

SIRIO ZOLEA*

MAKING THE MANIFOLD: PRIVATE LAW TO THE TEST OF THE COMMONS IN A BOOK BY M. SPANÒ

Michele Spanò's recent book is destined to be discussed within the whole academic community and in the general debate in the country.¹ For this reason, and for its intrinsic merits of accuracy of the analysis, originality of the reasonings, and evocativeness of the terminology used, it undoubtedly deserves to be reviewed. This is why it is a real honor for the reviewer to perform such a challenging task.

This book has the important merit of returning to the topic of the commons in the legal field, which had been a hot topic within the Italian (and international) doctrine of economic, social and legal sciences a few years ago, especially in the aftermath of the Global Financial Crisis started in 2007. The new global crises due to the consequences of the pandemic and the Russian-Ukrainian conflict, perhaps for their different intrinsic nature, have not yet solicited the same abundance of reflections from authors of juridical fields. For this reason, it is particularly relevant to read now – and to analyze from the perspective of a reader concerned by the difficult context of this moment of history – the most recent attempt to update and develop the legal doctrine of the commons, through the publication in 2022 of *Making the Manifold*.

It is however necessary to specify that this book collects a series of essays written during the long period 2013-2021, clearly because the author evaluates them as topical and suited to communicate something to today's reader as well. Thus, they have resisted the past of time, which, nowadays, perversely tends to make obsolete even the article written the day before. For this reason, in our times, the rare ability of Spanò to write beyond the contingent makes his doctrinal work particularly remarkable.

* Senior researcher, Roma Tre University.

¹ M Spanò, *Fare il molteplice: il diritto privato alla prova del comune* (Rosenberg & Sellier 2022).

The book is composed by an introduction and seven essays, united by the thread of the commons as paradigm of reconstruction and reassembly of the legal order after its crises. The work is characterized by interdisciplinarity, as this thread crosses essays focused on diverse legal disciplines: philosophy of law, history of law, general theory of law, and transversely in relation to the traditional bipartition between public law and private law, which is openly questioned and challenged by the author.

After an introduction aimed at explaining the thread and the main goal of the book, the attempt to legally establish the commons, overcoming the centrality of the subjective right in the system of private law, the seven essays/chapters develop this idea in different thematic fields and in different directions.

Chapter 1 is specifically dedicated to the aim of establishing the commons in a philosophical and legal perspective. Developing and paying homage to the vision of Yan Thomas, historian of Roman law, this essay analyses the crisis of the traditional forms of mediation and representation and promotes the disruptive role of the commons, as a form of critique of property and as a *tertium genus* beyond private and public property and, more generally, beyond the classical bipartition of private and public law. Following the path of Yan Thomas, the author rediscovers how the commons had already been conceived in Roman Law and had not only characterized the legal orders of the Middle Age. The field of procedure, with particular reference to the expansionary vocation of the class action, more than the field of substantive law, is interpreted and proposed to the reader as a suitable context where the rationale of the commons can be successfully developed.

Chapter 2 develops this latter consideration, taking cues from the reflection of Sir Henry Maine that substantive law is secreted in the interstice of procedure, and sketching more in details Spanò's vision of the remedies as stronghold for the commons and against the pernicious hegemony of the subjective right. The role of the commons as a hinge between substantive law and procedure is emphasized. The inspirational intellectual debate of German (Bernhard Windscheid, Theodor Muther) and Italian authors (Giovanni Pugliese) is retraced, in order to investigate the theoretical relationship between action and substantive right. According to the vision of the author, remedies, unlike subjective rights, do not pre-exist the interests punctually and

specifically generating them and thus are not built abutting a predetermined entity, but they reflect the mutability of the needs of a society increasingly embracing the commons.

Chapter 3 concerns the cooperative character of private law and, to this end, it critically develops some insights from Emilio Betti's thought. The sequency private autonomy-*negozio giuridico* (*Rechtsgeschäft*)-contract, placed at the basis of the system of private law and backed by the public support of the state machinery, is criticized as overcome by the processes of socialization of work and by the increased social cooperation. The aim of the author is to find – on the horizontal level of the relations between private individuals – the regulatory arrangements that might serve as means of social cooperation alternative to the public dimension. The alleged associations, traditionally believed, between sociality and economic exchange and between public and universal are both criticized, in favor of forms of normativity that are developed in an extra-state reconstruction of civil law, by following policies that focus on the needs. In other words, the intuition and the aim of the author are to make private autonomy more socially cooperative and to open the legal order to this conception of private autonomy.

Chapter 4 is devoted to the idea of a role of private law as an infrastructure for the commons. Once again beyond the dichotomy private-public, there is a close proximity between private law and the spontaneous cooperative vocation characterizing the dimension of the commons. Both private law and policy should be freed from the pollution of the sovereign prejudice, through the development of a renewed role of the legal phenomenon as a mediation without representation that goes directly to the heart of social relations, where the social players are directly the genuine protagonists.

Chapter 5 focuses more in depth on the already mentioned class action, in a time of 'tortification' of private law and of sunset of subjective right. This chapter is another time on the trail of Yan Thomas: his interpretation of the concept of city is an interesting model of collective entity in the Ancient Rome, which disregards the modern conception of representation as personification of the collectivity and prefers a procedural approach (quasi-representation). Nowadays, the spread of the class action is evoked by Spanò as a disruptive element of subversion of subjective right and full politicization of the procedure. The rights and needs of a 'class' are not private nor public, but common to many people and to each member of the group. They are not

individual nor general and they do not preexist the event that makes them arise, giving birth to the class itself. A class is a collectivity of adjectives without a determined subject. Each member of the class, similarly to what happened for the roman city, can express the collective dimension without a mechanism of representation, but through a form of quasi-representation that fits with the shifting figures of contemporary society: users and consumers.

Chapter 6 extends the logic of the commons to the private institutions. Concepts such as autonomy, relationships, and cooperation are reinterpreted developing the deconstruction of the subjective right as a legal expression of a capitalist market economy. The author criticizes the bourgeois kind of relationship between political power, conceived under the banner of sovereignty, and the dimension of the sociality, of the civil society, misleadingly identified with the economic exchange. Such an ideological attempt to reconcile reason and will attests to the connection between the form of the subjective right and the economic substance of a capitalist market economy. The current of thought of institutionalism, internally very diverse (Santi Romano, Maurice Hauriou, Widar Cesarini Sforza, etc.), was born as a response to the crisis of the bourgeois theory of law, conceived as a system of relationships, and these authors affirmed, in different ways, that law is the organizing principle of groups. Taking inspirations from them, Spanò extols cooperation as a source of both economic value and legal power, while legal relationships are to be fully exposed in their social dimension and mutualism is to be generalized in the multiple fields of the collective, the manifold and the common.

Chapter 7, finally, represents, in the logic of the book, the last step in order to go beyond the subjective right and the opposition public law (sovereignty, generality, equality)/private law (property, particularity, difference). Freed from this compression, private law would lose its rivalry with the collective, the manifold and the common, allowing to (re-)discover its real non-patrimonial cooperative vocation, and public law would be freed from the idea of sovereignty. To enable this path, it is essential to develop the logic of trans-subjective rights, which express the manifold without the need of a reference entity, a totality, a unity. In this way, law can fully provide the social infrastructure and can fill the collectivity with a normative equipment.

All the mentioned essays, in their succession and reciprocal links, provide not

scattered cues, but a systematic reflection which combines re-elaborations of distinguished authors of the past, reflections on history of law and analyses of the contemporary tendencies of the legal order, all matched to support an enterprising fundamental thesis, always thoroughly argued – whether or not one shares it. Some recurring themes characterize the entire work: searching for the roots of the culture of the commons in the legal configurations of the past; overcoming the opposition between public and private; unraveling the link between subjective right and capitalist market economy; investigating, with particular reference to the potential of the class action, the flexibility of the field of the procedure as a development ground for the legal culture of the commons; the centrality of social cooperation and its vocation for an autonomous development in private law without the need for public sector intervention; the will to free the legal system from the encumbrance of sovereignty; and, above all, summarizing it all, the role of the commons as a potential reconstructive paradigm of the legal order after its crisis. The cooperative nature of private law and its intrinsic openness to the collective dimension make it possible an evolution of its focus from the level of the property and of the economic exchange to the level of the manifold and of the commons.

The intuition of the manifold, according to the author, has always been present in the Western legal tradition since its Roman roots. Artificially removed from the bourgeoisie thought, in an attempt to tailor the legal system to the emerging market economy, the dimension of the commons remained dormant until such contradiction has become blatant. Already some authors of the 20th century, particularly those associated with the current of thought of institutionalism, had proposed critical insights that had made the system creak. After World War II, limitations and restrictions to private autonomy originated from the Constitution and attributed to the intervention of the state, together with the theory of functionalization of contract (Stefano Rodotà, in particular), have exacerbated the crisis of the contract hegemony within the legal order. Nowadays, in Spanò's thought, the development of productive forces in the direction of their socialization and the valorization processes do not seek to – and can no longer – express themselves in the ability to mediate of the state. This is why, following the last phase of re-expansion of the market logic, the need for social and collective expresses itself in new ways, more immediate, requiring and stimulating the direct horizontal cooperation among private individuals, testing and discovering new

forms of private autonomy. The protagonist of this innovative legal conception is a new kind of individual, a 'social individual', whose anthropologic model is much far away from the Robinsonian, capitalist model, and who implies the presence of a collective subject and of a social ground for subjective situations. The spread, in the legal field, of trans-subjective rights and the successful development of new sectors such as labor law, family law, environmental law, consumer law, etc., permit new approaches, according to which the real interests and needs distribute *a posteriori* the rights that will enable the subjects to act and claim, and not the other way around.

The two levels of being and ought to be, of what exists and what, according to Spanò's view, should hopefully happen, are closely intertwined in the book, to the point that, in some passages, the reader may find himself uncertain wondering on which of them is actually placed. In other words, the author argues that the evolutionary trend of contemporary law (where, precisely? It is the first question the legal comparatist would be inclined to ask to circumscribe the discourse) is towards a generalization and a spread of the paradigm of the commons in the whole legal order, and, at the same time, that such tendency is desirable and should be supported (by whom, precisely? It is the first question the political scientist would be inclined to ask to circumscribe the terms of the conflict prefigured). It might be observed that the 'optimism of the will', in the book, prevails on the 'pessimism of the intellect'. Maybe a breath of optimism cannot hurt in distressing times such as the ones we are experiencing.

An important merit of the book is the ability to reveal many mystifications and contradictions in the bourgeois traditional conception of the legal order, taking ideas from the reflections of Italian and international thinkers of the last century and linking them in new chains of association to bring out the full critical potential of their analyses. Of course, Spanò is not just the collector of precedent elaborations, but these serve to shore his original reasoning, focused on the legal system of nowadays and aiming to find evolutionary answers and ways out in the face of the crisis of legitimacy that is going out not only through the legal sphere, but through the whole society. In order to understand the reason why authors like Spanò spend their admirable efforts in trying to overcome the risk of a stalemate in legal thinking in the face of the problems and threats of our time, it is paramount to recognize the general character – 'organic' character, if we want to use the Gramscian terminology – of such crisis. The

fundamental political and economic choices made since the 80s, at the time of the neoliberal wave, have fundamentally moved social wealth and social power from the wages to the profits, breaking the Keynesian economic compromise and the constitutional legal and social compromise that had been inaugurated in the post-war period. The failure of such compromises to resist as a barrier to this wave and the resulting change in mentality are perhaps the reasons why some of the authors who believe in strengthening the collective dimension in society are today trying to seek out new roads towards this direction, which are not anymore focused on the intervention of the state. It is to be hoped that these new roads are susceptible to be traced deep enough to get somewhere and not to get lost in the desert.

The crisis, which Spanò commendably investigates in his book, and for which he proposes his solution, is today aggravated by the consequences of globalization and of computer revolution, which exacerbate some economic inequalities (at both the domestic and the international level) and dangerously reshape societies apart from the representative democratic circuit. The distrust for representation seems to have been somehow embraced by Spanò. However, one might wonder whether this trend, today, is likely to really benefit mostly the big businesses, which are able to move very well on the opaque terrains of the soft law and of the global governance. In spite of the original promises of democracy and horizontality, the computer revolution has intensified the thrust towards the cul-de-sac of liquid society² – and, consequently, of liquid law. It is an alienating and dehumanizing model of society (and law), where all the stable benchmarks and values (starting with the work sphere), all the identities (starting with the class identity), all the previously hard-won collective rights implemented by the state (starting with protection from arbitrary dismissal and continuing with good public health and instruction, wages and pensions sufficient for a decent living, etc.) are erased in the name of the figure of a ‘fluid’ individual. Such an attempt to dissolve all the forms of collective representation, all the classes identities, all the intermediate bodies, potential sources of successful social conflicts, and to replace them with the fragile, harmless, scattered roles of users and consumers – living an ephemeral eternal present studded with uncertainties and fears – benevolently protected by legal rules written in the interest of market competition, is a tendency arranged, supported and favored by the

² As dramatically depicted by Zygmunt Bauman in many of his works.

transnational capitalist class to remove any opposition and resistance to its hegemony.

Spanò's proposal seems to imply the suggestion to the subordinate classes – as it is unreasonable to expect that the push toward the manifold and the commons should come from those who already have everything – to finish absorbing and accepting the logic and the values of the liquid society and to try to exercise a counter-hegemony on that ground. However, one might wonder how to successfully realize it on a ground where the power relations are so favorable for a few oligopolists, and the majority of exploited people have apparently no means to organize themselves into a stable project of transformation of society. The question is why – *a fortiori*, in the midst of historical events (pandemic, geopolitical tensions) that, directly or indirectly, tend to put the state back at the center – the subordinate classes should renounce the struggle to preserve and re-enlarge the public dimension of the constitutional social compromise and should invest forces on a different ground where the preponderance of the opponent appears overwhelming.

The work of Spanò stands out for brave critical thinking, which is very important in a historical moment of widespread torpor of consciences. Despite the inputs of legal realism and critical legal studies, even now many legal reflections tend to considerate legal institutions regardless of historical and productive processes, as if they were 'pure' ideas of the human mind. Therefore, any contribution that takes on the more challenging, more complex, but more fecund task of digging deep should be received by the scientific community with the utmost regard. A full understanding of how legal institutions and the traditional structure of the legal order are tailored to satisfy the will of the economical ruling class is the necessary ground, for lawyers, to try to contribute to any effort aiming to use those institutions in an alternative way or, more radically, to replace them with others. The reflection of Spanò seems to prefer the first of these two roads, wishing that private law might open up to the manifold and to the commons, and consequently to the social and collective values, through a more flexible procedural and remedial approach. It remains to be understood why, flexible or not, the procedure should be able to express a balance of power relations in society other than that expressed in substantive law. Instead, the flexibility of the procedure and of the remedies has often been used by the fundamentally marked-oriented European lawmaker to introduce legal accommodations which bypass and outdo the more social-oriented national legal orders

inspired to the paradigm of people's constitutional democratic sovereignty.

What is somehow striking, in its radicality, is the choice of the author to refuse the public dimension, in favor of the dimension of the common, as the main (perhaps, it might seem, the only) bastion, in our times, of collective interest. According to the opinion of the writer of this review, there are some perplexities on such a choice, in a historical perspective, in the perspective of the analysis of the tendencies of the current legal orders (*de iure condito*, we might say) and in a perspective of suggestions for a hopeful evolution of the legal orders (*de iure condendo*).

From a historical point of view, a thing that an attentive reader might notice, in Spanò's reconstruction, is the choice – not completely explicable by the brevity of the book – to speak about the evolution of the legal thought on the collective dimension regardless of the experiences of the October Revolution and its long wave, real socialism in Europe and Asia. Many economic and legal orders, in Europe, during their socialist period, have much variously combined the public (centralized planned economy) and the common (soviet, kolkhoz, cooperative run enterprises, etc.), with multiple combinations depending on the place and time. Is it possible to speak about the path of the collective dimension in law prescindendo from the historical legal experience of the collectivization of the economy? From the consequences that the fact of the collectivization ongoing in the East had on the expectations of the working classes and on the fears of the ruling classes in the West? And from the consequences that the collapse of the first and (at that time) main socialist experience, the Soviet Union, had on the fears of the working classes and on the expectations of the ruling classes in the west? In some passages, avoiding hints on such issues risks making the description of the complex path of legal thought seem an abstract succession of idealities, in spite of the general approach of the book of paying attention to the historical and productive processes.

While analyzing the existing situation and its structural trends, Spanò not only wishes, but he fundamentally declares already in place an evolution of the mode of production and of the legal systems towards the commons. On the point of this alleged evolution of the legal culture (in which legal orders, specifically?), a legal realist might wonder where its clues and traces are to be found in lawmaking, in the case law and in the practice of law. The examples provided in the book are not many and, although fascinating, they hardly appear amenable to generalizations beyond the specific areas to

which they refer. The example with the most potentially disruptive scope, the class action, seems to have many difficulties in gaining a foothold in our system. Furthermore, its long-standing popularity in the United States of America seems to have failed to make this country a bastion of the collective in the legal comparative landscape. If we look at the legal consequences of the pandemic crisis in Europe,³ we can actually find several examples of how ideas such as social function and solidarity,⁴ in a phase of emergency, have strongly re-entered private law systems in a way not seen in a long time, with effectively cross-cutting approaches between private and public segments of regulation (landlord-tenant law, labor law, contract law in general, social law, procedure law in all the fields, etc.): but this seems to have occurred rather through vertical authoritative interventions of the public authorities, recovering their missed sovereign functions and attitudes, than through horizontal forms of cooperation and self-organization of a civil society to the rediscovery of the collective interest within its own spaces of autonomy. Lastly, even if we look outside the West, for example at contemporary experiences of Asian socialism (China, Vietnam, etc.), the path of market socialism requires to these lawmakers mostly an effort to carefully balance industrial and other development-oriented state-led policies with relatively automatic market mechanisms working in a quasi-by-default manner,⁵ in other words to balance the private and the public dimension, without a fundamental role for the commons in representing collective interests.

Finally, *de iure condendo*, moving from the interpretation of the world to the will to change it, there is definitely room for the greatest variety of points of view,

³ See, eg, the special issues of the journal *GiustiziaCivile.com* on the law during the pandemic: *Speciale emergenza Covid-19* (2020) <<https://giustiziaticivile.com/editoriali/speciale-emergenza-covid-19>> accessed 16 June 2023; E Calzolaio, M Meccarelli and S Pollastrelli (eds), *Il diritto nella pandemia. Temi, problemi, domande* (EUM 2020); *COVID-19 et droit des affaires* (2020) Dalloz; E Hondius and others (eds), *Coronavirus and the Law in Europe* (Intersentia 2021).

⁴ See F Macario, 'Per un diritto dei contratti più solidale in epoca di "coronavirus"' (2020) 3 *GiustiziaCivile.com* <<https://giustiziaticivile.com/obbligazioni-e-contratti/editoriali/un-diritto-dei-contratti-piu-solidale-epoca-di-coronavirus>> accessed 16 June 2023.

⁵ See A Gabriele, *Enterprises, Industry and Innovation in the People's Republic of China: Questioning Socialism from Deng to the Trade and Tech War* (Springer 2020).

interestingly fueling the debate of scholars and citizens in general. Could, in the years to come, the dimension of the commons become – as it had perhaps been the case at the time of the enclosures – the focus of the class struggle, in economy, society and law, superseding the today still fundamental dialectic between public and private? Would this be advantageous for the social development of humanity? Is there relevant room for the commons in a world where the transnational capital is more and more characterized by the oligopoly of a few big companies, with new possibilities, through the digital platforms, to influence the common sense in a dangerously totalitarian way? Is no longer – in a time when unipolarism in international relations is crumbling and neoliberal ideology has shown its weaknesses – people's constitutional democratic sovereignty the fundamental claim for the subordinate class in response to such an economic transnational concentration? Should not the subordinate classes still claim more welfare state and more public intervention in economy, to realize social equality and solidarity? In a period of dispersion of intermediate bodies, should the workers and the subordinate classes in general accept a condition of precariousness, instead of seeking new ways to form again intermediate bodies and to claim the stability of the rights which is necessary to live with dignity? Only time can really give answers.

Conclusively, the book of Michele Spanò is a book which deserves large circulation because of its sharp critical thought. It is a book which should be read and commented, in its multiple facets, not only by specialists of philosophy of law, but by the whole communities of legal, political and social scholars and public administrators, who can all find in it many inspiring cues.