical, legal and economic motivations for privatization were identified with the urgent need to repay a public debt that was too high in relation to GDP. Another argument in favour of privatization was that public activities which were highly monopolistic in nature needed to be liberalized especially because the public bodies that for a long time had managed them were deemed to be inefficient and excessively expensive.

The reorganization of water management began in the late 1980s, when specific legislation (law No 183/89) established some general principles for the conservation and protection of water resources within the general context of soil and environment protection. Five years later, in 1994, the Galli law[4] addressed the rules on the use and protection of the water resources establishing, once for all, their public nature. The Galli law established that the organization of water services should be based on the size of the natural water reservoirs and of their actual users, regardless of administrative and bureaucratic divisions. The underlying logic was that people who live in different municipalities, provinces or regions may well use water from the same reservoir delivered to them by the same aqueducts, and the organization of the service must reflect this reality. Accordingly, this law provided for the establishment of a new administrative body called 'Ambito Territoriale Ottimale' (Optimal Territorial Area; from now on, ATO) bringing together the local authorities in each territorial. Optimization referred to the administration rather than to the management of the reservoirs. Notably, the Galli law was approved by Parliament during the most intense phase of privatization of public services. However, the majority of local public services, including water, continued to be publicly managed.

[4] This is Law No 36/94, named after Galli, the member of Italian Parliament who wrote most of the text of this law.

The process of streamlining the use of water resources prioritised the protection of the soil and the conservation of water and its sustainable use in environmental, economic and financial terms. Such streamlining imposed, first, the reform of local public management, which began with the 1990 Act, and, then, the gradual transformation of local public companies into joint stock companies, thus preparing, the application of the free market system at the local level (Marotta 2011). Following the reform of the Title 5 of the second part of Italian Constitution in 2001, the national Parliament is responsible for the protection of competition principles and has the power to decide how local public services should be managed, while the provision of such services continues to be devolved to local authorities. In particular, the responsibility for the management of water services continues to be devolved to ATO Authorities. At the beginning of the 21st century, however, the process of liberalization, deregulation and privatization came to involve local public services. Specifically, the *Legge Finanziaria* for 2002[5] ruled that local authorities, municipalities, provinces and ATOs must turn to the free market for all local public services. In the field of water management, this marked the beginning of an attempt to entrust the optimization of service management entirely to the market.

This gave rise at once to strong resistance across Italian society, involving people of different political orientation and leading to the national co-ordination of all the movements and committees against the privatization of water. In June 2005 these movements decided to organize themselves permanently into the 'Forum Italiano dei Movimenti per l'Acqua' (literally, Italian Water Movements Forum; from now on, the Forum).[6] The Forum met for the first time in Rome on 10 March 2006 and placed itself outside the traditional party systems. Its purpose is the defence of public water as a common good and, since its constitution, the Forum has remained strictly outside the traditional party system's *modus operandi.*

The aim of the various associations, committees and self-organized groups participating in the Forum is to fight the privatization of water first locally and, then, nationally and internationally in light of the principles of the Italian Constitution and of the laws of the State. The Forum has achieved recognition as a fully constitutional body both in terms of legality and in terms of procedures of democratic participation. The fight included peaceful demonstrations in the offices of local management agents, but also legal challenges in the competent Regional Administrative Courts and explicit requests for municipal, provincial and ATO authorities to stop attempting to privatize water. At a national level, the Forum's first action was to prepare the text of a popular bill on water management. Significantly, the popular bill was titled, 'Principles for the protection, government and public management of water and measures for the re-nationalization of water services'. Over a few months over 400,000 citizens signed the proposal,[7] which was officially presented to Parliament in 2007. The bill has not yet been discussed by Parliament.

[5] This is the equivalent of the Chancellor's Autumn Budget.

[6] The Forum is made up by several organizations (see http://www.acquabenecomune.org/).

[7] 50,000 signatures are required by art. 71 of the Italian Constitution for Popular Bills.

In 2010, the Constitutional Court established that the Italian legislation can legitimately opt for free market principles for water resource management (Judgment No 325). As a consequence, the Forum's second national action was to request three referendums aimed at the abrogation of the rules approved by Parliament in support of the privatization of local public services, including water management.[8]

Initially, this second action consisted in collecting the necessary signatures to initiate the three referendums.[9] As in the case of the popular bill, this new initiative enjoyed strong popular support. In a few months, the promoters collected 1,400,000 signatures, almost three times the required amount.[10] The referendums addressed three questions. The first concerned the repeal of the law that forced local governments to turn to the market for the provision of all local public services; the second concerned the abolition of the specific rule on the choice of water services management; the third was related to the method of calculating the water service rates. In January 2011, the Constitutional Court, which rules on the eligibility of the referendum questions, rejected the second question and allowed the other two. In particular, the Constitutional Court approved the referendum for the repeal of the legislation on water services with specific reference to the criterion of 'adequate return on the invested capital' (Judgement No 26/2011). The Court made it clear that this referendum aimed at separating water management from the global logic of market profit.

The two referendums were held in June 2011. Citizens voted almost unanimously for the repeal of the existing legislation on the privatization of common goods. In spite of such an overwhelming result, two months later the Italian Parliament approved a law that strengthened the privatization of water management; that is, precisely the kind of legislation that the popular vote had asked to abolish (Decree No 138/2011).

At this point, the Forum started a determined legal fight in order to obtain the acknowledgement of the unconstitutionality of the new law from the Constitutional Court. As the legal appeal to the Constitutional Court concerning the new legislation could not be brought directly by the Forum, six Italian Regions — Apulia, Latium, Emilia Romagna, the Marches, Umbria and Sardinia — proceeded to do so claiming to have been discriminated in their prerogatives by the new law on local public services approved by central government and Italian parliament. In 2012, the Constitutional Court declared the new legislation constitutionally illegitimate, finding it in clear conflict with the popular will expressed in the referendum (Judgement No 199/2012).

Subsequently, the Forum started a campaign of 'civil obedience' and demanded that the popular vote expressed in the referendums of June 2011 should be respected. This campaign intended to make central government, parliament, regional governments, municipalities, the corporations that managed the water services and all public and private stakeholders respect the will of Italians and keep the management of water services public. In

[8] The 1948 Italian Constitution contemplates abrogative referendums only.

[9] A fourth referendum proposed by the Idv party (literally, Italy of values) was rejected by the Constitutional Court.

[10] According to art. 75 of the Italian Constitution, 500,000 signatures are required.

addition to legal action, the campaign included exhibitions, conferences, meetings, media campaigns and the uninterrupted mail-bombing of MPs, cabinet ministers, local administrators and all those involved in making decisions about water. In particular, to ensure the respect of the result of the referendums on the adequate return on capital, the Forum and its experts wanted to make sure that users of water services would be able to calculate the cost net of the interests on the invested capital.

Interestingly, the Italian government disregarded the will of Italian citizens not only in respect to the public management of water; after the 2011 referendums, it also proceeded to allocate the responsibility for decisions on how to set water service fees to what, after some wrangling, became the 'Italian Regulatory Authority for Electricity, Gas and Water'. Confusion increased. On the one hand, the Authority had to deal with fully liberalized goods, such as gas and electricity; on the other, it had to develop ways to assess the costs and their fairness, as part of what was essentially a not yet liberalized public water service.

Regarding the regulation of water services, this contradiction is also identified in a recent judgement made by the Regional Administrative Court of Lombardy on water costs (Judgement No 779/2014), which emphasizes that the water service is of general financial interest. While employing its regulatory power, the Electricity, Gas and Water Authority opts for a view on the 'cost' of the capital invested that is in line with mainstream economic thought. In other words, in order to calculate water costs, the Authority refers to the economic principles of the prevailing free market theory.

The Situation in Naples

In application of the Galli Law, in 1997 Campania (the Naples Region) was divided into four ATOs meant to optimize the management of uptake services, feed, sewage, drainage and removal of wastewater with the aim of saving water, thus avoiding waste and reducing management costs. The Naples and Caserta provinces (and their 136 municipalities) were in the same ATO.[11] In November 2004, the ATO's Board decreed to privatise partially the water management service for more than three million people,[12] provoking the immediate reaction of the Civic Committees for the Defence of Water (an important part of the national Forum), led by a priest, father Alex Zanotelli. At first, the protesters were few. Gradually the opposition to the privatization of water management involved increasingly large parts of the so-called civil society. There were many demonstrations, some of which are described below. Some of the 136 municipalities argued for public management and lodged an appeal at the Regional Administrative Court against the ATO's decision.

[11] The official denomination was, 'Ambito Territoriale Ottimale no. 2, Napoli-Volturno'. Later Caserta and its Province became part of a separate ATO. The two cities share the same water resources but have separate management systems.

[12] The agreement was that initially 40 per cent of the new company would be in private hands, the municipal authority retaining control of the remaining 60 per cent. It was also agreed that over the following two years the proportion in private hands would increase to 49 per cent. The finances of this deal are interesting. The ATO's total annual revenue was almost Euros 243,000,000. The private shareholders would pay Euros 200,000 for their 40 per cent of the company.

The most striking demonstrations took place in September 2005, near the deadline for private-companies' bids for water service management. The Civic Committees of Naples and Caserta organized events with stalls at the ATO's headquarters. Zanotelli asked Neapolitan citizens to display in their home, shop or office windows plastic bottles carrying the label, 'No to the privatization of water'. The real turning point came in the Autumn of 2005, when a large number of citizens gathered in the Assizes of Naples[13] decided to promote an Appeal against the privatization of the integrated water services in the ATO. The Appeal was nationally and internationally heralded by Riccardo Petrella[14] and Danielle Mitterrand.[15] It was signed, among others, by prestigious Italian economists, jurists, artists, intellectuals and representatives of the Civic Committees and movements for the defence of public water.[16] In a short time, a compact front developed. Originally generated by the Committees for public water and the active citizenship of large sections of the population, in time this movement came to include a large proportion of Campania's ruling-class. The text of the Appeal and some writings on the water issue were collected by in a volume titled, *Water Management and Fundamental Rights: A battle against privatization* (Lucarelli and Marotta 2006). This battle ended in January 2006, when the ATO's board decided to abolish the November 2004 decree on the privatization of water services. It seemed that in Naples a virtuous circle of public water management, in accordance with people's will had started. Yet this was not quite the case. Since then, while failing to implement privatization, the local political class have decided to give up and wait for the outcome of the Parliamentary debate on the reforms.

At the end of 2011, Naples chose to convert the municipal company Arin SpA (Neapolitan Water Resources Limited Company) into a completely public non-profit company named ABC (*Acqua Bene Comune*; literally, Water as a Common Good). In addition to the difficulties posed by the central government, there were technical difficulties related to existing legislation and the lack of previous experience in transforming a joint stock into a public non-profit company. This involved the transition from a body regulated by private law — the corporation — to one regulated by public law — the special company. This transition was key to preventing any form of privatization, guaranteeing the direct public management of water and keeping free market interests at bay. The key principle regulating public companies is to balance the budget as opposed to generating profit. This operation was

[13] This is an independent assembly of citizens that meets at Palazzo Marigliano, an ancient palace in the city's historical centre

[14] This is the former President of the Water World Contract.

[15] This is François Mitterrand's widow, who was active on many environmental and human rights issues.

[16] The Appeal was signed by the economists Augusto Graziani, Massimo Marrelli, Riccardo Realfonzo and Emiliano Brancaccio; by the jurists, Luigi Ferrajoli, Umberto Allegretti and Gaetano Azzariti; by the Head of the Faculty of Education at the University of Naples Suor Orsola Benincasa, Lucio d'Alessandro, by the Head of the Faculty of Arts at University of Naples Federico II, Eugenio Mazzarella, by the Head of the Faculty of Economics, University of Naples Federico II, Achille Basile and by the Head of the Law Faculty of the Second University of Naples, Lorenzo Chieffi, together with several professors of law and economics.

made possible by the 2011 referendums and the subsequent abrogation of the legislation that obliged local government to turn to the market for water resource management.

However, the problems in Naples are not over. The Campania regional government is accused of maintaining control over large aqueducts with a view to selling them to private companies. Also in this case, the Civic Committees, assisted by their lawyers, have suggested legislative changes at a regional level, thus accepting to participate in the political debate among the members of different political parties in the Regional Board. However, the Regional Council recently approved a law that conflicts with the results of the 2011 referendums in so far as it invokes the respect of competition rules, prescribing submission of the water service to market laws. This law has been challenged through an appeal to the Constitutional Court.

Disconnected Governance and the Crisis of Legitimacy

In recent times the problem of water management in Italy has generated a sharp contrast between citizens and government, pointing to a tension 'between state morality, and community and individual moralities as they are encapsulated in the processes of government, bureaucracy and legislation' (Pardo 2000).

The results of the 2011 referendums and the following rulings of Constitutional Court gave Government and Parliament explicit legislative guidelines. It is also clear that any intervention concerning water management must take into account the fact that Italian citizens have clearly expressed their will: water management must be kept public, must not be subjected to the logic of profit and must be efficient. The people participating in the National Water Forum have expressed an alternative political will and viewpoint on the Law and its application; the committees, associations and activists of the Forum embody a morality and ethics now waiting to be converted into law in line with the Italian Constitution. We have seen that this political will is accepted in some jurisdictional quarters, such as the Constitutional Court, but is still not fully accepted by parliament and central government. Borrowing from Pardo and Prato (2011), I have therefore titled this section 'Disconnected Governance and the Crisis of Legitimacy'. Here, the relationship 'between those who have the power to make decisions and those who have [to live] with the practical effects of such decisions' does appear to be increasingly difficult (Pardo and Prato 2011: 3). It is indeed significant that the Forum has defined its fight as a campaign of 'civil obedience'.

Hannah Arendt wrote that 'Civil disobedience arises when a significant number of citizens have become convinced either that the normal channels of change no longer function, and grievances will not be heard or acted upon, or that, on the contrary, the government is about to change and has embarked upon and persist in modes of action whose legality and constitutionality are open to grave doubt' (1972: 74). For the Forum, disobedience to current laws is not 'civil disobedience'; it is obedience to a different kind of political choice, a choice highlighted by democratic participation recognized by the Constitution but cannot find the way to become law. It is as if Government and Parliament base their reasoning on the dominant economic theory, while the community lays claim to a morality and ethics unmistakably alternative to the laws of the free market.

In other words, in the classical Rousseauian view of general will (Rousseau 1782) as in the Weberian paradigm (Weber 1968), law-abiding implies citizens' voluntary submission to the Law. In the water management case, the majority of Italians have expressed their dissent; clearly, those in favour of public water management are not merely ideologically oriented against the free market; rather, their actions suggest a civic awareness that privatization can negatively influence people's quality of life and, perhaps more gravely, democratic citizenship itself. Against such a background, the attitude adopted by the Legislator comes across as authoritarian and patronizing. The fact, of course, remains that civic communities must be accorded the right to choose public or private water management.

The Public vs Private Issue

I would suggest that the opposition public vs private should be addressed from a juridical point of view and, most important, that rules must reflect society's needs and expectations.

Historically, in Italy water management was kept independent from the market through principles of Public Law. This has changed dramatically, as over the past twenty five years privatization and free market trends have been injected into the system. The opposition to privatization which I have outlined has generated the present debate on water intended as a common good and the heartfelt need to envisage regulation beyond the private/public opposition, tailoring the use of this resource best to fit the needs of the community.[17] However, the discussion has also brought forth strong criticism of inefficiency and corruption in public Italian administration in a situation in which the concept of national state has been weakened by globalization.

During the 1970s, Norberto Bobbio (1977) asserted that from a logical point of view there was no alternative to Public and Private Law and pointed out that, necessarily, relations of power are excluded from private law while private convenience and interests are excluded from public law. Therefore, it is not surprising that in relation to water and more generally to common goods this issue of public and private law has generated strong debate.

In the field of social sciences the distinction between public and private law was based on the idea that Private Law concerned individuals, their private interests and the relationships between equal citizens, while Public Law concerned relationships between entities of different status in the community. According to Bobbio, in the 1970s two opposite processes were taking place, the nationalization of the private sector and the privatization of the public sector. They are incompatible but also overlap. The first involves the subordination of private interests to collective interests, represented by the state which progressively invades and incorporates society; the second represents the revenge of private interests through the establishment of conglomerates which use public apparatuses to reach their goals (Bobbio 1988).

The case of water management is significant because the defence of public water has encouraged movements to intensify democratic participation. It is especially so because this kind of action has happened in Italy only for short periods of time and in specific cases, such

[17] On this debate see Mattei (2011), Marella (2012) and Rodotà (2012).

as the referendums on divorce and abortion in the 1970s. The use of public law is an alternative to private and commercial law methods; it helps to avoid the negative results for the community when public and private values are turned upside down. This brings to mind the views of the Italian scholar Stefano Rodotà, according to whom common goods, such as water, must be seen as fundamental rights. This would generate a new institutional logic regarding common goods and, consequently, a substantial 'paradigm shift' in public and private law and in public and private property, whereby the definition of common good includes both goods which are essential for survival and goods which, for example, encourage the free development of the person, such as knowledge (Rodotà 2012: 120).

Some Diverse Viewpoints on Common Goods

A point of view different and alternative to the above is given by Elinor Ostrom in her book *Governing the Commons*, published in 1990 at the end of a forty-year research on the management of common goods. It is pointed out that in order to define a common good as a resource, or more precisely as a common-pool resource, we need to consider it as part of the economy because it binds the concept of common good to the potential benefits that may result from its use. A relationship is also implied, among the users, which is independent of the nature of the assets. In Elinor Ostrom's empirical research, the latter are of the most varied nature, from fishing grounds to water management, from the use of irrigation infrastructures to common forest areas. More recently, Elinor Ostrom and Charlotte Hess have given a short definition of common good as a resource shared among a group of people and subject to dilemmas, questions, controversies, doubts and social disputes (Hess and Ostrom 2007).

That the use of a certain good is the subject of discussion definitely places such a good in the field of institutional politics, whose goal is to find a solution to questions, controversies, doubts and social disputes, as opposed to leaning towards maximization of profit. As indicated by Ostrom's research, this, in turn, generates the need to conceive a series of rules that could be acceptable to all users — rules that promote equity, efficiency and sustainability and that can be identified in all successful cases of common goods management. It is worth noting that Ostrom's point is in line with the approach known as neo-institutionalism. Elinor Ostrom argued that the creation of new institutions is a great, difficult but worthy challenge for the social and juridical sciences (Ostrom 1990). As Dolšak et al. significantly point out, 'Human beings seem to have an intrinsic drive to organize, to build institutions, and to invent a new system of self-governance. Thus, even if institutions at the level of national government can indeed be nasty creatures, there are still hopes for the future' (2003: 349).

As Deflem explained, in a neo-institutionalist perspective 'the process of institutionalization is a cognitive, not a normative matter, whereby institutions are conceived as cognitive constructions that control human conduct even prior to any internationalization of sanctioning norms' (Deflem 2008: 148). So we need to envisage a new form of self-production of legal rules. This is a key challenge for juridical sociology. An application of Gunther Teubner's theoretical framework to the case of water management in Italy brings out a total incongruence between legal rules and social rules (Teubner 1987) involving critical issues of legitimacy of the Law (Pardo 2000).

Conclusion

The discussion of water management in Italy has highlighted how this specific sub-area of society is complicated by structural difficulties in the relationship between law and society. It has also highlighted the constitutional issues raised by the recent processes of privatization. In this scenario the action of social movements is a form of resistance, the resistance of social practices to the new economic regime of privatization. This resistance could produce a new 'civil constitution', in the sense that Teubner derives from David Sciulli (Sciulli 1992); that is, to protect, in Law, a logic alternative to the dominant tendency to turn into law a rationality based solely on economic maximization (Teubner 2008). In the area of water management the 'civil constitution' theorized by Teubner plays the traditional role of limiting the power of the political apparatus, at the same time giving the right to water an opportunity to emerge as a counter-institution in Italian society. This is possible, because as Teubner put it, 'In nation state contexts, for instance, the co-determination movement was successful in institutionalising social active citizen's rights in enterprises as well as in other social organizations' (2011: 206).

Thus, we can say that not only a private contract, as in the case of market-oriented sector, but also an organized collective action can produce new constitutional principles — as a constituent power — against mainstream (so-called) economic rationality. In conclusion, the economic organization of the market for the management of basic public services such as water which affect the quality of citizenship itself has apparently become the easiest way to deal with this problematic. Perhaps, not equally easily can we say that this is the best course of action. Given that the use of water is considered a fundamental right worldwide, is there an alternative to the opposition public vs private? Should water management be dealt with from an ideological or a practical viewpoint? What is to be considered more important: the popular will and citizen's interest in a good quality of life or the maximization of corporate profit? Can these needs somehow be combined?

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