Malebolge

Commons and Patent Law at a Crossroad

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Abstract

The commons and the nature of the interests inspiring a – more or less organized – community of people provide the conceptual background to make sense of the concept of 'appropriation', in line with the principle of subsidiarity. The goal is to open up to a variety of interests that motivate the individual members of the multitude to participate, next to (or even substituting) the public authorities, in new models of welfare projects, among which healthcare is crucial.

I. Introduction

The *commons* and the nature of the interests inspiring a – more or less organized – community of people provide the conceptual background to make sense of the concept of 'appropriation', in line with the principle of subsidiarity. Here, according to the classics, appropriation is understood as 'the transfer of goods from one person to another (...) to allow those most in need to benefit from them'.[1] It is a multiplier of value/utility, a distributive tool, grounded not only on mere exchange – eg, a contract of sale – but involving association contracts too. The goal is to demonstrate that predictive rationality, inherent to the classical notion of appropriation, often fails to meet past and present needs that arise in the realm of welfare.[2]

II. Commons. Discrete Rationality vs Dialectic Rationality

Rivalry vs Sharing is the dichotomy on which, in recent years, commentators have theorized the existence of a third type of assets: the *commons*.[3] The point

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[1] F. Carnelutti, *Teoria giuridica della circolazione* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1981), 1.

[2] M. Francesca, 'Beni comuni e razionalita` discreta del diritto', in G. Perlinglieri and A. Fachechi eds, *Ragionevolezza e proporzionalita`* (Napoli: Edizioni Scientifiche Italiane, 2017), 473.

[3] G. Hardin, 'The Tragedy of the Commons' 162 *Science*, 1263 (1968); M.A. Hedler, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' 111 *Harvard Law Review*, 622 (1998); E. Ostrom, *Governing the Commons. The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990). See also P. Grossi, *Un altro modo di possedere. L'emersione di forme alternative di proprietà alla coscienza giuridica*

of arrival of such framing – due also to the exponential growth of a notable line of scholarship difficult to summarise in few words[4] – remains uncertain, although it has led to a subtle construction and deconstruction of the contents of its natural antagonist, ie property rights, subject to appropriation and typically read through the lenses of 'rivalry'.[5] Most scholars have relied on the distinction between public assets and privatised public assets,[6] thus fostering a renewed role for the social function of ownership embedded in the Italian Constitution.[7]

However, that of 'commons' is a liquid concept, constantly in progress, which can hardly be reduced to a single regulatory formula. What one can certainly rely on is its non-conflictual nature, ie the absence of rivalry. From this angle, commons are the non-negotiable bottom line of legal civilisation,[8] suitable for justifying instances of 'civic expropriation',[9] as well as promoting a new type of 'functionalized state-ownership',[10] alongside with a revitalisation of the social function inherent in private ownership as opposed to purely proprietary egotism.[11]

Knowledge, natural sites, cultural heritage, environmental resources, and a wide variety of other goods fall within this category. However, the increase in wellbeing, produced by the widespread availability of such resources, highlights the need to revisit the traditional tenets on which 'appropriation' is rooted.[12]

postunitaria (Milano: Giuffrè, 1977).

[4] V. Cerulli Irelli and L. De Lucia, 'Beni comuni e diritti collettivi' *Politica del diritto*, 6 (2014); L. Rampa and Q. Camerlengo, 'I beni comuni tra diritto ed economia: davvero un tertium genus?' *Politica del diritto*, 253 (2014).

[5] See M. Musella, 'Produzione e valore non patrimoniale: beni ambientali e culturali. Brevi riflessioni di un economista', in *Benessere e regole dei rapporti civili. Lo sviluppo oltre la crisi – Atti del 9° Convegno Nazionale SISDiC* (Napoli: Edizioni Scientifiche Italiane, 2015), 23; F. Viola, 'Beni comuni e bene comune' *Diritto e società*, 381, 387 (2016).

[6] G. Napolitano, 'I beni pubblici e le «tragedie dell'interesse comune' *Annuario. Analisi economica e diritto amministrativo (2006). Atti del Convegno annuale (Venezia, 28-29 settembre 2006)* (Milano: Giuffrè, 2007), 125; A. Algostino, 'Riflessioni sui beni comuni tra il «pubblico» e la Costituzione (25 novembre 2013)', available at https://tinyurl.com/yj34paky (last visited 31 December 2021). On the dichotomy see also M.R. Marella, 'Il diritto dei beni comuni. Un invito alla discussione' *Rivista critica di diritto privato*, 103 (2011); L. D'Andrea, 'I beni comuni nella prospettiva costituzionale: note introduttive' *Rivista AIC* (2015); Q. Camerlengo, 'La controversa nozione di bene comune' *Diritto e società*, 558 (2016).

[7] U. Mattei, 'Una primavera di movimento per la «funzione sociale della proprietà»' *Rivista critica di diritto privato*, 531 (2013); M.R. Marella, ibid 551, 568 (2013); G. Carapezza Figlia, 'Concetto di beni comuni' *Rassegna di diritto civile*, 1068 (2011). In general terms, P. Perlingieri, 'Proprietà, impresa e funzione sociale' *Rivista di diritto dell'impresa*, 208 (1989); P. Grossi, 'I beni: itinerari tra 'moderno' e 'post–moderno'' *Rivista trimestrale di diritto e procedura civile*, 1059, 1064 (2012).

[8] L. Nivarra, 'La funzione sociale della proprietà: dalla strategia alla tattica' *Rivista critica di diritto privato*, 503 (2013).

[9] U. Mattei, n 7 above, 531.

[10] L. Nivarra, n 8 above, 526.

[11] U. Mattei, n 7 above, 531.

[12] Corte di Cassazione-Sezioni unite 14 February 2011 no 3665, *Politica del* diritto, 2 (2011), with note of S. Lieto, 'Beni comuni, diritti fondamentali e Stato sociale. La Corte di cassazione oltre la prospettiva della proprietà codicistica'; M.R. Marella, O*ltre il pubblico e il privato. Per*

Commons, described in this manner, may be everything and the opposite of everything: governed by rationality and, at the same time, contradicted by the very same rationality.

Ostrom demonstrates, through the prisoner's dilemma, that the exclusionary structure of a relationship between two parties for the realisation of a competing interest often constitutes an inefficient, non-rational model of conflict-management.[13] The same model is, on the other hand, used to explain Hardin's theory on the tragedy of the commons:[14] the innate selfish inclination of individuals shows all its destructive capacity precisely in the forms of collective management. From this point of view, the interest in property constitutes the predominant factor on which rational decision-making is based.

The feeling is that current speculations around the commons are only the argumentative basis of a deeper juxtaposition between two competing concepts of rationality: a conformative-dialectic rationality *versus* the one based on discrete states.[15] Which, on turns, ends up mirroring the interplay between predictive rationality – which shapes the function of any norm[16] – and behavioural rules.[17]

Suffice it to think about knowledge, and about its qualification as an intangible asset, to unveil the outlines of an infra-systemic clash.

III. *Commons* and Scientific Discoveries: A Difficult Coexistence

The case of *Myriad Genetics*, a genetic research company that discovered

un diritto dei beni comuni (Verona: Ombre Corte, 2012); M. Barcellona, 'A proposito dei beni comuni: tra diritto, politica e crisi della democrazia' *Europa e diritto privato*, 617 (2013); F. Marinelli, *Diritto privato dell'economia* (Torino: Giappichelli, 2016), 99; S. Patti, 'La funzione sociale nella 'civilistica italiana' dell'ultimo secolo', available at https://tinyurl.com/yep3mpz7 (last visited 31 December 2021); A. Di Porto, 'Per uno statuto della proprietà dei beni destinati all'uso pubblico' *Diritto e società*, 551 (2016). See also G. Calabresi, 'Introduzione', in *Benessere* n 5 above, 7, 9. See also S. Rodotà, 'Note critiche in tema di proprietà' *Rivista trimestrale di diritto e procedura civile*, 1252, 1312 (1960).

[13] E. Ostrom, n 3 above, 16.

[14] G. Hardin, 'Collective Action as an Agreable N-Prisoner's Dilemma' 16 *Behavioral Science,* 472, 481 (1971); L. Rampa and Q. Camerlengo, n 4 above, 253; S. Nespor, 'Tragedie e commedie nel nuovo mondo dei beni comuni' *Rivista giuridica dell'ambiente*, 665 (2013); G. Resta, 'La conoscenza come bene comune', available at https://tinyurl.com/yeqa8gdr (last visited 31 December 2021).

[15] A.M. Turing, 'Computing machinery and intelligence' 59 *Mind*, 433-460 (1950).

[16] ibid; P. Femia, 'Pluralismo delle fonti e costituzionalizzazione della sfera privata' *Il diritto civile oggi. Compiti scientifici e didattici del civilista* (Napoli: Edizioni Scientifiche Italiane, 2006), 189,193.

[17] N. Irti, 'Capitalismo e calcolabilità giuridica (letture e riflessioni)' *Rivista delle società*, 801 (2015); A. Zoppini, 'Le domande che ci propone l'economia comportamentale ovvero il crepuscolo del «buon padre di famiglia»', in G. Rojas Elgueta and N. Vardi eds, *Oltre il soggetto razionale. Fallimenti cognitivi e razionalità limitata nel diritto privato* (Roma: Roma Tre Press, 2014), 11; A. Gentili, 'Il ruolo della razionalità cognitiva nelle invalidità negoziali', available at https://tinyurl.com/yj6tjols, 75 (last visited 31 December 2021).

the location and sequence of two genes whose mutation produces a high risk of breast and ovarian cancer, is now well known. The Company patented the discovery by developing a series of tests for quantifying the increased risk in patients. The matter came before the US Supreme Court, which overruled the lower court's decision and endorsed the patentability of the cDNA synthetically constructed.[18]

It was on 13 June 2013 when the Supreme Court modified its own position, stating that the laws of nature, natural phenomena and abstract ideas are not patentable as instruments of scientific and technological research ('A naturally occurring DNA segment is a product of nature and not patent eligible merely because it has been isolated').[19] The Supreme Court thus leaned towards discrete rationality, embodied by knowledge.

Knowledge is included among the commons as a constituent element based on participation. At the same time, it still represents the subject-matter on which the market appetites are concentrated. With respect to the *Myriad* judgment, clearly political in nature, one wonders if an overt advocacy of knowledge within the doctrine of commons[20] would have altered the outcome reached by US Supreme Court.

The issue of pharmaceutical patents is sadly evident today.[21] The world's population and the global economy, prisoners of COVID 19, are now prisoners of pharmaceutical patents on vaccines and their scarcity. The entire commons category and its theoretical underpinnings have not stopped the profit-maximisation process and have not impacted on the patentability of knowledge even in cases of mass diseases.

One should perhaps take a step back and point out that, in 1978, the Italian Constitutional Court[22] recognised the need to extend patent protection to scientific discoveries in medicine. The Court noted that it was not about «encouraging (or not preventing) 'price increases' of medicines as a consequence of the exclusive rights held by the patent holder, because the prices of pharmaceutical products are determined and adjusted on the basis of state laws and of regulations issued

[18] *Association for Molecular Pathology* v *United States Patent and Trademark Office*, 653 F.3d 1329 (Fed. Cir. 2011). See G. Resta, n 14 above.

[19] *Association for Molecular Pathology* v *Myriad Genetics*, 689 F. 3d 1303 (2013).

[20] M. Heller, 'Tragedy of the anticommons: property in the transition from Marx to market' 111 *Harvard Law Review*, 622 (1998); L. Nivarra, 'Anticommons and legal standards' *AIDA*, 260 (2013); A. Pradi, 'I beni comuni digitali nell'era della proprietà intellettuale', in A. Pradi and A. Rossato eds, *I beni comuni digitali* (Napoli: Edizioni Scientifiche Italiane, 2014), 7; see also W.I.U. Lenin, *L'imperialismo come fase suprema del capitalismo* (Reggio Calabria: Lotta Comunista, 2001); G. Colangelo, *Mercato e cooperazione tecnologica. I contratti di patent pooling* (Milano: Giuffrè, 2008).

[21] M. Francesca, ' "Uno studio in rosso". Sicurezza, sistemi e alterità artificiali' *Actualidad Jurídica Iberoamericana*, 54 (2021).

[22] Corte costituzionale 20 March 1978 no 20, available at C*onsulta online*; C. Casonato, 'I farmaci, fra speculazioni e logiche costituzionali' *Rivista AIC online*; R. Pardolesi, 'Sul divieto di brevettazione di farmaci' *Il Foro Italiano*, 809 (1978).

by the Inter-ministerial Committee on Prices (Art 33 decreto legge 26 October 1970 no 745). Besides, the experience of the other Countries, where the patents on pharmaceutical products (or at least on the manufacturing process) are permitted, shows that it is not possible to establish a causal link between patentability and price levels, since the market for pharmaceuticals is largely corrected by regulation, which must take into account not only the cost of raw materials, labour and packaging, but also the distribution of the drug, the incidence of research, as well as other factors».

The legislation on patents then in force consisted of decreto regio 29 June 1939 no 1127 (which allowed the implementation and enforcement of an exclusive right to such an extent as it did not endanger the needs of the country) and of Art 54 of the same law as amended by Art 1 of decreto presidenziale 26 February 1968 no 849.

Both provisions have been repealed by decreto legislativo 10 February 2005 no 30. However, it is worth recalling that the previously mentioned Art 54, in case of gross disproportion between the patent-holder's exclusive rights and the needs of the Nation, recognised the right to a 'compulsory licence for the non-exclusive use of the patent, in favour of any interested party upon request'. The system was hence capable of counteracting the scarcity of the product induced by the patent-holder's right.

This is where we come from. The system today is no longer capable of self-adjustments. Albeit grounded on the needs of a single nation-state, the adjustments allowed under the old rules had at their core an aggregate rationality, suitable for balancing competing interests and explaining the transformative function of regulation.[23]

In the current microcosm, driven by purely market factors, the typical twenty-year patent for pharmaceutical products is no longer renewable for as many years, but only up until five years. The time is considered necessary overall for the recovery of research and development costs, from the filing of the patent application to the actual marketing of the product. In short, the mechanism is designed to ensure that the costs for scientific research and development on the product, up until its marketing, are effectively covered.

It is clear that we are in a very peculiar market, so much so that the EU Court of Justice has established a new principle, that of competition on the merits,[24] which has had a therapeutic effect on a market heavily influenced by

[23] ibid.

The question of compulsory licences provided for in Art 31 of the TRIPs Agreement adopted in Marrakech on 15 April 1994, concerning trade-related aspects of intellectual property rights, ratified by Italy with legge 29 December 1994 no 747, are substantially limited to some countries in particularly poor conditions, as also established in the objectives of the Declaration on the trips agreement and public health, Doha, 9-14 November 2001.

[24] Case C-457/10 *P AstraZeneca AB e AstraZeneca plc* v *European Commission*, Judgement of 6 December 2012 available at www.eurlex.europa.eu. See also Autorità garante della

dominant positions. In short, the Court recognises the state of the art, especially in the pharmaceutical market, and seeks to find a solution to the problem by considering that those claims which are misleading or lacking in transparency give rise to an abuse of a dominant position, discouraging 'competition on the merits'. In particular, the Court functionalises the so-called competition on the merits to the interests of consumers, even when the product is protected by patents and the company's market position is a dominant one. The Court's message is clear: it seeks to strike a balance between the single market player's legitimate expectations and the benefit that can be derived by the end users.[25]

IV. Insufficiency of the Proprietary Paradigm *Vis-à-Vis* the Emergence of Social Interests

History and recent court decisions show that everything can be apprehended and that everything is measurable in economic terms. The problem is just about choosing the right measure.[26] Yet, at the very moment when the commons are defined on the basis of their conceptual distance from other goods, they are indirectly qualified as 'goods', subject to be apprehended just like any goods (whether public or private). Such a definition 'by distance' does not differentiate the commons from all other apprehensible goods and, in short, does not accurately reflect the underlying interests.[27]

So, it is perhaps worth forcing the border fence that figuratively surrounds the attempts to qualify the commons.

The proposal by the Rodotà Commission ('for the amendment of the Civil Code on public assets' – 14 June 2007) included the commons among the assets whose ownership does not exclude others from drawing utility therefrom and makes them functional to the exercise of human rights, also with a view to a more efficient reorganisation of public assets. New goods, notably intangible and financial assets, are now included among commons.

The feeling is that in this field a continuous mimicking of the traditional model is occurring, either by addition or by subtraction.

Undoubtedly, the category of commons risks being too limited in what it covers or too broad, in the latter case ending up absorbing or even replacing

Concorrenza e del Mercato, 11 January 2012, no 23194, A431, Ratiopharm/Pfizer, available at www.agcm.it; *contra* Tar Lazio 3 September 2012 no 7467, confirmed by Consiglio di Stato 12 February 2014 no 693, available at www.dejure.it qualifying the matter in terms of abuse of right. In general, see C. Osti, 'What's in a Name: The Concept of Abuse in Sui Generis Abuses', in G. Pitruzzella et al eds, *Competition Law and Intellectual Property. A European Perspective* (Alphen aan den Rijn, Kluwer Law International, 2016) 235.

[25] Case C-457/10 n 24 above.

[26] C. Mignone, *Identità della persona e potere di disposizione* (Napoli: Edizioni Scientifiche Italiane, 2014), 227, 233.

[27] See L. D'Andrea, n 6 above, 13.

individual statutes or disciplines. However, it is equally clear that the new benchmark is now by and large represented by sustainability, aimed at improving the quality of life and fostering a new concept of wellbeing, as such no longer depending on purely economic factors.[28]

It is obvious that not every discovery causes the same bewilderment which arose from the *Myriad Genetics*' DNA patent or more recently with respect to the COVID-19 vaccines; of course, this would not be the case with the research carried out by Nobel Prize laureate Elinor Ostrom, or with the discovery of a new fibre that allows fabric to change colour at will. In short, the goals and interests underlying a discovery/invention will certainly influence the decision on the granting of a right to exclusive appropriation. Such a link may be better understood by adopting a systematic approach.

V. Multitude, Pharmaceutical Patents, and Patterns for Action

The appropriative models, confirmed and valorised by the industrial revolution, are showing their limits in the face of the new demands grounded on relationality[29] as fundamental aspects of social wellbeing.

It is no coincidence, then, that the word 'multitude'[30] is almost a fitting match in the link between the commons and the realization of social interests, to which these goods would be ontologically projected. Outside the perspective of the class struggle against the domination of the individual's subjectivity, the 'multitude' can now be appreciated along the lines of experience-sharing, comprising the whole range of individual interests jointly headed towards the common good.[31] All this is to be contrasted against to the 'multitude' – created *in vitro* – of 'consumers' and 'professionals' who trade for the realization of their own interests.

In short, it is a new phase in the evolutionary process of the constitutional system, not solely entrusted to the public sphere,[32] but fuelled also by private actors, whose growing role in the provision of socially beneficial goods and services has earned them political momentum, as creators of wellbeing.

Ostrom herself takes into account different organizational models with respect to the governance of assets capable of producing plural benefits: from contract

[28] P. Perlingieri n 7 above, 218.

[29] A. Barbera, 'Art 2', in G. Branca ed, *Commentario della Costituzione* (Bologna-Roma: Zanichelli, 1975), 71.

[30] M. Barcellona n 12 above, 629.

[31] E. Rossi, 'Le finalità e gli strumenti della democrazia partecipativa nell'ordinamento giuridico italiano' *Diritto e società*, 493 (2016); R. Di Maria and F. Romeo, 'I beni confiscati alla criminalità come "beni comuni": brevi considerazioni tra diritto pubblico e privato', ibid, 589; P. Femia, 'Il civile senso dell'autonomia' *The Cardozo Electronic Law Bulletin*, 4 (2019).

[32] P. Perlingieri, 'La sussidiarietà nel diritto privato' *Rassegna di diritto civile*, 687 (2016).

to associationism,[33] the point of convergence is social welfare. Within this context, the subsidiary role played by private actors is revitalised, by promoting an osmotic relationship between social and individual interests. Individual interests, albeit grounded on profit-seeking, have the merit of objectivising an interest – thus making it evident on the normative and social dimensions – which may variously affect the public sphere (eg, hindering the transmission of knowledge, the protection of life or of other goods of cultural, historical or communitarian importance). Regulation of private relationships has, hence, a political value; moreover, it allows an adaptation of the existing regulations to the needs of collective wellbeing (those under construction in the new control-rooms).

There appear to be two viable solutions, each grounded on a peculiar conception of multitude.

The first one situates the multitude in the contractual arena, with the important specification that contract rules can no longer be considered stranger to market regulation, especially but not solely for the purposes of assessing abusive, anti-competitive practices.[34] To this aim, individual consumers and even consumer associations, as established by Art 140-*bis* of the Consumer Code on class action, are now provided with a direct cause of action. Probably the most difficult task today is to overcome the shortcomings of current consumer law,[35] within which the private right of action on issues concerning pharmaceutical products is constrained by the product liability regime.

However, with a view to providing the primary good with adequate protection, it is useful to recall that remedies ought to be derived from the system as a whole.[36] The root of conflict should be reconceptualised: the clash is now between defective pricing (due to a gross disproportion between the production costs and the right to protection of life)[37] and the need to counter mass diseases effectively (which may eventually have an impact on the duration of the patent).[38] This is similar to what occurred in South Africa in a court case concerning access to antiretrovirals, necessary for the treatment of AIDS.[39]

According to the second solution, instead, the multitude should acquire

[33] E. Ostrom, n 3 above, 79.

[34] Autorità Garante della Concorrenza e del Mercato, 27 February 2014, *La Roche* and *Novaritis*, available at www.agcm.it.

[35] A. Quarta, 'Il diritto privato nell'era della *sharing economy*', in M. Francesca and C. Mignone eds, *Finanza di impatto sociale. Strumenti, interessi, scenari attuativi* (Napoli: Edizioni Scientifiche Italiane, 2020), 239.

[36] P. Perlingieri, 'I diritti umani come base dello sviluppo sostenibile. Aspetti giuridici e sociologici', in Id ed, *La persona e i suoi diritti - problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 1972), 73; G. Perlingieri, '«Sostenibilità», ordinamento giuridico e «retorica dei diritti». A margine di un recente libro' *Foro napoletano*, 101 (2020).

[37] R. De Giorgi, 'Niklas Luhmann e i paradossi del diritto', in R. De Giorgi ed, *Temi di filosofia del diritto* (Lecce: Pensa Multimedia, 2015)161.

[38] G. Teubner, 'La matrice anonima. Quando "privati" attori transnazionali víolano i diritti dell'uomo' *Rivista critica di diritto privato*, 9 (2006).

[39] M. Francesca, n 21 above.

enough financial leverage to ensure the production of indispensable goods for meeting basic needs, including of course the so-called life-saving medicines. The implementation of such a measure takes time, of course. But it is important first, and once for all, to overcome the idea that the pursuit of non-lucrative aims is the sole justification for the provision of welfare services by private (non-state) undertakings/subjects.

The second fundamental theorem of welfare economics is grounded on the distinction between the concepts of equity and efficiency (which were jointly accounted for in the recent reform of third sector law in Italy and, more generally, in the policies favouring direct investments by public authorities).[40] Equity (described by economists as 'a better division of the pie') has often shown its weaknesses, and the corrective measures promoting a return to efficiency have failed as well. The transition, at this point, should be forced to follow the path of efficiency, that is, by widening the 'welfare pie'.

Notably, given the indisputable demand for public services, it is perhaps necessary to consider the possible rearticulation of supply: an uneven demand may be met by an equally uneven supply. It is clear, however, that the new mapping of supply requires taking a more attentive look at the solidarity principle, also in the traditional 'second sector', typically driven by efficiency and profit-seeking.

In short, it is not a question of excluding the lucrative nature of the activity, but quite the opposite.

As early as the 19th century, Arsène Dupuit, an engineer of the Administration of the *Ponts et chaussées*, studying the suitability of public works, concluded that only public services could be free of charge, as they were financed through taxation.[41] The central role of taxation has been reaffirmed, more recently, in the regulation (through tax-cuts) of 'third sector' service-providers.

Instead, to understand the new starting point illustrated in these pages, it is sufficient to observe that private undertakings operating in the third sector of the economy may as well be motivated by egotistical levers that are decidedly different from empathy.[42] This is what we learned in the past few months with vaccines: knowledge, which was finally patented, required high intellectual and experimental costs.

So now the question is: how do we ensure stability in the supply of solidarity, without ethical biases? The profit motive, the main selfish lever, can,

[40] F. Reganati, 'Efficienza allocativa e politiche di incentivazione', in *I rapporti civilistici nell'interpretazione della Corte costituzionale. Iniziativa e impresa* (Napoli: Edizioni Scientifiche Italiane, 2007), 317.

[41] C. Pace, 'Stato, mercato ed esternalizzazione dei servizi pubblici' *Quaderni dei Convegni delle Settimane culturali di Sperlonga* (Roma: Arbor Sapientiae, 2001), 53.

[42] M. Francesca, 'La rilevanza dei fatti di sentimento nel diritto privato: associazionismo, terzo settore e tutela dei diritti sociali', in R. Di Raimo et al eds, *Percorsi di diritto civile. Studi 2009/2011* (Napoli: Edizioni Scientifiche Italiane, 2012), 41.

like others, be the subjective and objective driving force for the stabilization of socially useful activities, capable of broadening and diversifying supply (which, until now, has not always been consistent with the variety of demand and, most of all, with societal needs).[43]

Indeed, it is a matter of applying the facts to the theories, rather than the theories to the facts, accepting the variety of interests that motivate the individual members of the multitude to participate, next to (or even substituting) the public authorities, in new models of welfare projects,[44] among which healthcare is crucial.[45]

Government bonds (Bot, BTP, Cct and Ctz) have always been part of this overarching logic: that of incentivising investors to devote part of their savings in supporting public spending, in exchange for a secure (financial) return.

On the whole, the individual interest remains in the background as opposed the paramount interest to sound public spending. In the microeconomics of the systems of production of socially relevant goods, the contracts of partnership – whether 'co-operation covenants' or 'Social impact bonds' – can be placed on an equal footing. 'Social impact bonds', in particular, are financial instruments aimed at the creation of collective wealth, which, like traditional government bonds, use the egotistical capital leverage of some non-institutional investors who bet on the achievement of a socially relevant result, usually taken on by a third sector entity.

Where the target company, financed through a Social impact bond, is a public-private partnership, it is important that the financial instrument does not end up influencing the management model. In other terms, the company pursuing a socially relevant goal should not be forced to optimise its performance on the sole basis of market-driven parameters.[46] This would exclude the possibility of witnessing a new *Myriad Genetics* case and allow us to get prepared to deal with possible new pandemics with a more solid control of the means of defence, by of course remunerating the producers of knowledge but at the same time retaining the possibility that a not-for-profit entity takes the lead of a joint action in the common interest through the results of scientific

[43] M. Musella, 'Finanza sociale e sviluppo dell'economia civile. Una introduzione', in M. Francesca and C. Mignone eds, n 35 above, XIII; N. Riccardi, 'Sviluppo economico e ricadute sociali', ibid, XVII.

[44] L.R. Perfetti, 'I diritti sociali. Sui diritti fondamentali come esercizio della sovranita` popolare nel rapporto con l'autorita`' *Diritto pubblico*, 101, 113, 119 (2013); Id, 'L'attitudine della giraffa. Per una teoria dei diritti sociali come esercizio della sovranita`, nella stagione della crisi del welfare pubblico', in M. Francesca and C. Mignone eds n 35 above, 61.

[45] C. Mignone, 'Finanza alternativa e innovazione sociale: prolegomeni ad una teoria dell'«impact investing»', in *Benessere* n 5 above, 343; Id, 'Investimento a impatto sociale: etica, tecnica e rischio finanziario' *Rassegna di diritto civile*, 924 (2016).

[46] C. Mignone, 'Meritevolezza dell'iniziativa, monetizzazione del benessere e nuovi modelli di welfare sussidiario' *Rassegna di diritto civile*, 133 (2017); N. McHugh et al, 'Social impact bond: un lupo travestito da agnello?', available at *rivistaimpresasociale.it*, 3 (2014).

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In an era of budgetary constraints, suffice it to remember, as Manzoni observed, that even Donna Prassede, so devoted to the cause of solidarity, in truth had an innate need to satisfy herself by exercising social control. And within the multitude it is not unlikely to find one (or more) Donna Prassede.