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SOCIAL MOVEMENTS AS CONSTITUENT POWER: THE ITALIAN STRUGGLE FOR THE COMMONS

Saki Bailey¹ & Ugo Mattei²

INTRODUCTION

In the aftermath of the June 2011 Italian National Referendum opposing the compulsory privatization of public utilities, profit on tap water, and nuclear program, a constitutional moment³ has been unfolding in Italy. The Referendum prompted a political clash of a constitutional nature between the neoliberal state and the “people,” united through a social movement under the banner of the “beni comuni” or common goods movement. The “political commons”⁴ in the Italian context has emerged as a strategy for reclaiming fundamental common goods (like water, culture, and education) and the democratic processes and spaces, which govern their access and distribution. This commons movement, as will be argued in this paper, is an instance of one of the many struggles taking place throughout the world; from the Bolivian Andes to the Indian Himalayas, local people are pushing out the state and predatory multinationals acting in collusion to enclose common spaces and resources for the benefit of private profit. These individual struggles for the commons are linking together through global networks and are emerging as a transnational social movement challenging the top down economic constitutionalism of the WTO, and what has been dubbed the “troika”: European Central Bank, European Commission, and IMF.

The common goods movement in Italy was born out of the concerted action of a number of groups within civil society combatting neoliberal privatization: the work of scholars in the Accademia di Lincei (the most prestigious research institute in Italy) involved in drafting proposed reforms to the civil code to protect common spaces; the work of lawyers undertaking an impressive range of activities: from fighting against privatization in courts both on the constitutional and municipal levels to assisting communities to organize into legal associations like foundations (in the case of national theaters) to prevent privatizations; the work of activists within the official water forum who rallied public support for the referendum; and finally the important work accomplished by regular citizens and local communities reclaiming nature, culture, labor and education as commons from collusive corporate and state actors. The success of this movement was demonstrated in the unexpected victory of the “water referendum,” where in an unprecedented manner over 27 million Italians turned out to vote with over 95%

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³ See generally BRUCE ACKERMAN, *WE THE PEOPLE* (1991) (times of political crisis in which the electorate acts collectively to effect constitutional change through informal, extra-constitutional means).

⁴ Saki Bailey, *Politicizing the Commons* (on file with author)(In the Italian context, “commons” is understood as “political” and not only as the institutional design analysis of Elinor Ostrom, but a political and legal tool and strategy for fighting privatization.

voting against privatization, accomplishing the first 50% quorum in Italy in over 16 years.⁵ This major victory produced an extreme counter reaction by the neoliberal opposition fearful of popular revolt, leading to the modification of provisions of the Constitution of 1948 with a large majority vote by a corrupt Parliament (no party can currently win a majority), to prevent another popular referendum from taking place.⁶

A major clash between representative and direct democracy is occurring, which has led to the occupation of not only squares, as in Greece and Spain, but occupations of actual sites of privatizations, such as national theaters like the Teatro Valle and development projects, like the high speed train in the Susa Valley. Recently the ongoing struggle was settled by the Constitutional Court in a landmark decision⁷ that shielded referendum results beyond the reach of Parliamentary legislation, thus offering a major constitutional source of legitimacy to the so called *beni comuni* movement fighting the neoliberal strategy of the government. Since the Referendum results the former Government deemed untrustworthy by the European neoliberal establishment, was forced to resign in November 2011. A new, so called, “technical” Government, headed by a former European Competition Commissioner Mario Monti, was formed to carry out the neoliberal policy mandate of the troika and today enjoys an overwhelming economic emergency based majority in the Parliament. This quite dramatic and sudden turn of events is a clear example of the marginalization of “the people” in the current phase of global capitalism, and poses significant questions as to the meaning of state sovereignty and the status of constituent power today.

The Italian *beni comuni* movement is a powerful example of the way in which social movements are emerging as an important form of constituent power on both national & supranational levels, serving not only to enforce the protections and guarantees of national constitutions but also, in the context of the decline of the nation state, as counter hegemonic bottom up forces against the top down economic constitutionalism of international economic institutions. This paper is divided into three parts: Part I attempts to make the case that social movements are emerging as an important form of constituent power offering: 1) alternatives which challenge the assumptions underpinning the liberal constitutional form namely of private property, and 2) a much needed channel for politics where representative government politics and state politics have failed to protect the public from predatory private actors. Part II In a participant observation by one of the authors,⁸ explores constitutionalism on the level of practice as opposed to a priori theories, through the national constituent role played by the *beni comuni* social movement in upholding the protections and guarantees of the Italian Constitution. Finally, Part III analyzes the supranational constitutional process and

⁵ Almost 55% of Italians went to the polling station (more than 27 millions people) and 95% of voters chose to vote “yes” to abolish art. 15 of Decree 135/2009 (Ronchi Decree). Data available at: <<http://elezionistorico.interno.it/index.php?tpel=F&dtel=12/06/2011&tpa=Y&tpe=A&lev0=0&levsut0=0&es0=S&ms=S>

⁶ According to Art. 138 of the Italian Constitution if both chambers of Parliament in two subsequent votes pass a Constitutional amendment with more than 2/3 majority, the referendum to approve the amendment is precluded.

⁷ Italian Constitutional Court Decision n. 199 of July 17, 2012

⁸ Part II is the product of two years of full time political and legal activism where one of the authors (Ugo Mattei) played a nationally recognized role in the *beni comuni* movement as lawyer, scholar, and activist.

considers the *beni comuni* movement as part of an oppositional global constituency challenging the top down imposition of global economic constitutionalism and reclaiming the “commons” from predatory multinational actors through bottom up societal constitutionalism.

I. THE PARADOX OF CONSTITUENT POWER

The idea that social movements, made up of civil society groups, as “constituent power,” remains a contested claim. Classical constitutional theory designates the capacity for “constituent power” to the “people” through the concept of popular sovereignty, however it is assumed that it is only legitimately exercised through representative democracy. There is an inherent tautology or “paradox” in this designation, which has perplexed constitutional theory from its origins, and as most legal scholars know, there is a long debate on the controversy stretching from Hobbes, Rousseau, Hume, Bentham, Burke, to name a few, and most recently Hardt & Negri with the concept of “Multitude.” The paradox is often referred to as the problem of the “non foundational foundations of law”⁹ and may explain the exclusion of civil society actors as “constituent power” in traditional constitutional theory. This problem of the “non foundational foundations of law” appeared in legal theory in the shift from natural law to positivism, which produced a kind of chicken/egg problem for constitutionalism: what came first the constitution or the state? Constituent power or the constitution? How can the state produce constitutional law when it is the constitution itself which produces the state? How can a “social contract” between the “people” with “government” exist prior to the making of the social contract itself? Part of the difficulty clearly lies in defining and naming the entities between whom the social contract is made, and on which the idea of constitutionalism is founded. Ruth Buchanan describes this paradox as a product of a myth which positivists have accepted as a concrete reality.

A constitution is essentially an originary narrative, in that it offers an account of the source of both legal and political authority. It does so by purporting to ground that authority in the political will of a 'people' understood to be capable of acting as a unified entity. The 'people,' however, cannot come into existence as such until after the founding inaugurated by the constitution. The constitutional 'moment', then, is always a type of 'pious fiction'.¹⁰

As Buchanan explains “the people” are a product of the constitution itself, a unified political entity constituted by the constitutional form, not as something which has an *a priori* existence. The paradox of the constitutional narrative is that “the origin has to 'be' before and after the point of origination.”¹¹ This myth has been critiqued most recently by Hardt and Negri, whom argue that the unified political entity of the “people” facilitates the cancellation of the pre-political subjectivity of the “multitude,” which in turn is functional to the merger of the popular political will into the will of the sovereign,

⁹ Gunther Teubner, *Societal Constitutionalism: Alternatives to State-centred Constitutional Theory*, available http://papers.ssrn.com/sol3/papers.cfm?abstract_id=87694.

¹⁰ Ruth Buchanan, *Legitimizing Global Trade Governance: Constitutional and Legal Pluralist Approaches* 57 N. Ir. Legal Q. 654 (2006).

¹¹ Peter Fitzpatrick, *Breaking the Unity of the World: Savage Sources and Feminine Law* 19 AUS. FEM. LJ. 47 (2003) .

robbing the “multitude” of their ongoing constituent role and power in the constitutional process.

“Hobbes challenges the existence of the multitude on more directly political grounds. The multitude is not a political body, he maintains, and for it to become political it must become a people, which is defined by its unity of will and action. The many, in other words, must be reduced to one, thereby negating the essence of the multitude itself: “When the multitude is united into a body politic, and thereby are a people...and their wills virtually in the sovereign, there the rights and demands of the particulars do cease; and he or they that have the sovereign power, doth for them all demand and vindicate under the name of his, that which before they call in the plural, theirs.”¹²

The “social contract,” which results after negating all claims and existence of the multitude is a contract of the sovereign with himself, leaving the sovereign free to pursue his own interests while maintaining the appearance of popular sovereignty as a counterbalancing check to power. But who/what is the multitude and who/what is the sovereign? There is an entire field of scholarship, which we will not attempt to synthesize, on the evolving concept of the sovereign: from monarch, to the third estate, to the modern state and the shifting *raison d'etat* from pastoralism to neoliberal governmentality.¹³ However, for our purposes, we will narrow the issue to the anticipated ongoing constituent role for both the political people and the raw constituent power of “multitude” in the constitutional process. Hardt and Negri, describe the Multitude as “unformed constituent power” capable of bringing back “the condition of possibility of the modern idea of popular sovereignty.”¹⁴ In sum, the “Multitude” is the pre-political form of “the people,” which we explore in this paper as civil society, whose constituent power was obliterated for the purpose of what they argue was to safeguard property rights. “In the course of the great bourgeois revolutions of the 17th and 18th centuries, the concept of the multitude is wiped out from the political and legal vocabulary, and by means of this erasure the conception of the republic (*res publica* rather than *res communis*) comes to be narrowly defined as an instrument to affirm and safeguard property.”¹⁵ Scholar, Jim Tully goes even further and suggests that the modern liberal constitutional form, which gave birth to the idea of “republic” and “representative democracy,” was functional to the low cost and efficient continuation of the hegemonic colonization of non European people. He suggests that the “paradox” of constituent power is a result of two fundamental “antagonistic imperatives” in constitutionalism, one which is that consent of “the people” must somehow be obtained (the idea of popular sovereignty) and the other that “governmental power must be divided, constrained and exercised through distinctive institutional forms.”¹⁶ One of such institutional forms, assumed by modern liberal constitutionalism, and functional for the purposes of imperial conquest, is private property. As Tully explains, these two imperatives pull in opposition directions, and the tension has become more acute in modern constitutions, where the

¹² MICHAEL HARDT & ANTONIO NEGRI, *COMMONWEALTH* 42 (2009).

¹³ See MICHELE FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE* (2008); SECURITY, TERRITORY AND POPULATION

¹⁴ HARDT & NEGRI, *supra* note 7.

¹⁵ *Id.* at 50.

¹⁶ Jim Tully, *The Imperialism of Modern Constitutional Democracy*, in *THE PARADOX OF CONSTITUTIONALISM* 315, 317 (Loughlin & Walker 2007)

development of the constitutional framework has undergone a process of institutionalization into highly complex and autonomous forms.¹⁷ Tully refers to this institutional autonomy as “disembeddedness,”¹⁸ a defining feature of the modern constitutional form, where the structure of law has an independent status from “the activities of those who are subject to it” and thus has the power to “constitute” the field of recognition and interaction of the people subject to it.”¹⁹ Thus, the “disembedded” and “autonomous” quality of property as a institution, actually counterintuitively embeds it within the modern constitutional structure itself. As a result, a pre-determined set of property relations, which are not only defended by the substantive law but rather underpin the entire constitutional form, restrain and constitute constituent power within the limits of individual private property relations. This effectively makes the institution of property invisible/unnoticeable from the point of view of the unified political entity of “the people” and thus beyond contestation.

The private property relations assumed by liberal constitutionalism and the failure of the idea of the public or “res publica” as representative democracy are resulting in the inability of constitutional law to provide a shield against private interest, permitting the take over of the public by predatory private actors, resulting not only to reinforce existing property distributions, but effectuating massive transfers of public and common wealth into private hands. Today, intensified by the global economic crisis and austerity measures, governments of modern liberal constitutions under the “state of emergency” act like the absolute sovereign monarchs of feudal times; transferring to the private sector anything that it desires, as if it were a private owner to serve the interests and profits of corporations. This complex transformation makes the very distinction between the public and the private sector all but senseless, as visible in so many versions of revolving doors and conflicts of interests, revealing the blatant collusion between state actors and the global ruling élite that profit from privatizations. In this scenario, sometimes described as neo-medievalism, state sovereignty is weak and constitutional law is reduced to shield the people in front of a Leviathan that is uses the iron fist with the weak (the people) and the velvet glove with the strong (corporate powers). Meanwhile, Leviathan is himself at the mercy of transnational corporate power and its role is now essentially that of enclosing the commons by a continuous process of privatization of its own sovereignty. In a nutshell, while constitutional law can operate to defend the private sector against the public one (due process of law, just compensation clause) it simply cannot operate the public sector against the private one. Today, privatization is possible outside of any constitutional limit or judicial review because states and governments are too weak to impose a legal order over economic forces and private economic actors. Rather than

¹⁷ *Id.* This notion of “secondary rules” (a concept of H.L.A. Hart) as the defining characteristic of constitutional forms is utilized not only in describing the constitutions of nation-states but also beyond the nation state for example in the theory of Gunther Teubner's societal constitutional forms.

¹⁸ *Id.* Many scholars consider this “disembedded” quality the primary differentiating characteristic between western modern constitutions, considered as “formal,” from non western indigenous constitutional forms, considered “customary,” where the separation between the constitutional form and customary laws and norms is collapsed. It is this very distinction which led to the conclusion by colonial powers that the colonies, prior to wester conquest, were essentially lawless. This rhetoric also persists within the “development” packages of the IMF and World Bank in the third world, which bundle neoliberal reform together with the “rule of law” and “human rights.”

¹⁹ *Id.*

ruling the economy, governments are ruled by economic power through a variety of capture phenomena and by the operation of various ideological apparatuses, including legal academia.²⁰

If we accept the failure of representative government then what hope is there for constituent power? What is the continuing relationship between constituents and the constitution? What are the constitutionally designated ways in which constituents can reassert popular sovereignty when representative government fails? Scholar Jim Tully presents four theses explored by Loughlin and Walker about the ongoing constituent relationship between the people and the constitution.

When people subject to a constitutional form see themselves as multitude (an as yet unorganized and unrecognized potential agent) behind the whole constitutional-constituent formation and strive to exercise all three constituent [political, labor, and security/police] power together, overthrow the regime and bring into being a new kind of constitutional formation, which in turn must be subject to ongoing constituent transformation (so the multitude remains sovereign over the constitutional form to which it subjects itself).²¹

This thesis, called the “radical sovereignty” thesis, suggests that the pre-political “multitude” can by an act of radical sovereignty, otherwise known as revolution, overthrow a given constitutional form. Of course this can happen at the level of the whole State territory, or it could take place in a much more limited physical space, such as an occupied Theater, or firm, or a square, or a mountain Valley, that the multitude is physically or politically capable to maintain beyond the reach of the State. The question still remains, however when an act of the multitude is truly in the name of the multitude and when is it an act of cutting the constitutional restraints of the Ulysses's bind and heeding the sirens calls of mob rule. While there is clearly danger in treading beyond the limits of the liberal constitutional form, given its deforming power vis a vis its reinforcement of private property, and its weak protection of the public interest, it seems clear that we must expand our notion of constituent power beyond the formalistic “juridical containment” definition.²² Can we interpret the Multitude, “the pre-political” form of the people, as civil society? Can civil society, autonomous and free from the liberal constitutional form renew constituent power and the idea of popular sovereignty? Can we only fight the private with the private? Today, we are witnessing, a new wave of social movements of the commons playing a constituent role on both national and transnational constitutional levels engages in an ongoing constituent transformation, exercising constituent power in the absence of a constitution.

A. Social Movements as Constituent Power: Constituent Power without a Constitution

Social movements have a long history of affecting change, not only by exerting pressure on politicians, but even on courts resulting at times on major shifts in constitutional law.²³ Think about the role for example the influence of civil rights

²⁰ See Ugo Mattei, *The Rise and Fall of Law and Economics: An Essay for Dean Calabresi*, in 64 MD. L. REV. 220 (2005); UGO MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* (2008).

²¹ Tully, *supra* note 17.

²² *Id.* Juridical Containment Thesis is one of the four theses explained as

²³ See generally Ackerman, *supra* note 13. (Bruce Ackerman's seminal work *We the People*

activists in the United States on the Warren Court which produced *Brown v. Board of Education*²⁴ or the Friendly Settlement resulting in the Uwa indigenous people's case against Occidental before the Inter-American Human Rights Commission.²⁵ These cases highlight the important role civil society can play, not only in influencing courts, where representative politics has failed in achieving social justice, but in the face of today's weakening Leviathan to negotiate directly with multinationals themselves. Social movements may offer a new “pouvoir constituent,” providing alternative channels for achieving justice where states have failed. Many scholars are optimistic that a project for “democratic constitutionalism,” as opposed to the imperial project of “constitutional democracy,”²⁶ is underway and points to “non-imperial forms of global networking;” transnational social movements challenging from below the imperial power of international organizations and multinationals imposed from above.

All over the world, citizens have worked to elect social democratic and workers' parties, only to watch them plead impotence in the face of market forces and IMF dictates. In these conditions, modern activists are not so naïve as to believe change will come from electoral politics. That's why they are more interested in challenging the structures that make democracy toothless, like the IMF's structural adjustment policies, the WTO's ability override national sovereignty, corrupt campaign financing, and so on.²⁷

As people increasingly lose faith in the power of the state as a forum for transformative politics, they are increasingly turning to the “constituent power” of social movements and tackling head on the very “structure” that makes democracy “toothless;” the invisible rules and institutions which determine distributions of property and of wealth. The role of social movements like the commons, while largely ignored by legal scholars,²⁸ we argue are playing two important functions in the context of the decline of

describes various “constitutional moments” taking place in four periods of American history often outside of constitutional procedures and influenced by civil society).

²⁴ William N. Eskridge Jr., *Some Effects of Identity Based Social Movements on Constitutional Law*, 100 MICH. L. REV. 2062, 2086-2096.

²⁵ U'wa Indigenous Community/Precautionary Measures. Case N. 11.754, accessible from <http://www.escri-net.org/docs/i/414389> (last accessed August 11th, 2012)

²⁶ Tully, *supra* note 17. Scholar Jim Tully suggests that the modern liberal constitutional form is inherently imperial with property and contract being assumed and operating “secondary rules” which structure and establish the distributive stakes involved thus functional to the low cost and efficient continuing colonization of non European people.

²⁷ Naomi Klein, *Reclaiming the Commons*, 9 New Lft. Rev. 82, 88.

²⁸ BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW*, (2003). (Rajagopal argues that social movements are not only sources of international law but that they challenge liberal categories of rights (and by extension constitutionalism) and the assumption that legitimate power can only be exercised through recognized political forums. Rajagopal points to several reasons why social movements may have been largely ignored by international law scholars, what he identifies as jurocentrism, an institutionalist bias, and elitism. Jurocentrism being the tendency for lawyers to focus on textual analysis of law emerging from legislatures and courts, which prevents the inclusion of text of resistance or analysis of “illegal” interpretative acts by individuals which may go against the very text of the law. The institutionalist bias refers to the way in which scholars tend to focus on the state as the major source of law and legal institutions, a narrow conception of the 'social' as unified and controlled by the agent of the state. Finally, Rajagopal points to the elitist blindspots of international law, “given that social movements consist of the urban poor, peasants, workers in the informal sector, illiterate women, and indigenous peoples whose resources are being destroyed.” It is for the very reason that subaltern subjects tend to be already voiceless within their own nations, excluded from

the nation state: 1) they are expanding the concept of “politics” enclosed by the liberal constitutional form, which in turn is extending the concept of “constituent power” beyond the liberal constitutional form of representative politics 2) they are filling a crucial vacuum where representative politics has failed by offering alternative channels for political engagement. Social movements are expanding our understanding of politics as something more than a set of actions taken in formal political arenas. They are redefining “what counts as political and who defines what is political.”²⁹ Reuniting the idea of the constitution with constituent power.

Scholar, Rajagopal identifies three waves of social movements: the first characterized by their organization around the “nation” referring to the national liberation projects of the third world which took place in the 50s and 60s; the second “identity” wave referring to the civil rights, feminist, and gay rights movements which stretch from the 60s into the 90s; and finally the third wave of “anti-globalization” movements which erupted in the 90s as a reaction against capitalism, highlighting the struggle over global resources.³⁰ It is within this third wave that we locate the transnational movement of the commons characterized as the struggle of local communities to reclaim access and governance of resources from collusive state and market actors. Protest movements in the form of local resistance against privatization are taking place throughout the world from the Global South to the heart of the West.

As our communal spaces—town squares, streets, school, farms, plants—are displaced by the ballooning market place, a spirit of resistance is taking hold around the world. People are reclaiming bits of nature and of culture, and saying ‘this is going to be public space.’ American students are kicking ads out of the classrooms. European environmentalists and ravers are throwing parties at busy intersections. Landless Thai peasants are planting organic vegetables on over irrigated golf courses. Bolivian workers are reversing the privatization of their water supply. Protests are multiplying.³¹

As Klein describes, these movements reclaiming the commons and fighting against the negative effects of economic globalization are united through their opposition to what has been identified as a common enemy: “Thanks to the sheer imperialist ambition of the corporate project at this moment in history— the boundless drive for profit (...) multinationals have grown so blindingly rich, so vast in their holdings, so global in their reach, that they have created out coalition for us.”³² United against corporate power, the commons movement are forming networks of activists together with the anti-globalization movement in the fight to protect common resources. The name, “anti-

traditional political for a that they join social movements in the first place. Ignored and excluded from the traditional political for a it is no surprise that they are also largely ignored by legal scholarship.)

²⁹ *Id.* Rajagopal analyzes this point by describing the way in which social movements are enacting a “cultural politics” offering alternative conceptions of rights and identities, and Sally Engle Merry in the way in which transnational norms are indigenized or vernacularized into the systems of meaning which are often culture bound.

³⁰ These distinctions however are not black and white as “Balakrishnan Rajagopal, for example, argues that the distinction often implied between ‘old’ and ‘new’ social movements, with only the former concerned with the distribution of resources, should be rejected. Rather, he suggests for all social movements issues of identity are tied up with strategies for survival.”

³¹ Klein, *supra* note 27, at 82.

³² *Id.*

globalization,” in many ways has always been a misnomer, as what the movement fights is not globalization, but rather like the commons movements, corporations and capitalism, working to ensure that “it is those who live on the land who benefit from its development.”³³ Commons social movements are not only claiming that the “personal is political,” to borrow the slogan made popular by the feminist wave of social movements, by demanding that property relations governed by private law are exposed to contestation in the political sphere through the political process, but (primarily in the Global South) they are also making the “political personal” by demanding through the political process that the public sphere respect existing communal forms of property relations, acting as a shield against corporate and state control.³⁴ Social movements of local communities reclaiming their autonomy through collective ownership over common resources, not only challenges the logic of private property assumed by liberal constitutionalism but also threatens the role of the state. “As one Indian minister said upon being confronted with a local dam-building effort by farmers in the Krishna River valley using local, small-scale technology: “If peasants build dams, then what will the state have left to do?”³⁵

Rajagopal goes on to cite numerous examples of communities in India engaged in self rule outside of the state of collective lands and resources from the Panchayat raj amendments to the triban Gram Sabhas.³⁶ These actions not only challenge the state but its concept of development compelling recognition of alternative forms of property. Social movements, however are not necessarily pursuing autonomy with the state as its target, but rather they seek autonomy from the logic of private property which underpins its liberal constitutional form. In fact in many cases, the state and traditional public politics are important arenas and sources of support for social movements. “Their attitude is often strategic, contingent and opportunistic towards institutions of the state-they constrain or work with whichever institution happens to show more support for their interests at any given time.”³⁷ It is this “strategic, contingent and opportunistic” attitude of social movements which reinforces their autonomy and in turn their “constituent” potential. It is this very autonomy from the constitutional form, which gives social movements their raw political potential. This autonomy also provides the freedom for social movements to engage in “politics” utilizing non traditional methods and non traditional forums: in the form of protests, occupations, transnational networks, and alternative institutions of governance. These alternative forums for “doing politics” outside the state have in many cases proved more effective for regulating predatory private actors than through state regulation. Increasingly, the state is being sidelined as local communities are directly negotiating with multinationals both on local and national levels, strategically using both private and public tools and forums, as will be explored in the Italian case of the beni comuni. Many scholars argue that “one of the key political

³³ *Id.*

³⁴ “The personal is political” a slogan reflecting the feminist critique of fundamental rights and human rights, which takes the position that the rights discourse, which is primarily based on political and civil rights, is impotent to change the lives of those often excluded from the political “public sphere” and possibly most in need of “human rights” such as women whose lives are controlled by the private sphere and private family and property law. See

³⁵ RAJAGOPAL, *supra* note 28 at 264

³⁶ *Id.*

³⁷ *Id.*

developments of recent times has been the direct engagement between social movements operating in transnational mode and the major players in the global economy.” Gavin Anderson makes a very strong case for the success of this direct engagement through the example of the conflict between the Uwa community in Columbia and Occidental over amazonian oil resources. In this case the Uwa indigenous people were able to bypass the corrupted state and national politics to fight Occidental by building a transnational campaign which ended in a Friendly Settlement before the Inter American Commission of Human Rights, successfully terminating Occidental's drilling rights in the Uwa's land.³⁸ The resources wars have taken a transnational and subaltern turn: rather than a future of states fighting one another for over control of crucial resources like water and energy, in the face of a weakening leviathan overtaken by powerful corporate actors, it is the multitude of civil society actors and not the state that is capable of battle corporate “pirates” in the private channels of free markets, beyond the regulation of the nation-state. In this way social movements, unbound by the limits of the state and its constitutional form, offer alternative political strategies and forums in the vacuum created by a weakening Leviathan, revitalizing constituent power without a textual constitution.

In order to give a thick practical substance to these theoretical premises, we will now analyze the kind of constituent role played by the Italian beni comuni through a “participant observation” by Ugo Mattei, a key figure in the movement. The beni comuni movement, as the constituent struggle for the commons is a good example of a constituent struggle between social movements, the state, and corporate forces. The beni comuni movement invoked both indirectly and directly constitutional protections of the public and commons described below, and these actions can be viewed as efforts to restore the democratic constitutional fabric, especially in light of the many illegal changes made to the constitution simultaneously by neoliberal oppositional forces. Many of the actions pointed directly to constitutional text available in a number of highly advanced and mostly unimplemented provisions of the 1948 Constitution, as described above, most fundamentally in Article 3 and Article 42, however while the movement upholds the spirit of the constitution, and thus being outside and autonomous the beni comuni movement is exposing the contradictions of the state-private property dualism, which has colonized the modern constitutional imagination.

II. CONSTITUTIONAL & CONSTITUENT ROLE OF THE ITALIAN BENI COMUNI: A PARTICIPANT OBSERVATION³⁹

This section describes the referendum campaign and formation of the beni comuni as a social movement in the Italian national context, as well the oppositional neoliberal forces, which organized against it. A diverse array of actors (scholars, lawyers, activists and politicians) produced the complex scenario of struggle for the commons using both legal and political tools to advance a vision that the referendum proved as potentially hegemonic in the country despite continuous attempts, rooted in an emergency strategy,

³⁸ Gavin Anderson, *Corporate Constitutionalism: From Above and Below (but mostly from below)*, DRAFT

³⁹ A draft of this paper was prepared for the discussion at the Transnational Societal Constitutionalism conference organized by Professor Gunther Teubner at the IUC on May 17, 18, 2012. Earlier draft discussed in Bologna, Uninomade seminar May 4, 2012.

by the official organs of the State to maintain and constitutionally restructure the neo-liberal order. The *beni comuni* movement utilized a strategy, which was fully aware of the complex and highly pluralist nature of the law in the contemporary scenario, in many instances successfully reclaiming the commons from neoliberal privatization. These legal and political actions of the *beni comuni* movement have reinvigorated the constitutional debate in two ways. First, by bringing the “economic constitution” within the Italian Constitution to life, thereby reinserting popular consciousness of what ought to be the space for the “public” and the constituent role of the people back into constitutional debate. Second, by preventing, through successful constitutional challenge, the claim by the large neoliberal majority currently sitting in Parliament of its own power to ignore the referendum result thereby establishing a higher constitutional value of the will directly expressed by the people over that stemming from Parliament. Thanks to the *beni comuni* movement direct democracy has renewed relevance in the Italy.

A. Background of the Italian “Economic Constitution” & Constituent Role of the Beni Comuni

In Italy, the constituent claim of the commons movement is rooted in the constitution's purpose of defending the people against abuses of power. The idea behind the commons constitutional claim is that the most fundamental constitutional reform that one could promote in Italy today is the implementation of the current constitution, especially Art. 3 and 42, rather than the drafting of new provisions (which would be illegitimate given the current lack of parliamentary representativeness today in Italy). Article 3 goes beyond the bourgeois liberal model by making it a “duty” of the Republic to remove the social and economic obstacles that de facto make it impossible for everybody to participate in the political life of the country.⁴⁰ Article 42, while considering private and public property on the same level (“property is public or private”) requires the law to protect private property only as far as it is “accessible to everybody” and serves a “social function.”⁴¹ Similar “social” language is shared by many constitutions of the twentieth century⁴² but the political effort to implement this vision (through a gradual process of limitation of social inequality) has been discontinued after the so called Reagan-Thatcher revolution. Here, the background of the relevant economic provisions of the Italian Constitution, which the commons brought to life are

⁴⁰ Constitution of the Italian Republic (December 22, 1947) available in Italian:

<www.parlamento.it>. Art. 3 All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. 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 organization of the country. [Translation Saki Bailey]

⁴¹ *Id.* Art. 42 “Property is public or private. Economic assets may belong to the State, to public bodies or to private persons. Private property is recognized and guaranteed by the law, which prescribes the ways it is acquired, enjoyed and its limitations so as to ensure its social function and make it accessible to all. In the cases provided for by the law and with provisions for compensation, private property may be expropriated for reasons of general interest. The law establishes the regulations and limits of legitimate and testamentary inheritance and the rights of the State in matters of inheritance.” [Translation by Saki Bailey]

⁴² David Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT. A CRITICAL APPRAISAL (Trubek and Santos eds. 2006)

presented.

The Italian Constitution of 1948, the product of a constituent process in which for the first time also women could participate, is usually described as a great compromise between three cultural components represented by the political parties that freed the country from Nazi occupation and fascist rule: the liberals, the socialists\communists and the popular Catholics.⁴³ In fact, the Yalta agreements placed Italy firmly within the capitalist block so that the very powerful Communist party, always functional in maintaining a capitalist status quo, was to be formally “compensated for a missed revolution with a promised one,” to use the sarcastic description of Piero Calamandrei, a liberal champion, a founding father and a famous scholar of civil procedure, later to become the first Chief Justice of the Constitutional Court.⁴⁴ More recent scholarship has argued that the Italian Constitutional text, rather than being a coherent compromise of merits was a clever move to table the discussion of the most heated issues, by postponing them to future political struggles.⁴⁵ The technical tools deployed to implement this truce were: the broad delegation of authority to the formal (ordinary) law to define the limits of economic activity (so called “riserva di legge”), and trade union negotiations, supported by the constitutional right of strike, which were seen as a wait and see strategy functional to the interests of all the political parties represented in the Assembly. As a consequence, while the Constitution emphatically sides with labor in its struggle against capital, (in particular Art. 1), the actual text of what is usually known as the “economic constitution” is much more ambiguous and clearly divided in zones of cultural and political influence.

In particular Art. 41, the brain-child of the liberals mostly influenced by the conservative economist Luigi Einaudi, later to become the first Italian President of the Republic, is the fundamental guarantee of free enterprise, which can only be limited by the law in the interest of human health, safety and dignity.⁴⁶ Art 42 contains a clear protection of private property, which includes the traditional just compensation clause, only limited by the notion of the “social function of private property” borrowed from the European debate of the early twentieth century and previously rejected in the drafting of the civil code. This article, especially dear to the social Catholics (Dossetti), avoided taking a position by referring to ordinary law the “property question” in the Constitutional Assembly.⁴⁷ Article 43⁴⁸ gives constitutional recognition to the major role

⁴³ See S.Z. Koff & S.P. KOFF, ITALY FROM THE FIRST TO THE SECOND REPUBLIC (2000).

⁴⁴ See PAUL GINSBORG, STORIA D' ITALIA DAL DOPOGUERRA DA OGGI (1990).; Mario Comba, *Constitutional Law*, in INTRODUCTION TO ITALIAN LAW (J.LENA & U. MATTEI, 2002).

⁴⁵ See STEFANO RODOTA, IL TERIBILE DIRITTO, (2002).

⁴⁶ *Id.* at supra note 7. Art. 41: “Private economic enterprise is free. It may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity. The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and co-ordinated for social purposes.” [Translation by Saki Bailey]

⁴⁷ See Ginsborg, *supra* note 44.

⁴⁸ *Id.* Art. 43: “For the purposes of the common good, the law may establish that an enterprise or a category thereof be, through a pre-emptive decision or compulsory purchase authority with provision of compensation, reserved to the Government, a public agency, a workers' or users' association, provided that such enterprise operates in the field of essential public services, energy sources or monopolies and are of general public interest.” [Translation by Saki Bailey]

that factory councils in the Northern industrial triangle (Turin, Milan, Genova) had played in the liberation struggle and by reserving certain strategic assets to “communities of workers and users” can be seen as the “promised revolution” (with just compensation guarantee!) that the cynical leader of the Communist party, Palmiro Togliatti could use to pacify his constituency so that it respected Stalin’s desires at Yalta. Significantly this Article, the constitutional basis of any nationalization policy, was practically dormant through the life of the 1948 Constitution and only very recently came to new life being deployed as a Constitutional base for action by both the occupation movement generated by the referendum on the commons and the attempts to grant direct participation of the people in the administration of the utilities system that is taking place in Naples.⁴⁹ Finally, Article 9 strictly connected to property law has also remained dormant for many years but is now playing a very significant role in the critique of the neo-liberal logic. This article gives protection to cultural property and the “landscape” a notion incrementally interpreted as “the environment,” and it offers a powerful constitutional argument for a critique of the logic of exploitation of nature that so much characterizes the current order. For its introduction in the Italian Constitution credit is due to Concetto Marchesi, a leading classicist and Communist representative in the Constitutional convention.

Within the same logic of tabling the issues, as no party knew who would eventually be in minority, the Italian Constitutional system rejected any “winner takes all” logic. The very same power was vested in the two Chambers, the Prime Minister was seen as a “primus inter pares”, the President of the Republic was given a mostly formal “super partes” role of representation (something similar to that of the President in Germany or to the Monarchy in Great Britain or Spain), and the “core” of the democratic struggle was intended to be between the political parties, where citizens could participate in the democratic life of the country (Art. 49),⁵⁰ Parties were formally kept as “private organizations,” their leaders being endorsed with shining credibility and a large level of deserved prestige, due to the role they were able to play in clandestine organizations and later administrative authorities in the progressively liberated areas of the country. The idea was that the more representative democracy is trusted, the less direct citizen’s participatory democracy is needed. Consequently, in the Italian constitutional scheme direct democracy was maintained in a very minor form. The Referendum takes only two forms. The abrogation referendum of Article 75⁵¹ of the Constitution, which can be requested by half a million voters that wish to abolish a formal statute not connected with

⁴⁹ See Alberto Lucarelli, *Commento all’art. 43 della Costituzione*, in R. Bifulco, A. Celotto e M. Olivetti (a cura di),

Commentario alla Costituzione, tomo I, Torino, (2006).

⁵⁰ *Id.* at supra note 7. Art. 49: Any citizen has the right to freely establish parties to contribute to determining national policies through democratic processes. [Translation Saki Bailey]

⁵¹ *Id.* Art. 75: A general referendum may be held to repeal, in whole or in part, a law or a measure having the force of law,

when so requested by five hundred thousand voters or five Regional Councils. No referendum may be held on a law

regulating taxes, the budget, amnesty or pardon, or a law ratifying an international treaty. Any citizen entitled to vote for the

Chamber of deputies has the right to vote in a referendum. The referendum shall be considered to have been carried if the majority of those eligible has voted and a majority of valid votes has been achieved.[Translation Saki Bailey]

taxation, budget, amnesty, pardon or ratification of an international treaty. Also a confirmation referendum can be requested by the same number of citizens if a Constitutional change is introduced by Parliament. This possibility is not available if the change is passed in both Chambers with a 2\3 majority. While the confirmation referendum has no quorum, the abrogation referendum requires a turnout of half the electorate to validly abolish a law.

In the last two decades “economic constitution” described above, primarily Art. 3 and 42 was transformed by privatization and the development of the idea of the “regulatory state” was replaced by that of “entrepreneur state,” which intellectually justified the dismantling of the welfare system in the name of competition and efficiency.⁵² The formal constitution was transformed in 2001 to decentralize the system enlarging the power of the regions but the fundamental idea of the social state was never openly challenged until the current constituent phase. The targets of the constituent attack to the text of the 1948 constitution began with the last shot of the Berlusconi Government that in the process of drafting the “Ferragosto Decree” blamed the Italian crisis on Art. 41 of the Constitution (as we remember the brain-child of conservative liberals such as Einaudi and De Nicola) which states that free enterprise “cannot be carried on in contrast with social utility or in a way that damages human security, dignity and freedom” and that reserves to the law (again technique of tabling the issues) “to determine the program and the appropriate controls so that public and private economic activity can be aimed and coordinated to reach social purposes.” The read of the Berlusconi Government, carried on in full continuity by Monti, was that the *ex ante* model of administrative control, typical of the civil law tradition, was to be replaced by a system of *ex post facto* redress on the tort law model typical of the US. Art. 1 of the Ferragosto decree emphatically stated that, within the necessary time to change Art. 41 Constitution, all what is not expressly prohibited to the enterprise is now legal. This inedited style of constitutional reform by decree is itself the object of a pending constitutional challenge.

The discussion on the formal reform of the economic Constitution was thus officially inaugurated in a context in which the very idea of reform had changed from its original meaning. Previously seen as an incremental application of Art. 3 of the Constitution in order to reach a more egalitarian society, reform now means, in the neo-liberal context, deregulation and increased “flexibility” of the legal system in order to maximize the spaces of free economic enterprise. While proposals to reform Art. 41 of the Constitution are still making their way through Parliament, the first formal victim of the new wave of constituent strategy (dubbed structural reform) inaugurated by the Monti Government is Art. 81 of the Constitution. This article has been rewritten with an overwhelming Parliamentary majority (more than 2\3) in two separate reads of both Chambers, to include the balanced budget provision arguably “required” the Italians by the Troika (EU Commission, BCE, IMF). The inclusion of a balance budget provision, coupled with the ratification of the so called “fiscal compact” agreement will make it practically impossible to revamp the public sector and to effectively carry on the reform plan of art. 3. The new reform ideology has taken over the Constitution of 1948 introducing, within its very text, a principle that defeats all its promises. What one must add is that the current Parliament enjoys a popularity rate of less than 10%, and that by voting with this overwhelming majority it has made it impossible for the people to call

⁵² SABINO CASSESE 2002;

the confirmative referendum (Art. 138). The coalition defeated in the water referendum didn't want to risk the polls again! Interestingly this very significant Constitutional reform, one of the handfuls of textual changes since 1948, has been carried out in the complete absence of debate and even when the reform was written into law, the media did not even report the event. Today many usually informed citizens still do not know that the change occurred.

The pressure exerted by the "troika" of the European Union played a large role in installing the technical "puppet" government capable of implementing austerity measures in the absence of public support. The Monti Government, short from being a technical executive, shows a very marked pro-business attitude. Among its early successes there was a pension system reform, passed without consultation with the trade unions, a reform of the labor market, dismantling most of the guarantees that the worker's movement had obtained in the nineteenth seventies, and a reform of professional services aimed at liberalization. His attention on the public transportation system has also been sustained with an attempted liberalization of the Taxi cab industry. The Government has moreover linked the municipalities to a strict balanced budget requirement that made it necessary to sell a variety of assets; it has reformed the local taxation system by introducing a new tax on immovable property accompanied by a revaluation of the cadastral value. The privatization of public property, including a large number of rural areas belonging to the State. In particular Art. 4 made it even less likely to maintain public services in public hands, while Art. 18 declared the area around the works of the TAV train in Valsusa a "site of strategic interest" defined by a red zone broadly protected by criminal law. In sum, through deploying the "state of emergency," the Monti government has been able to implement a "shock doctrine," facilitating the expansion of capital and profits for the private sector.

Significant part of this policy, in particular the compulsory privatizations of public services, have been deemed unconstitutional by the Constitutional Court in its already mentioned landmark decisions (n 199 and 200) of July 17 2012. The Court seized by a local government (Regione Puglia) represented by lawyers of the *beni comuni* movement (including one of these writers) decided that the decision directly taken by the people in a referendum being an exercise of direct democracy must be respected by representatives sitting in Parliament for a reasonable amount of time. Thus the doctrine of "succession of the law in time", that would apply should a statute had equal value to a referendum does not apply. Direct democracy, one of the strongest tools of constitutional power available to the people, thus enjoys in Italy a surplus of constitutional force compared to ordinary legislation.

B. The Italian Water Referendum & the beni comuni (Common Goods) as a National Social Movement

The Referendum of June 13, 2011 was the climax moment of a long struggle to limit the apparently irresistible process of neo-liberal commodification and privatization.⁵³ This referendum is often referred to as the "water" referendum because much of the political momentum leading to its success was linked to the global struggle against water privatization, whose global visibility was granted by the Cochabamba war

⁵³ See UGO MATTEI, EDOARDO REVIGLIO, STEFANO RODOTA, *INVERTIRE LA ROTTA: IDEE PER UNA RIFORMA DELLA PROPRIETA PUBBLICA* (2007)

on water of 2000. Indeed the very simple platform, “water as a common,” mobilized tens of thousands of activists from its proposal in December 2010 to its success in June 2011 when more than 27 million Italians went to the ballot.⁵⁴ Thanks to the high turnout and 95% majority, it was the first time in Italian history where an absolute majority of the voters answered “yes” to a proposed statutory abolition. In order to understand the success of the Referendum we need to consider two important points: First that water was not the only issue on which the referendum was called and second, that the referendum was only one tool of a larger effort to challenge the neo-liberal logic of privatization that in Italy has occupied most of the first decade of the new millennium.

In June 2011, the Italians were called upon to vote on four questions, only one of which was technically devoted to water. The first referendum was aimed at stopping a compulsory program of privatization of all of public services and involved, public transportation, garbage collection and other public services provided by local governments such as nursery schools.⁵⁵ The second referendum, the only specifically devoted to water, was aimed to abolish a legal provision that guaranteed the “remuneration of the invested capital” as part of the final cost to the user of the water supply system. This referendum aimed to preclude the profit motive from the water service, thus canceling the incentives to private companies to deal with water. The third referendum, presented by a committee different from the “water as a common,” was aimed at abolishing the law that re-established an Italian nuclear program,⁵⁶ and complemented the alternative vision of society that the commons movement was proposing in Italy. The fourth referendum, promoted by an opposition party IDV, was aimed at abolishing laws providing a judicial shield to Prime Minister Berlusconi and was all but legally empty, though very meaningful from the political point of view. Interestingly, while all the questions were overwhelmingly approved by the voters with majorities of more than 95%, the most voted question was the question specifically devoted to abolishing profit on water.

After a phase of negotiation with the water movement and a major organizational effort to put together a broad coalition of civil society organizations (which included trade unions, environmental and consumers groups, but that purposefully excluded direct political parties participation), the questions were finally deposited at the Court of Cassation in Rome and the signature collection officially started on April 22, 2010, permitting the Referendum to take place in the spring of 2011 in a timely way to stop the compulsory privatization of water designed by the Ronchi Decree. According to Italian constitutional law, the half million signatures were duly collected in person and officially certified one by one by a notary or another public official of the municipality and were collected within three months from the date of the referendum and placed on the proper form released by the Court of Cassation. The collection process proved to be an incredible sign of vitality of the commons movement, which mobilized tens of thousands of volunteers, collecting nationwide signatures in the most remote corners of the country. People, usually skeptical of political collections of signatures actually lined up, sometimes for hours, to sign and by mid July 2010 more than 1.4 million certified

⁵⁴ Supra note 5.

⁵⁵ Italian Constitutional Court Decision 24\2011

⁵⁶ The Nuclear program was already rejected once by referendum in 1986 in the aftermath of the Chernobyl accident.

signatures were transported in huge boxes in front of a crowd of media and reporters to the Court of Cassation.

1. Neoliberal Oppositional Powers & Battle at the Constitutional Level

The strategy of the bi-partisan neoliberal coalition opposing the Referendum clearly emerged from the very beginning. The referendum was to be ignored by the media. Berlusconi himself, well known for his control over official newspapers and national TV Channels, and the Democratic Party in power in many regions and municipalities, was extremely hostile to this effort of direct democracy, which could endanger its own possibility to profit off of planned privatizations. This explains the quite impressive silencing strategy, which was clearly aimed at making the Referendum fail for lack of the sufficient turnout at the polls. On the merits, the theory of our opponents was that the liberalization of the local public services was a requirement of European law so that the Constitutional Court could not possibly admit the Referendum. As mentioned, Referendum cannot abolish a law that is mandated by International law which is technically the nature of European legislation. Nevertheless on January 12, 2011 the Constitutional Court gave a genuine lesson of Constitutional and European law by admitting four of the six questions presented, including two out of three of those presented by the Water coalition. It was to the large satisfaction of the lawyers involved in the argument (including one of these authors), because the Court clearly said that European Law does not mandate liberalization nor privatization of public services and that it is up to the member states to decide whether they prefer to use the private sector (only in this case they are bound by European law contrasting State subsidies) or whether they prefer to take direct responsibility of public services. According to the Court, the Decreto Ronchi was a discretionary act of the Italian State, and as such could be abolished should a referendum be successful in doing so. The Court also discussed, as mandated by its own case law, the issue of the legal vacuum that might follow a referendum because, should it happen after the abolition of the law, the referendum could also not be admitted. The Court held that there would be no vacuum in all the admitted questions because European law could directly be applied to fill up the vacuum leaving to each local municipality the choice of what to do with its own public services.

Once the obstacle of admission was passed, the real political difficulties started because the voters were largely ignorant of the fact that a Referendum had been called. With no help from the media, the commons activists had to engage in a very long, old style, door to door campaign because the Internet and the social media, although assisted a lot especially among youth, in Italy are still very short from reaching the majority of the population. To make the issue even more difficult was the fact that Italians were already called to a double set of administrative elections in the month of May, and the government refused to have the Referendum at the same time. Rather, it opted strategically for the last possible date, June 12-13: when schools were already closed, many people on vacation, and students still away from home to take university exams. The legal challenge in Court against the decision of having an independent date for the referendum (costing Italian taxpayers an estimated 300 million Euros in extra organizational costs) was defeated because both the administrative and constitutional jurisdictions held that the executive enjoyed a discretionary power on this matter. This almost desperate situation was subverted by the nuclear accident of Fukushima which

produced a panic reaction of the Government that attempted to cancel by decree the nuclear referendum, fearful that a majority of the people would show up to the poll as it had happened already in a previous one of 1986 in the aftermath of Chernobyl. This attempt produced much stir on the media, because of the Government's declaration that it was acting to avoid an emotional and irrational vote. This time the legal reaction was sustained by the Court of Cassation (that confirmed the date of the referendum) and the accident only produced a final round of media visibility to the whole referendum campaign. In the last few weeks, when it became clear that the victory was not beyond our reach the Democratic Party jumped on our train and the largest newspaper La Repubblica (very close to this party) also shifted gear. Moreover, in the administrative elections of Naples, Milan and Cagliari three absolute outsiders, enjoying the support of the commons movement, won against establishment bi-partisan neo-liberal candidates. Consequently, this exciting phase of Italian political life after the overwhelming referendum victory became known as the Italian Spring, as being credited for creating the conditions for the fall of the Berlusconi Government.

The Italians had voted to invert direction away from neo-liberal ideology by participating in massive numbers (more than 55 % to a referendum with little media coverage) to re-establish responsibility for a renewed public sector and to defend the commons from both privatization (Questions 1 and 2) and mega-projects of development (Question 3). This vote has certified a large separation between the Parliament and the people. In fact, the sitting Italian Parliament was already suffering a democratic deficit. Elected in 2008 with an electoral law (significantly nicknamed "porcellum" the pig's law) that curtailed the possibility of the people to choose their representatives, it is resented as composed by MPs chosen by the political parties secretariats rather than by the people. Practically every one of its members either was against the referendum or strategically decided in its favor at the very last minute and certainly was not ready to oppose neoliberalism. Thus a constitutional crisis was open. The official reaction to the "Italian spring" followed a path that directly opposed the vision articulated by the commons movement. In the summer of 2011 a strong attack by the so called "financial markets" targeted Italy. On the first days of August, a "secret" letter signed by the sitting and the designed Governors of the European Central Bank was delivered to Silvio Berlusconi requiring urgent action by decree to reduce the Italian public debt. This letter required a strong liberalization policy not only of the public services but also of the labor market. A few days later, on August 14 2011, the day in which most Italian are in vacation, the Berlusconi Government weakened by internal infighting and by a wave of sexual and corruption scandals enacted a Decree aimed at introducing urgent measures to "calm" the international speculation which included a provision, Art. 4 of the "Ferragosto Decree" entirely reproduced the text of Art. 13 bis of the Ronchi Decree. By so doing the Government re-proposed a roadmap for obligatory liberalization and eventual privatization of the public services maintaining water as an exception. An envelope containing almost ten thousands signatures collected in a few days via internet under an appeal to the President, produced by three of the legal scholars that had prepared the Referendum (Lucarelli, Mattei and Nivarra), arguing that to write the Decree into law would be unconstitutional. The request was ignored and the Ferragosto Decree, was urgently signed into law only to be declared unconstitutional less than a year later by the already mentioned decisions 199 and 200 of the Constitutional Court for its contradiction

of the Referendum result which, by reproducing an obligation to sell, abridged the prerogative of the local governments (Regions). Rather than paying attention to the will of the people President Napolitano was keen on following the desires of the International business community and with practically no consultations decided the name of the next Italian Prime Minister, installing yet another “technical government.” Despite the respectful obedience to the European diktat of the Decree of Ferragosto, Berlusconi could not keep a majority and was forced to resign in favor of newly appointed Life Senator the former European Commissioner to the Internal Market, neo-liberal economist and President of the conservative Bocconi University in Milano. This transition shamelessly negotiated in the shadow of the need to please the so called Troika and the international markets, occurred in a context of relentless propaganda where the declared “emergency” was to avoid “ending like Greece.”

2. Beni Comuni as a National Social Movement

In order to explain the unexpected success (no referendum reached a quorum in the last 16 years) of the campaign, one must consider that a national network of local water committees (active in different part of the country since 2001) was in place since 2006, and a systematic scholarly effort to re-think and criticize the legal basis, which was facilitating easy privatization in Italy, was in place since 2005 and undoubtedly these two primary forces contributed to the overall success of the referendum.⁵⁷ The commons idea, in the aftermath of the Referendum, was way beyond the single issue movement of water. In Italy the commons has emerged today as the recognized symbol of a different vision: theoretically articulated in a Manifesto (published in September 2011⁵⁸), which generated a large political and legal literature, many contextual struggles and, most recently even the birth of a new political entity, Alleanza Lavoro Beni Comuni Ambiente (ALBA).⁵⁹ The movement was built by a combination of scholars, lawyers, and activists claiming not only water but nature, culture, labor, and education as a commons. The origins of this movement in its different constituent dimensions is explored below.

a. Scholars

The effort of scholars, particular the research carried out at the Accademia Nazionale dei Lincei, the most prestigious scholarly institution of the country, was critical in building the beni comuni movement. The study carried out at the Lincei was motivated by the observation that Italy between 1992 and 2000 was the first country in the world from the point of view of privatized assets (roughly 140 billion Euros of value), which makes it the second worldwide (after Great Britain) in the value of privatizations between 1979 and 2008.⁶⁰ In 2007, under the Prodi Government, the scholarly effort at the Lincei generated the establishment by decree of a special commission of the Ministry of Justice. Its task was to propose a reform of the provision on public property contained in the Italian Civil Code, in order to establish some principles governing the possibility and the limits of the privatization of public assets. At the fall of the Prodi Government,

• ⁵⁷ Rodotà Commission Bill, Delegated Legislation to Reform the Civil Code Articles Concerning Public Property, Atto Senato n. 2031, XVI Legislatura

⁵⁸ UGO MATTEI, BENI COMUNI: UN MANIFESTO (IXth ed 2012)

⁵⁹ www.soggettopoliticonuovo.it

⁶⁰ See MATTEI, REVIGLIO, RODOTA, *supra* note 53.

the now famous Rodotà Commission⁶¹ produced its reform proposal, which contained the first technical definition of the commons, as a legal category and form of property different from both private and public ownership, deserving special protection at the constitutional level. This proposal, abandoned by the second Berlusconi Government (which took office in April 2008) was resurrected by a bipartisan bill presented by the Piedmont Region in November 2009 but was never discussed by the Senate.⁶² In the definition of the Rodotà Commission, the commons are “goods that provide utilities essential to the satisfaction of fundamental rights of the person” and access to such goods remains no matter if the formal title of ownership is public or private and in all cases must be protected also in the “interest of future generations.”⁶³ Water was included as the first item in the open list of the commons suggested by the Rodotà Commission. While this political and scholarly effort, justified by a sense of responsibility for future generations, was in place (and here the influence of the Constitutional experience of Bolivia and Ecuador was clear), the very same day (November 26, 2009) in which the Rodotà text was presented in the Senate by the Piedmont Region, the lower chamber passed with a confidence vote and no parliamentary discussion, the so called “Decreto Ronchi”, which introduced a duty for local governments to follow a compulsory scheme of privatization of all local services aimed at transferring control to the private sector.⁶⁴ According to article 113 bis of the Decree, by December 31, 2011 all local services controlled by the public sector, including the water supply system, were to be placed on the market by a public auction. Art. 1 of the Decree declared that such release of public control was mandated by European law.⁶⁵ This blatant display of corruption, generated a mode of indignation and within a few days six law professors, four of which already members of the Rodotà commission (Professors Mattei, Lucarelli, Nivarra, Rodotà, Azzariti and Ferrara), drafted three of the referendum questions, created a referendum committee, and posted⁶⁶ a document on the web calling for the beginning of a referendum procedure, two of the questions presented which were eventually admitted by the Constitutional Court to be put on the ballot.

⁶¹ Introduction of the category of “common goods”, that is things that are functional to the exercise of fundamental rights and to a free development of human beings. Common goods should also be protected by the legal system to the benefit of future generations. Holders of common goods can be either public or private legal persons. 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; their concession/grant is allowed only in the cases provided by the law and for a limited time, with no possibility of extension. “Examples of common goods are, among the others: rivers, streams, spring waters, lakes and other waters; the air; national parks as defined by the law; forests and wooded areas; mountain areas at a high altitude, glaciers and perpetual snows; seashores and coasts established as natural reserves; protected wildlife; archeological, cultural and environmental goods. [...]” (art. 1, par. 3.c) [...]” (art. 1, par. 3.c) [translated by Emanuela Roman]. The name of the Commission is derived from the name of its President a leading Italian property law scholar and former distinguished member of Parliament.

⁶² *Citizen Initiative Bill* available at www.acquabenecomune.org

• ⁶³ Rodotà Commission Bill, Delegated Legislation to Reform the Civil Code Articles Concerning Public Property, Atto Senato n. 2031, XVI Legislatura

⁶⁴ Decree 25 September 2009, n. 135 (Ronchi Decree) (GU 25 September 2009, n. 223) converted into Law 20 November 2009, n. 166 (GU 24 November 2009, n. 274).

⁶⁵ *See id.*

⁶⁶ www.siacquapubblica.it

b. *Activists Forum Acqua beni comuni*

The efforts of the water network (Forum Italiano per il movimento dell'acqua) in 2009 produced the Citizen's Initiative Bill for a Water reform statute,⁶⁷ which collected more than 400.000 signatures, only 50.000 of which are necessary for such initiatives. The popular Water bill proposed, however, was never discussed in Parliament. The Forum was crucial in organizing an impressive coalition of trade unions, consumers movements, activist's groups and a few left-wing political parties (not represented in Parliament), which carried on the basic coordination effort for the collection of the signatures, the fundraising and the production of the materials necessary for the campaign.

c. *"Culture as a Commons" Theater Occupations*

On June 14, 2011 the day after the Referendum, a group of precarious workers of the cultural industry: actors, technicians, musicians and independent producers, occupied the Valle Theater in Rome. Their motto was "Like water and like air. Let's recapture culture." The Valle Theater, one of the oldest and most prestigious theaters in Europe, was in the process of being relinquished by the Minister of Culture, transferred to the Rome Municipality run by a former Fascist major, in order to be placed on the market for privatization. The occupation was masterminded as a short demonstrative event aimed at rising public attention of a category of workers that were suffering under the established neo-liberal policy of cuts on public spending for culture. The occupants invited this author, Mattei, as a protagonist of the water campaign, to address the permanent assembly and after a lecture on "culture as a commons," a decision was taken to make the occupation permanent and steps were taken to develop a long term legal and political plan of a constituent nature. What is occurring at the Valle Theater, short from being an action limited to the world of the arts, is an ambitious political plan to hybridize culture, politics, and economics to transform the Valle into the hub of a large bottom-up occupation network movement of the commons aimed at real constituent power. The long term plan is to develop an "independent participant foundation"⁶⁸ endowed with a set of bylaws capable to offer an example of a legal setting working as a constitution of the commons based on a direct application of Art. 43 Constitution.⁶⁹ Today, the model of the Valle as a commons and the method of occupation is being put in action not only in Rome but also in Venice (Teatro Marinoni), Catania (Teatro Coppola), Naples (Asilo della creatività), Palermo (Teatro Garibaldi) and Milan where a 31 story building was occupied on May 5, 2012 in order to transform it into a "cultural common" before being evacuated by a very controversial police reaction.⁷⁰ This bottom up constituent effort is rooted in the people's right of resistance and links together all the apparently distant struggles against the neoliberal politics carried on by those who suffer most under its destructive policy.

d. *"Nature, labor, and education as a commons"*

In the aftermath of the Referendum, in the Valle di Susa near Turin, the NO TAV

⁶⁷ *Id. supra* at note 59.

⁶⁸ <http://www.teatrovalleoccupato.it/>

⁶⁹ A "Community of workers and users" is now running the Theater which is thriving in the heart of Rome. Such a "community" mentioned in Art. 43 Constitution is neither a public nor a private institution but rather, an experience of revolutionary commoning, such as that of workers in Nazi occupied Italy.

⁷⁰ La Repubblica, "Macao, addio alla Torre Galfa occupato un palazzo a Brera": http://milano.repubblica.it/cronaca/2012/05/19/news/macao_addio_alla_torre_galfa_occupato_un_palazzo_a_brera-35475294/

movement, which in the last 20 years had resisted a mega development project of a new 56 kilometers tunnel through the Alps, occupied an area close to the area where the first perforations were supposed to take place. The movement has declared the area a “Libera Repubblica della Maddalena,” and has experienced for more than a month a community economy based on gift and cooperation. It would be beyond the scope of this paper to describe this long and still ongoing saga, however suffice it to say that the Susa Valley population is still systematically accused (by a media system in a blatant conflict of interest) as a violent and illegal NIMBY (not in my backyard) approach, which has been attacked by the police with violent means and incarceration of activists. There again, in a very large assembly, with this writer as a representative of the water movement, the idea that that the NO TAV was a commons movement, opposing in the general interest, the same logic of economic and political concentration of the Nuclear industry. The Maddalena was violently evacuated by the police on the morning of June 26, 2011 but the motto “NO TAV beni comuni” a radical reconfiguration of the NIMBY idea from the individual “not in *my* yard” to our collective “nature is a common.” The theory of the commons has connected the NO TAV with the Valle Theater, water, the no nukes and the many other experiences of anti neo-liberal resistance. The motto was carried in Turin at the head of a demonstration of more than 20,000 participants that for the first time brought the NO TAV outside of the closed perimeter of the Susa Valley. Instrumental to the success of this march was the FIOM trade union, just expelled from the FIAT after a dramatic blackmail referendum in January 13 2011, that on October 16 2010, right in the middle of the water campaign, had marched in Rome in a gigantic demonstration lead by the motto “Il Lavoro é un beni comuni.” Furthermore, on December 15, 2011, while the Berlusconi government was beginning to lose its majority in Parliament because of infighting in the post-fascist part of its coalition, a massive student demonstration against the University Reform bill took place in Rome and was stopped by the police resulting in many arrests of students. Here again the motto of the protest , which involved many student unions active in the Referendum campaign was “L’Università é un beni comuni” (University is a common good.)

e. Assessor of the Commons

In Naples a newly elected mayor, elected as a complete outsider just weeks before the referendum victory thanks to the strong endorsement of environmental and social activists, in the middle of an embarrassing crisis of garbage accumulation through the city, appointed one of the drafters of the water referendum (Alberto Lucarelli) to a newly established post, that of “Assessor to the commons” (Assessore ai beni comuni). This key political role is aimed at experimenting with new forms of local participatory democracy based on Art. 43 of the Constitution, and to create a new participant institutional system of governance for the local utilities corporation in what is the third largest Italian city. The municipality of Naples has thus become a hub for commons activism, having launched a variety of campaigns, including a campaign for a “European Charter of the Commons”, to be proposed as a citizen’s initiative to the European Commission according to art. 11, of the Lisbon Treaty. A proposed draft of the Charter, drafted by a high level academic conference in December 2011 at the International University College of Turin, and presented at an International Conference at the Valle Theater in Rome in February 2012, is now in the process of being discussed Europe-wide through partners at

European Alternatives⁷¹ (meetings have been organized in a number of European capitals: London, Rome, Paris, Zagreb, Sophia) to elaborate the best strategy to make this action effective.

In sum, the beni comuni movement engaged as constituents in a constitutional process from the bottom up: invoking legal tools at local, national and even super-national levels, and carrying out a strategy both through private law and the public law tools wherever possible. For example, the occupation of the Valle Theater attempted to translate its radically democratic practice into such a private law tool as a foundation, a counter hegemonic use of the law in order to oppose a language and practice of legality based on private autonomy to the accusation of carrying on illegal practices. Other struggles, such as the water one, or the NO TAV are using a variety of legal tools: including resort to Courts of law, ordinary, administrative and even constitutional, to vindicate respect of the referendum meaning and to protect the rights of the people against the anti-democratic use of public authority. In other places such as Naples the very structure of local government authority has been modified in order to relinquish power to the people for direct or at least participatory governance of the commons. Finally, the availability of such tools of public participation that have been provided very recently by European law, such as the European Citizens Initiative are also on the radar-screen of the activists to explore their availability and functionality to carry on their struggles. Most significant however, was the contribution of beni comuni movement in modifying the constitution in action by giving full force and effective application to the previously unapplied provisions of the 1948 Constitutional text, (especially Art. 43) bringing life to the “economic constitution” to defend the public and common against the private sector.

The commons movement has quite systematically used the strategy of physical occupation for reclaiming and actually managing commons. Such a strategy directly challenges existing constitutionally reinforced private property relations. From the point of view of property law, these actions would be deemed “illegal,” however the commons movement refuses the idea of being engaged in an “illegal” practice. Rather, the claim is that occupations are aimed at opening up enclosed common spaces, the access to which is constitutionally guaranteed, and are therefore to be considered legitimate exercises of people’s constituent power. These actions are legitimate as long as they genuine efforts to “open up” and to grant direct access to property (both private and public) to implement its “social function” and to defend the public interest from the abusive use of the right to exclude. It is argued that these occupations are aimed at “opening up” public and private spaces by a formally “illegal” action to recover peoples possession of under-utilized or corruptly utilized spaces functioning as a sort of peoples “drittwirkung,” (horizontal application of Constitutional law in private law matters) whose legitimacy is determined by the actual capacity to resist an illegal rule of law by counter-hegmonically turning the law against itself and subverting the very meaning of legality. This however still begs the question, when is occupation, which is the very physical act of resisting existing property relations, a legitimate constituent action? The answer to this question cannot lie in the law itself.⁷² The legal system reduces issues of justice to the “binary code” of

⁷¹ European Alternatives: European Alternatives is a civil society organization devoted to exploring the potential for transnational politics and culture. <http://www.euroalter.com/>

⁷² Gunther Teuber, *Self Subversive Justice: Contingency or Transcendence Formula?* (As Gunther

legality/illegality, but the social world is far more complex than this binary. Teubner states, “justice needs then to be understood as the subversive practices of law's self transcendence.”⁷³ Some of the actions such as occupations of public spaces, however were at least initially viewed as “illegal” from the point of view of the law but nevertheless were accomplished with the intention of pursuing what was perceived by the movement as constitutionally guaranteed rights to the common. In light of the mass corruption in government and the very strong reaction of oppositional forces in transforming some of the most important constitutional features of our system without democratic consent, tactics such as occupation, as means of renewing constituent power and achieving justice, have been necessary to rectify an extremely unjust situation.

III. SOCIETAL CONSTITUTIONALISM OF THE COMMONS FROM BELOW V. TOP DOWN ECONOMIC CONSTITUTIONALISM

The current decline of State sovereignty, not only in the periphery but even at the very center of the capitalist system, suggests that maintaining (and expanding at the global level) a liberal constitutional model simply will recreate the conditions for continuous accumulation of power and wealth through what can only be understood as a process of continuous enclosure of sovereignty. As Jim Tully describes, “The systems of transnational law, especially trade law, function as 'constitutions' in the sense that they subordinate national constitutions, that is, treats national constitutions as legal regimes under their jurisdiction (first order rules in H.L.A. Hart's sense) and open them to free trade.”⁷⁴

The top down economic constitutionalism of the World Bank, WTO, and in the context of Europe, in what has been dubbed as the troika; have subordinated state governments to implement neo liberal reform not only in the periphery, in the form of structural adjustment programs, but at the very heart of the West, in the form of austerity measures. This section analyzes the supranational constitutional process and considers the *beni comuni* movement as part of an oppositional global constituency of social movements. In this context, we apply the theory of societal constitutionalism proposed by Gunther

Teubner poses it, the question is: “Is it lawful to apply the distinction between lawful and unlawful to the world?” He answers, “Thus, as soon as the law encounters its own paradox, then it is exposed to the question of justice.” Justice, and not law, must be the standard by which to judge what forms of constituent power and which constituent actions are legitimate. Teubner describes this process as an “ongoing discursive process within the legal practice itself” which can include actions of those outside of the legal profession, including citizen's protests. Luhmann describes the relationship of justice to the law as law's contingency formula, he says “Justice can only mean an adequate complexity of consistent decision-making.” This does not mean that justice is found only within the consistency of legal decision as Teubner describes, “Justice as law's contingency formula explicitly goes beyond internal consistency. It is located at the boundary between the law and its external environment and means both the historical variability of justice and its dependency on this environment.”).

⁷³ *Id.* Teubner describes the subjects capable of “subversive practices” must come from an “outside” position, not necessarily “outside” the law but in an observational capacity “In order to find one's way in challenging, as it were artificial situations, one must observe the observers.” He notes that these observers may include judicial decision makers or legislators, but as mentioned above are not limited to the legal profession, perhaps commons social movements may provide this third outside perspective of justice into the legal system. Replacing the economic contingency installed by governments and corporations with a social and global justice contingency.

⁷⁴ Tully, *supra* note 17.

Teubner or as the Zapatistas call the concept of “one world in many worlds.” Can a societal constitutionalism of the commons from below mount a challenge to the economic constitutionalism imposed from above by such actors like the IMF and WTO?

A. Economic Constitutionalism Beyond the State

A number of scholars,⁷⁵ have answered the challenge of articulating a theory of constitutionalism beyond the state: “This approach views constitutionalism as a continuum, and constitutionalisation as the process by which various entities acquire constitutional characteristics.”⁷⁶ Many scholars have applied this analysis to make the case that “economic constitutionalism” is taking place within and by economic institutions like the WTO and EU.⁷⁷ While the WTO has neither a democratic legislature nor court, it generates law in the form of soft law, resulting in non binding decisions, which are enforced by stron states on weaker ones under the threat of political and/or economic retaliation. Similarly, the states of the European Union, while far from ratifying a political constitution, are bound by the laws of the European Union Law. The European Union operates as a supranational body with a “quasi-federalist” ethos, and while careful not to explicitly overstep the state sovereignty of its member states, exerts economic pressure blatantly through the European Central Bank, imposing a defacto hierarchy of European law over state law, as demonstrated above in the example of the Monti technical government in Italy.

Both in the case of the WTO and European Union, there are clearly problems in making the claim that these organizations constitute “economic constitutionalism,” though they exhibit many constitutional features, such as “plausible claims to sovereignty, jurisdictional scope, tenets of citizenship and modes of representation.”⁷⁸ The most effective critique leveled at this constitutional claim is that these organizations fails in one crucial respect, the lack of democratic representation, resulting in lack of accountability, and the exclusion of non western and non state actors. Membership in these organizations is open only to states, and as we analyzed in the Italian case, representative democracy is failing at the state level, and thus representation by states in the WTO and European Union is similarly tainted by extension, resulting in state representatives often working against the interests of its own people. Furthermore, membership in these organizations requires that member states accept and facilitate the free market ideology which underpins their projects, often favoring western nations at the disadvantage of the Global South. As a solution to these critiques, many scholars are promoting constitutional pluralism, calling for broader inclusion of nonwestern states and non-governmental actors as constituents.⁷⁹ A pluralist and open vision of constitutionalism would consider the multiple forms constituents may take outside of the liberal constitutional form and traditional politics. In this spirit, Buchanan promotes

⁷⁵ Most notably, Gunther Teubner and a number of the scholars present at the Transnational Societal Constitutionalism conference organized by Professor Gunther Teubner at the IUC on May 17, 18, 2012.

⁷⁶ Anderson, *supra* note 38.

⁷⁷ See N Walker, *The EU and the WTO: Constitutionalism in a New Key* in G de Búrca & J Scott (eds) *The EU and the WTO: Legal and Constitutional Issues* (2001) 31; & D Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (2005). See also Joel Trachtman, *The Constitutions of the WTO*, 17 EU J. Int. LAW 623-646

⁷⁸ Anderson, *supra* note 38.

⁷⁹ Buchanan, *supra* note 10

social movements as a positive counter-hegemonic force to the constituent power of western states and describes how they are producing a "discursive interface between international organizations and a global citizenry" capable of "monitor(ing) policy making in these institutions, bring(ing) citizens concerns into their deliberations and empower(ing) marginalized groups so that they too may participate effectively in global politics."⁸⁰ Similar to the way in which social movements, through transnational advocacy networks, are able to put local communities directly in contact with multinationals as discussed in the Uwa case, social movements may also mediate the relationship between economic institutions like the WTO and civil society. Buchanan along with many others, however argue that social movements are far from being representative of "the peoples" interests. She critiques the way in which these counter movement has been primarily led by NGOs, and the similar problems they have to governmental actors such as agendas driven by the west under the guise of representing Global South or "subaltern" interests, resulting often in regulations and institutions very similar to the WTO and EU themselves because they embrace the same "development" and "efficiency" rhetoric as their counterparts. Third world approaches scholars like Rajagopal and Mukua Mutua are referring to this move as the NGOization of social movements. Mutua for example points out the incestuous origins of many of these NGOs: sharing often the same founders and governing boards as one another, all being white, male, from the West and educated in US Ivy League Schools.⁸¹ Like Buchanan, Marti Koskenniemi argues for pluralism in the economic constitutional process, but similarly points out the striking "homogeneity of the cultural and professional outlook" of those participants involved on both sides, offering the same legal and technical solutions.⁸² In this context, the commons social movement may offer some hope in providing the legitimacy that social movements have lost through this "NGOization" effect.

Commons movements tend to demand representation by those who are actually part of the movement. Often members are extremely suspicious about foreign funders and outside organizers and even reject them where they know it will undermine their local legitimacy.⁸³ Furthermore, as discussed in a previous section, social movements may be more capable of challenging existing institutions and offering true alternatives because they are made up of civil society actors rather than professionals and may provide the much needed institutional "imagination" necessary to providing true alternatives for example to private property. They may offer new imagination in the sense of functioning alternative reconfigurations of property, new or traditional communal forms of property that promote cooperation in sharing scarce resources thus broadening access to these resources for the local people who depend on them. As one commons scholar Lee Anne Fennell put it, "A resource arrangement that works in practice can work in theory."⁸⁴ Commons communities rather than offering rhetoric are offering tested best practices, which not only challenge the policies of top down economic actors theoretically but empirically. The local and practice oriented nature of common movements may provide the much needed legitimacy and imagination to social movements as counter constituents, which NGOs lack, in challenging and limiting top

⁸⁰ *Id.* at.662

⁸¹ Mukua Mutua, *The Ideology of Human Rights*

⁸² Marti Koskenniemi "Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought"

⁸³ Rajagopal, *supra* note 28

⁸⁴ Lee Anne Fennell, *Ostrom's Law*

down economic constitutionalism unveling technocratic “economic” decisions taken from above as political decisions where values like justice, as opposed to “efficiency” and “development,” have renewed relevance.

B. Societal Constitutionalism of the Commons

Constitutional approaches beyond the nation state can be used to describe the economic constitutionalism taking place from “above” but they can also provide us with tools to understand constitutional processes taking place “from below” in civil society. They can also be used to describe the “societal constitutionalism” within social movements, like the commons movements, taking place rather than “beyond” the state, “below the radar.” Commons movements have real value not only in the sense that they are mobilizing civil society actors to fight against corporations and the capitalist system which exploits them, but also in sharing the experiences of successful community resource governance. As Michael Hardt explained in an interview, while the previous alter-globalization movements were nomadic, functional to mapping the nodes of economic power from the G8 to Seattle, Washington, Genoa; current occupation movements in contrast, which share the same fight again corporate greed and the negative effects of capitalism, are rooted in time and space for longer periods of time which presents new opportunities for organization and alternative forms of governance.⁸⁵ In fact, many commons communities in the commons movement as discussed above, especially throughout the Global South, rather than forming only to protests like the occupy movement, are in fact the traditional form of resource governance under threat by state and corporate powers. The political economy scholarship of those like Elinor Ostrom have analyzed the commons in terms of “institutional design,” and commons property scholars, have shown that the commons themselves are systems of regulation; drawing upon both formal and informal sources of law, which determine the use, transfer and expropriation of common resources.⁸⁶ While this scholarship on commons uses the language of “design” as opposed to “societal constitutionalism,” both approaches similarly analyze civil society as a site for politics and sources of law and regulation.

Civil constitutions are formed in underground evolutionary processes of long duration in which the juridification of social sectors also incrementally develops constitutional norms, although they remain as it were embedded in the whole set of legal norms. In the nation-state, the glare of the political constitution has been so blinding that the individual constitutions of the civil sectors have not been visible, or at best have appeared as part of political constitutions.⁸⁷

Taking this “societal constitutional” approach, the commons, as has been argued by other scholars about other civil society organizations like labor unions, consumer associations, environmental associations, and digital regulation communities, are not only potentially contributing to a larger political constitutional process on national and supranational levels, but are also engaged as constituents in their own civil constitutional

⁸⁵ Saki Bailey and Tommaso Dotti, *Occupying the Commons: Teatro Valle Occupato Documentary* (2012) available: <http://www.commonssense.it/>

⁸⁶ ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990). See also Elinor Ostrom, *Community and the Endogenous Solution of Commons Problems*, 4 J. OF THEORETICAL POLITICS 343, 344-45 (1992).

⁸⁷ Teubner, *supra* note 9 p.

processes, acquiring constitutional characteristics through their practices. Law and law making in this context takes place outside the designated liberal constitutional forms of law creation of legislatures and courts, and rather exhibit constitutional features produced by the internal regulations and governance institutions from within the associations themselves. While, it would be beyond the scope of the paper to explore the potentially constitutional features of each sub organization of the larger beni comuni movement in Italy (water, theater, labor, education, nature)⁸⁸, to give just one example the Teatro Valle, much like the occupy movement, operates using the decision making method of the “General Assembly” where decisions on programming, direction, funding, etc. are made by “consensus” rather than by majority. Some of these meetings can go on for hours, even a whole day, but the organization is committed to the procedural rule that everyone must agree. While there is often disagreement and not always is agreement wholehearted, the procedural rule commits the community to a deliberative process where all viewpoints, even the most marginal are considered before a final decision. While the most marginal views are rarely adopted, the opportunity to air them transforms not only the substance of the decisions in form but also in quality, producing intense commitment from a broader group of community members to implement and sustain the decisions taken.⁸⁹ In fact many commons scholars have noted similar deliberative processes in other commons communities and such procedural structuring rules have been linked to the effectiveness of these communities to manage resources in a long lasting and sustainable way.

In a debate, which took place last year between Antonio Negri and Gunther Teubner,⁹⁰ Teubner poses the very question “Where is the potential space for social movements in its relation to global governance?” The point of intellectual tension between Negri and Teubner seem clearly to be the issue of characterization of the “private” as “private property” and the danger of the “common” replacing the “public.”

While the “common” seeks to overcome the alienation of the private via collective activities and collective modes of attribution, the “public” tends to strengthen the space of open and democratic deliberation, which finds its different forms in each social field. Undoubtedly, common property has a powerful potential, which has been suppressed under the domination of neo-liberal policies of private property. But the choice between different attributions of property rights cannot be decided a priori on theoretical grounds in favor of the commons, but needs to be governed by public reflection processes within each sphere of life.⁹¹

Would a turn to the “common” promote a regression into local tribalism, operating, as explained by property scholar Carol Rose, as a commons “inside” but as private property “outside,”⁹² effectively excluding users outside of the community to the resources controlled within. There is certainly the danger that autonomy of the common from the private can result in the exclusion of the public. If we view the commons social

⁸⁸ Bailey, *supra* note 4

⁸⁹ Bailey & Dotti, *supra* note 67.

⁹⁰ Gunther Teubner & Antonio Negri, *The Law of the Common: Globalization, property and new horizons of liberation*, Finnish Yearbook

⁹¹ *Id.*

⁹²

See Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 CHICAGO L. REV 711 (1986)

movement as engaged in subversive practices of law's self transcendence through its counter hegemonic uses of the law, then whether the commons can remain “just” in their overthrow of the binary will depend on their ability “to thematise the restrictedness of their specialized perspective and to infer self limitations for their expansionist course of action.”⁹³ The idea of a social constitutionalism of the commons is this very concept of the self limitation of the commons movement in their effort to limit the expansionist course of the economic sphere and collusive state and market actors over the societal sphere. The idea is not just to promote a plurality of actors but a plurality of civil constitutions. “The outcome is a multiplicity of independent global villages, each developing an intrinsic dynamic of their own as autonomous functional areas, which cannot be controlled through the outside.”⁹⁴ Nancy Fraser promotes a similar idea with her concept of “subaltern counterpublics” as “parallel discursive arenas where members of subordinated social groups invent and circulate counter discourses, which in turn permit them to formulate oppositional interpretations of their identities, interests and needs.”⁹⁵ Activist Naomi Klein suggests the Zapatistas version:

The Zapatistas have a phrase for this. They call it “one world with many worlds in it”. Some have criticized this as a New Age non-answer. They want a plan. “We know what the market want to do with those spaces, what do you want to do? Where's your scheme?” I think we shouldn't be afraid to say: “That's not up to us.” We need to have some trust in people's ability to rule themselves, to make the decisions that are best for them. We need to show some humility where now there is so much arrogance and paternalism. To believe in human diversity and local democracy is anything but wishy-washy. Everything in McGovernment conspires against them. Neoliberal economics is biased at every level towards centralization, consolidation, homogenization. It is a war waged on diversity. Against it, we need a movement of radical change, committed to a single world with many worlds in it, that stands for “the one no and the many yesses.”

The commons movement as a transnational social movement as opposed to isolated cases of commons communities may present exactly this type of movement: where local communities focused on defending local interests and common resources are linked with a global movement of many autonomous commons. This transnational social movement of the commons provides engagement between the many worlds and the interaction serves not only to limit the possibly destructive tendencies of each site of societal constitutionalism, but contributes to a truly bottom up deliberative process to challenge the top down imposition of economic constitutionalism.

CONCLUSION

The beni comuni common goods movement in Italy is a powerful example of the way in which social movements are emerging as the new “pouvoir constituant” in a top down and undemocratic process of economic constitutionalism. They are proving on both national and supranational levels that civil society actors are a potent source of

⁹³ Teubner, *supra* note 9, at 5-6

⁹⁴ *Id.* at 10-11

⁹⁵ Nancy Fraser, Rajagopal points out: “these counterpublics have a dual function: on the one hand they function as spaces of withdrawal and regrouping, where identities are affirmed to recover human dignity which has been denied in the overarching public sphere; on the other hand, they also function as spaces in which alternative conceptions of rights, body, and politics are re/formulated with a view to influencing the wider public sphere.”

constituent power to both enforce national constitutional protections of the public through counter hegemonic uses of the law and also at the transnational level where they are forming global networks capable of not only negotiating with corporate power directly but also to influence the top down economic constitutionalism of such actors like the WTO and “troika.” Social movements are expanding our notion of the public sphere and politics giving new meaning to the slogan “the personal is political.” Commons social movements are not only sites of political protest but also sites of societal constitutionalism, producing alternative forms of resource governance and management, which provide not just theoretical but empirical challenges to the assumption of private property and the developmental state which underpins the liberal constitutional form. In order to promote a truly pluralist and open vision of constitutionalism which renews the constituent power of the multitude, there must be full recognition that the two fundamental institutions of current capital accumulation, the sovereign State and corporate private ownership, which share a model of concentration of power and of exclusion that has incrementally squeezed the public interest outside of constitutional law by an imbalance favoring the guarantees of private property over those of democracy. Thus restoration of the democratic constitutional fabric is a constituent action as long as the direct and physical struggle for the commons is rooted in a democratic practice of a multitude and can point at a constitutional text or fundamental principle capable of restoring the interest of the people over that of the profit. In Italy for instance, such text is clearly available in a number of highly advanced and mostly unimplemented (Art. 9 and art 43) provisions of the 1948 Constitution, most fundamentally in Article 3 and Article 42. Clearly the constituent struggle for the commons aims at interrupting the path of constitutional transformation that has been initiated by neo-liberalism and that in Italy has reached the textual level. The constituent struggle for the commons, for the time being, is more contextual than textual and aims at producing a new common sense by exposing the contradictions of the state-private property dualism that colonized the modern imaginary. There can be no constituent effort, nor liberation from corporate greed, outside of a radical critique of private property rights. A social movement of many worlds many sites of societal constitutionalism of the commons offers new hope for a truly bottom up constitutional and deliberative process capable of reinvigorating the concepts of “constituent power” and “popular sovereignty” to reverse the progressive transfer from the commons to the private, both at national and global levels.