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Francesco Paolo Grossi

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OUTLINE

TEXT

1. Premises and purpose of the paper

1 There have always been fierce clashes over water due to its inescapable relevance to human life and its many sources of supply. Thus, water has been a major concern of both jurists and social scientists[1] who more generally study the interdisciplinary nature of water policy. Two organizational systems have a hand in public access to water. Public property legal regimes are founded on the requirement of state intervention in the ownership and governance of water resources. Private property regimes are based upon water’s status as a source of profit and the consequent possibility of entrepreneurial management of it. This juxtaposition

can concern different segments of water policies, notably the proprietary regime of the asset and the supply service. Indeed, what needs to be considered is that the evaluations and outcomes of juridical analysis vary depending on the section of water policies examined. It is worth noting that, on a theoretical level, the concept of ownership and the one of provision are two distinct and autonomous systems from each other in terms of regulation and discipline. However, the elaborations of the doctrine and the jurisprudence with regard to the legal framework pertaining the asset have constituted a true ideological vector at the moment when it became necessary to establish and govern the service that guarantees the use of the resource. In fact, on the assumption that water was a public good, or, according to different approaches, a common, subject to an autonomous fundamental right, it has been believed—sometimes dogmatically—that the service should be handled through entities exclusively held by the public administration. Thus, while public property of the resource is currently considered the only viable option, much greater contrasts are encountered regarding the possibility of entrusting service management activities to private entities.

2 This study delves into juridical aspects of water policy in the context of the Italian legal system.[2] It is divided into two parts. First, it analyses how water has come to be viewed as a public good. Then, it considers the availability of water as a public service and scrutinizes, from a juridical standpoint, the admissibility of private participation in the sector. Following separate analyses (inevitable due to the diversity of regulations), this paper aims to question whether ownership and provision are indeed two autonomous systems or, considering the necessary guarantee of access to the resource, their autonomy can be called into doubt.

3 In terms of the methodology used, the first part mainly considers older legislative sources and the interpretation provided by coeval or contemporaneous doctrine, in order to understand how and why the legal system arrived at the extensive declaration of the publicity of water and the simultaneous disappearance—or at least the drastic reduction—of the category of private waters.

4 The second part, on the other hand, starts from more recent legislative sources, primarily of European origin. The study of the issue also involves analysing, interpreting and systematizing the numerous contributions from the scholarly literature and the European, constitutional and administrative case law, which have contributed to shaping the normative framework of reference. Before the closing remarks, some considerations on the newly approved Italian reform of local public services will be necessary, given that it significantly affects the governance of the water supply service.

2. The problematic evolution of "public" water

5 By now, conceiving of water as a public good may seem to be a given. However, in Italy, this assumption has been long in coming. The idea of the existence of private waters was inherited from the frequent coexistence of the legal-patrimonial private matrixes that were typical of the feudal age and nourished by common tolerance of individual and non-rivalrous uses of water. For a long time, these arrangements were not just accepted; they were considered dominant with respect to public use of water, which was limited to navigation until the end of the XIX century in accordance with the *Code Napoléon*, transposed in Italy by the Sardinian Code of 1837. This Code later strengthened the protection of property by imposing a generic duty of non-dispersion. Even so, this change in policy was incremental, corresponding to the liberal idea that only public use, i.e., non-excludable collective uses, justifies the public character of a good. Economic utilities that could be exclusive were left to private appropriation.[3]

6 The subsequent need to establish public control of the asset of water was also a consequence of the gradual acceptance of the idea of a *domaine public*, as opposed to a *domaine privé*. This distinction was progressively consolidated starting from French Revolution, albeit initially from a different perspective than the modern meaning of state property.[4] It was then refined by the doctrine of public property that developed in Germany at the end of the XIX century.[5] Based on these various theoretical and historical influences, a dominant definition of public property has emerged in national legal systems

around the world, including in Italy.[6] In a preliminary approximation, public property is conceptualized as a complex of movable or immovable assets (in the legal sense) that belong to the state or to another public body, "identifiable on the basis of specific criteria established by law or because they are concretely destined to a public function or service".[7]

7 During the XIX century, a strong contrast also emerged between two positions that were inspired, on the one hand, by Title V of the Public Works law of 20 March 1865 (no. 2248 all. F), which called for water to be regulated primarily for civil protection purposes, and on the other hand, the coeval first Italian Civil Code. The first corpus, as *acque pubbliche* (public waters), included rivers, streams and minor waterways, divided into ditches, rivulets and culverts usable by private individuals only with a concession. The Civil Code, on the other hand, which was inspired by liberal ideology, defined *acque demaniali* (state-owned waters) (Art. 543) rivers and streams only, expressly leaving minor waterways to be construed as private property. An intermediate solution, referred to as "distinguishing"[8], assigned public status to smaller waterways (and therefore to lakes, springs and tributaries) whenever they served the public interest. This development marked the first concrete retreat of private interests in favour of a broader conceptualization of the public domain, which influenced subsequent legislation.

8 After some legislative interventions at the turn of the two centuries,[9] the second stage of development was reached with the fundamental T.U. *Acque Pubbliche* (Consolidated Law on Public Waters), which is partially still in force today. This law addresses the procedures for granting derivation concessions. A rule posed in Article 1 holds that all inland waters, even in different natural forms (springs, lakes, rivers), origins (surface or underground) and locations are public if they had (at the time when the rule came into force) or subsequently acquired "aptitude for uses of general public interest". The category of private waters remained (not all waters were deemed public), but basic assumptions were changing.[10] The distinguishing criterion between public and private waters changed from a nominal one to a teleological one, and the distinction became fluid in relation to circumstances that attain juridical relevance.[11] One well-known expression is "riserva in bianco" (blank reservation)[12] under public

control in the field of waters. However, the change in the State's attitude towards public goods corresponded in principle to the prioritization of Italy's economic and industrial development, especially concerning water's role in the production of electricity and the irrigation of fields. There was perfect overlap between the intensive exploitation of the utilities attainable from water and the public's interest in obtaining them,[13] while the ecosystem protection component was almost absent. When in 1942 it came to the discipline of Article 822 of the Civil Code, which is currently in force, most of the reconstructed developments had already taken place. Thus, the Code classified waters as "state property" (*acque demaniali*) based on mixed criteria: partly ontological (by expressly mentioning streams, rivers, lakes) and partly neutral, referring to relevant sectoral regulations. The Code also established the property statute, which specified exceptions to common rules. The first exception concerns non-commerciality, which includes both a public destination and inalienability by the administration[14]. This exception invalidates transfers of fractions of the water system, making the conduct of anyone who withdraws waters without having been previously granted a regular concession unlawful. The second exception allows public officials to undertake executive actions as self-defence and as an alternative to the generally used means of defending property and possession.

3. The Galli Law and a new scale of values: Water as a resource to be protected

9 Towards the end of the XX century, a changed awareness served as the basis for new legislation about water,[15] most importantly a law passed on 5 January 1994 no. 36, known as the Galli Law. This law implemented an approach that was extremely innovative for the time. With developing awareness of the non-limitlessness and vulnerability of the good, it fundamentally changed public authorities' approach to water policy and inaugurated the third and final directive on the matter. Critics had charged that the old system had distorted the relationship between common use and exceptional use.[16] That system

had almost exclusively rewarded the concessionaire's withdrawal efficiency, concurring both with severe environmental externalities produced by a system based solely on the instrument of the concession.[17] The innovative essence of the law is condensed in Article 1:

> All surface and underground waters, even if not extracted from the subsoil, are public and constitute a resource that is safeguarded and used according to criteria of solidarity. Any use of water is carried out safeguarding the expectations and rights of future generations to benefit from an intact environmental heritage. The uses of water are aimed at saving and renewing resources so as not to jeopardise the water heritage, the livability of the environment, agriculture, aquatic fauna and flora, geomorphological processes and hydrological balances.

10 A literal interpretation of the normative text is that the State should control all bodies of water, as supported by the majority doctrine[18] and the jurisprudence of the Constitutional Court.[19] There were, however, some observers who argued that the result of the amendment was more limited. They disagreed with the assumption that all waters were automatically declared public[20] and so the possibility of identifying private waters would remain. However, as confirmed also by the recent case law[21], the path the administration and specialized judges must take is the opposite of the past, operating under an inverse presumption of State ownership.

11 In any event, focusing on the issue of permanently private waters makes one lose sight of the real innovative impact of the Galli Law. Its main contribution is that it obligated present generations to protect the water needs of future generations, imbuing the asset with legal value. The passage of the law quoted above, though loaded with a clear meta-legal component, allows the matrix of solidarity to yield positive regulation when allocative choices are made. Three components—priority for human consumption[22], environmental protection and safeguarding of the quality and quantity of the resource—are to be considered pre-eminent *vis-à-vis* economically rational uses that had been preferred before the Galli Law. Water policy seemed to be moving towards "overcoming any residual individualistic conception".[23] Moreover, as emphasized during the

judgement of constitutional legitimacy on the law, "the centre of gravity has shifted towards the regime of use, rather than the regime of ownership, with a view to safeguarding a primary human good and the fundamental value of the integrity of the patrimony"[24]. In short, the Galli Law marked a paradigm shift that was in some ways epochal and distinct from the way other assets in the public domain are treated. Water was no longer seen from an appropriative perspective as an expressive asset of an economic *utilitas* to be exploited, but rather as a resource[25] to be protected due to its scarcity and status as an essential human need. Water came to be viewed as "custodial" public property[26], an expression coined in the wake of the experience of the *État* expressly qualified as *gardien* by the "*Loi affirmant le caractère collectif des resources en eau et visant à renforcer leur protection*", adopted on 11 June 2009 concerning the waters of the Canadian Province of Quebec[27].

12 The most recent regulatory interventions follow the same direction of the Galli Law, but under a completely changed values framework. The influence of European Union legislation has been strong; Directive 2000/60/EC (the so-called Framework Water Directive) "establishes a framework for Community action in the field of water" and differentiates water from common commercial products in Article 1.[28] Subsequent environmental codification (Legislative Decree 152/2006), in which the Galli Law converges, codifies European principles on environmental protection,[29] above all the principle of sustainable development.[30] Moreover, it imposes a rationalisation of water as a resource, aiming to avoid waste and favouring its renewal.[31]

4. Water as a modern public property and the suggestion of the commons

13 At this juncture, it is pertinent to inquire about the purpose of framing the public ownership of water in these terms and whether this discipline differs in any manner from other forms of public property. It has been argued that public ownership of water is not the express aim of the regulatory regime. Instead, it is the instrument

through which the State protects a plurality of interests that are considered fundamental, including those deriving from water[32]. In a general perspective, the regulation of water is inspired by the need to ensure sustainability, which unfolds on three levels: environmental, economic (as costs of use must be adequately accounted for and covered by users) and social (considering the ethical problem of access for every human being). That is the reason why some, even *de jure condito*, have argued for the qualification of water resources in terms of the commons:[33] a category often invoked by legal science[34] but presently lacking firm support in terms of positive law.[35] More realistically, public planning and control of water is undertaken primarily for the purpose of protecting a good whose over-consumption would lead to irreparable impoverishment,[36] resulting in the so-called "tragedy of the commons".[37] Indeed, water seems to be the guiding star of an evolved and constitutionally oriented form of public property amid an ever-growing crisis. A public regime still configured in anthropomorphic terms, in the sense of a direct relationship between the public *dominus* and property (in homage to the already mentioned Franco-German tradition), is said to be increasingly inadequate to respond to new inherent needs and the social protection of fundamental rights rather than upholding the old sovereign-proprietary dimension.[38] Interpreted in this sense, public ownership of water should never be called into question.

5. The application moment: The supply service

14 Without delving into the debate about whether there is a new and distinct "right to water" of international, European or domestic juridical dimension and relevance,[39] which has sometimes led to the affirmation of the need to include it among core constitutional norms,[40] distribution efficiency of the service is what makes current water policy effective in practice and thus important to safeguard. In fact, at any given moment, water (as a resource) loses its static characterization and is projected into a dynamic dimension destined to meet the needs of the community that has claims on its use; that is, a public service demand arises. The latter is characterized by the attribution and ownership of an activity,

qualified as a duty by the legislature (whose purpose is to protect the essential interests of the community it serves), which takes a specific organizational form (not necessarily a public one, as the State can choose to confer it to a private contractor).[41] The Galli Law, already so innovative in terms of the public property aspects of water policy, also created the Integrated Water Service (IWS), consisting of all the public services of intake and output of water for civil uses, sewerage and purification of wastewater.[42] Moreover, by leveraging the principle of economies of scale, the Galli Law imposed criteria of efficiency and industrial administration of the IWS in conjunction with the principle of unified management. The latter implied the provision of the service according to the so-called optimal territorial division (OTD) and the necessary correspondence between each OTD and a single supplier.

15 Over time, the conflict between the public and the private has been decidedly more radical in the context of the IWS than anything that developed regarding the proprietary regime of the good. If public ownership of the good "water" is now a shared (and desired) fact in the legal system, on the service there is a dialectic fueled by two opposing theses. On the one hand, the public nature of the (common) good implies that the IWS should be run by entities that are owned or managed exclusively by the State[43]. On the other hand (and this position is by far the majority one), there are those who believe that notwithstanding the public nature of the asset and the State's functions of direction and control, nothing should prevent the IWS from being managed by private parties.[44] In addition to "in-sourcing management"[45] (which is entirely internal to the public authority) and "special undertakings"[46] (separate legal entities but subordinate to the direction and control powers of the public administration), what has attracted the attention of experts is primarily the so-called in-house providing, a term coined by the historic European ruling, Teckal.[47] For two decades, it has been considered the leading public management model: as is well known, the in-house company is regarded as an extension of the public entity, a phenomenon of self-organisation which, thus, exempts from the conduct of competitive procedures. However, it remains at the center of the complex work of adjustment within the legal system, in Italy as in other countries.[48] As for the positive law, definitively

clarified by Concessions Directive UE/2014/23,[49] the in-house approach is an alternative to outsourcing through public tender and the constitution of a joint company with a private partner (in the context of the so-called institutionalized public-private partnership).

16 As for the profiles of interest here, the most impactful recent event was the referendum of June 2011, which resulted in the repeal of two provisions of law by a large majority of Italian voters, on the (mistaken) assumption that the classification of water as a public good was under threat. The first legal provision to fall was Article 23 bis of Law No. 133 of 2008 as amended by Article 15 of Decree-Law No. 135/2009. It made recourse to the in-house option available only when circumstances did not permit an effective recourse to the market and prescribed both a reinforced motivation of entrustment by the local authority and a prior opinion of the Italian Antitrust Authority.

17 The second provision removed Article 154 of the environmental Code, which had allowed payment of a tariff to service providers that took into account "an adequate return of the capital invested", At that time a fixed remuneration of 7 percent of invested capital was established, regardless of the legal status or the concrete efficiency of the operator (therefore, even the inefficient ones were rewarded).

18 The repeal of these provisions brought a "new fact"[50] into the legal system: an entire sector of the national public administration—and one of the most important ones—had come to be directly and immediately governed by a European source. The European Union, however, at least at an early stage, never favored or imposed a precise form of operational model for the so-called SGEIs, remaining neutral and safeguarding the principle of free choice for public administration.[51] The national legislature, on the other hand, has taken a different tack. In the wake of what may be termed an all-embracing conception of the competition's defence—which has also been endorsed by the Constitutional Court[52]—It has continually disfavored in-house management. The regulatory technique has in principle always been the same: to impose reinforced motivational obligations on authorities charged with the task of justifying not resorting to the market since the latter is assumed to be the

maximum model of efficiency, so much so that the outsourcing of the service is preferable to internalization.

19 The order—first, the Article 192 of Legislative Decree No. 50 of 2016, implementing Directive 2014/23/EC and then Article 5 of Legislative Decree No. 175 of 2016 (the so-called Consolidated Law on Public Owned Entities Company)[53] expressly provided for motivational burdens on entities that choose to proceed with the in-house approach.[54] Finally, the entire institutional design of the Italian legislation was promoted first by the European Court of Justice,[55] then by the Constitutional Court,[56] on an argument constant in jurisprudential reflections that the national legislature has unquestioned political discretion in providing for the implementation of competition policies to an extent that goes well beyond the minimum ones to which it is obliged by European law.[57]

20 These interventions were not applicable by express provision to the IWS, which therefore continued to maintain its preferred status; however, they did end up informing the in-house approach whenever chosen by the authority governing the OTD.[58]

6. The new Consolidated Law on local public services. Brief considerations

21 The Consolidation Law 201 of 23 December 2022 was approved as the annual law on competition. For the first time, a century after the Giolitti Law,[59] it organically regulates local public services of economic importance.[60] The unified text directly impacts the IWS and, therefore, it requires some considerations. Moreover, it allows for brief reflection on the impact of privatization policies for the relevant sector.

22 An overall analysis of the Consolidated Law reveals a clear inclination towards promoting competition concerning water, as requested by the European Union during the approval of the National Recovery and Resilience Plan.[61] The assumption of neutrality on the part of EU institutions thus seems rather remote. These principles should be balanced, or at least aspire to guarantee a high level of quality, safety

and accessibility, equal treatment in universal access, and the rights of citizens and consumers. Article 4 is the keystone of the policy. In deference to European principles, it establishes a clause of prevalence of the Consolidated Law itself with respect to sectorial disciplines (and therefore also of the IWS) in the event of conflict.

23 Today, the three above-mentioned forms of management dominate: complete outsourcing, public-private partnership, in-house providing. "In-sourcing management" and "special undertakings" are no longer permitted, except in absolutely residual cases, [62] and only for non-networked local public services. More specifically, when the amounts of in-house awards exceed European thresholds for public contracts, local authorities and other competent bodies are required to award the service on the basis of a:

> qualified motivation that expressly accounts for the reasons for not having recourse to the market for the purposes of efficient management of the service as well as illustrating the benefits for the community of the chosen form of management [...] also in relation to the results achieved in any previous in-house management. [63]

24 In addition, the entrusting entities are required to draw up a business plan, to be updated every three years, which accounts for both the efficiency of the choice and the reasons justifying the maintenance of their in-house choice. This obligation is justified by the rationalisation of public shareholdings, to which the entrusting entities are obliged by Article 20 of Legislative Decree 175/2016. In short, it is the legislature's intention to promote the competition principle, which operates as a sieve criterion for efficient managements. Local authorities are therefore subject to an enhanced motivational obligation and must demonstrate efficiency in previous in-house operations. Once again, the in-house model is clearly viewed with concerns.

25 Moreover, one of the criteria included in Article 26(d) for determining the tariff is the parameter of the "adequacy of the remuneration of the invested capital, consistent with prevailing market conditions". In practice, the same provision that had been expunged by the voters re-enters the process. This provision, however, will have to be interpreted in the light of the new tariff methods prepared by the

Italian Regulatory Authority for Energy, Networks and Environment (ARERA), which has enjoyed regulatory powers in this area since 2012.[64] These methods have passed the scrutiny of the administrative judges unscathed[65] and, despite providing for remuneration of both debt capital and invested equity capital, are based on the efficient-costs mechanism in a price cap regime, which is very different from the fixed remuneration provided for under the previous system.

26 On the other hand, the fundamental separation[66] between regulation, directive and control functions, on one side, and management functions, on the other side, has not been adequately emphasised. The specific rule (Art. 6, para. 2) which provides that the governing authorities cannot have any stake in the companies that manage the service by express provision does not apply to the IWS (Art. 33, para. 1).

7. Closing remarks

27 Leaving aside the question, entirely internal to Italian constitutional law, concerning the duration of referendum constraint on the legislature,[67] the referendum result has been substantially disregarded over the years by the Italian legislature, first in a more nuanced manner, and then, through the new consolidated law, in a decidedly more direct way.

28 However, in Italy, the atavistic problems of the water service are not about the legal nature of the company managing the service. The challenges lie elsewhere. First has been the failure to implement the Galli law across much of the country for two decades and the consequent obstacles to updating the tariffs, which have had significant effects on general taxation and quality of service. Additional challenges include the confusion between political and technical functions; the chronic insufficiency of investments which can hardly be fully borne by public finances;[68] the intolerable state of the network that, especially in the South of the country, registers heavy losses (the so-called water service divide); and pending infringement procedures for violation of European legislation on urban wastewater.[69] Therefore, instead of emphasizing the debate about the legal nature of the operator, it would be better to focus on

the managers' abilities to achieve the performance standards set by the public sphere, which, in this sense, necessitates maintaining the functions of direction, control, and regulation.

29 However, it is hard not to notice how water is, on the one hand, the beneficiary of one of the most advanced protective regulatory regimes that the legal system can offer. Nevertheless, water ends up being the subject of a market, albeit a regulated one. The friction between the discipline of the good and the discipline of the service is evident.

30 To overcome this immanent contrast, while at the same time seeking to shun any ideological stance, the current legal framework should be read from a constitutionally oriented perspective that takes into account core values including the right to life and the preservation of human health and the natural environment, all of which are directly connected to the availability of water and necessarily preclude the water service from being subject to full commodification within the market.

31 In other terms, it is certainly true that the regulation of the service is autonomous from that of the ownership, but it cannot be to the extent of nullifying the reasons for public ownership.

32 The aforementioned core values must not be ignored, nor should they succumb when weighed against the rules of competition. The principle of the "neutrality" of the manager must be verified in concrete terms, because water is inherently a matter of public interest. Thus, neutrality must guide the modalities through which the State can relate to the water system, identifying fundamental junctions of indispensable public governance of the asset.

33 As there are no specific "golden power" provisions, the role of the regulator seems destined to become increasingly central to future public interventions. The regulator's actions, for now, are not solely focused on liberalizing measures aimed at creating a competitive market through administrative decisions.[70] Instead, they account for the universal dimension that aims to guarantee equal access to water for everyone, especially members of vulnerable groups. This equity may be achieved through tools such as tariff containment, water bonuses, and minimum vital quantities. Moreover, the regulator

seems to have become the privileged interlocutor of both public and private players in the sector.

34 If private actors remain difficult to eliminate (nor would their exclusion necessarily be desirable), due to the principle of horizontal subsidiarity, now codified by Article 6 of the aforementioned Consolidated Law, and the direction the legislature has taken (which is ultimately linked to the funds of the National Recovery and Resilience Plan), the new legislation should not permit an uncontrolled, extensive privatization. The water service has always enjoyed a special regime thanks to the public law principles that inform ownership of the asset and regulation of it. In conclusion, the complete subjection of the water service to the rules of competition would risk undermining the regime of equality of access, which is essential, especially in a time characterized by the scarcity of the resource.

NOTES

1 See, among others, J.-L. Gazzaniga, "Droit de l'eau et organisation sociale", in *Histoire du droit social*, *Mélanges en hommage à Jean Imbert*, Paris, PUF, 1989, p. 267 *sq.*; V. Shiva, *Water Wars: Privatization, Pollution and Profit*, Cambridge, South End Press, 2002.

2 Some comparative experiences are illustrated in V. Parisio (ed.), *Demanio idrico e gestione del servizio idrico in una prospettiva comparata. Una riflessione a più voci*, Milan, Giuffrè, 2011.

3 See B. Tonoletti, "La disciplina del demanio idrico e l'acquisizione della risorsa per il consumo humagne", in L. Carbone, G. Napolitano, A. Zoppini (eds.), *Annuario di diritto dell'Energia 2017: Il regime dell'acqua e la regolazione dei servizi idrici*, Bologna, Il Mulino, 2017, p. 172.

4 During the *Ancien Régime*, assets of any kind belonging to the sovereign, the so-called *domaine de la Couronne*, were removed from the application of the *droit commun* and subject to a series of derogatory rules, not dissimilar to those known today. The French revolutionary legislature, on the other hand, was imbued with the bourgeois principles that urged the commercialisation and privatisation of economic assets to gain profit from them. So, with the famous law of 22.11-1.12, 1790, these assets were returned

to the *domaine de la Nation*. As for the profiles of interest here: "le fleuves et riviéres navigables ou flottables". For the French doctrine, without any claim of exhaustiveness, see J.-B. Proudhon, *Traité du domaine public*, t. II, Dijon, Lagier, 1st ed., 1833; L. Duguit, *Traité de droit constitutionelle*, t. III, Paris, de Boccard, 2nd ed., 1923, p. 323 *sq.*; M. Hauriou, *Précis de droit administratif et de droit public*, Paris, Sirey, 12th ed., 1933, p. 779 *sq.*; M. Lagrange, "L'évolution du droit de la domanialité publique",*RDP*, 1974, p. 5 *sq.* ; P. Yolka, *La propriété publique : éléments pour une théorie*, Paris, LGDJ, 1997. This last Author writes (see p. 107): "The space reserved, within the state property, for certain goods considered insusceptible of private ownership, undoubtedly constitutes the germ of the distinction between *domaines*. But the synonyms used to designate public property on the one hand, and the lack of correspondence between the concepts of *domaine public*, of goods intended for public use, and of things out of commerce, on the other hand, prevent discussing *dualité domaniale* for the period covered by the *droit intermédiaire*".

5 Fundamental remain the studies of F. Eisele, *Uber das rechtsverhaltniss der res publicae in publico uso*, Basel, Universitätsbuchdruckerei von C. Schultze, 1873 and O. Mayer, *Le droit admnistratif allemand*, vol. III, Paris, V. Giard et E. Brière, 1905.

6 With regards to German and French influences on Italian legislation about public goods, see, extensively, V. Caputi Jambrenghi, *Premesse per una teoria dell'uso dei beni pubblici*, Naples, Jovene, 1979, *passim*, and V. Cerulli Irelli, *Diritto pubblico della "proprietà" e dei "beni"*, Turin, Giappichelli, 2022, p. 105-109. As is known, Italian legislation, although inspired by the French one, did not embrace the duality of state properties present in that country. Currently, it distinguishes between assets belonging uniquely to the State and constituting the "public domain" (in Italian, *demanio pubblico*) and so-called patrimonial assets, which are further categorized into "unavailable" and "available" based on their allocation for public purposes (in Italian, *beni patrimoniali, indisponibili e disponibili*). In French doctrine (see C. Chamard-Heim, *Droit des biens publics*, Paris, PUF, 2022, p. 46-47), it has been said that this legal system introduced a true "échelle de la domanialité italienne", recalling L. Duguit's well-known theory. More cautious the Italian scholars, but without denying the latter's influences. In this regard, see V. Caputi Jambrenghi, *supra*, p. 67-69, in part. Fn 5.

7 Thus, *verbatim*, V. Cerulli Irelli, "Beni pubblici", in *Dig. disc. pubb.*, vol. II, Turin, Utet, 1988, p. 273. See, also, A.M. Sandulli, "Beni pubblici", in *Enc. dir.*,

vol. V, Milan, Giuffrè, 1959, p. 277 *sq.*; S. Cassese, *I beni pubblici. Circolazione e tutela*, Milan, Giuffrè, 1969; V. Caputi Jambrenghi, "Beni pubblici (uso dei)", in *Dig. disc. pubb.*, Turin, Utet, vol. II, 1987, p. 294 *sq.*; V. Caputi Jambrenghi, "Beni pubblici", in *Enc. giur.*, vol. V, Rome, Treccani, 1988, *ad vocem*. For a qualification of public property in terms of duty, see V. Caputi Jambrenghi, "Beni pubblici e d'interesse pubblico", in L. Mazzarolli, G. Pericu, A. Romano, F.A. Roversi Monaco, F.G. Scoca (eds.), *Diritto amministrativo*, vol. II, Bologna, Monduzzi, 2005, p. 179 *sq.*; V. Caputi Jambrenghi, "Proprietà-dovere dei beni in titolarità pubblica", in *Annuario AIPDA 2003*, Milan, Giuffrè, 2004, p. 61. In the opinion of the Author, considering that legislative sources refer to "belonging" rather than "ownership", it can be believed that public ownership is more of a bundle of duties, far from the classical notion of ownership, which is normally linked to the concept of rights (first and foremost, the right to exclude others from enjoyement).

8 For an analysis of the animated debate at the time, see F. Caporale, "Acque pubbliche ed acque private tra Otto e Novecento", in M. Galtarossa, A. Genovese (eds.), *La città liquida/la città assetata: storia di un rapporto di lunga durata*, Rome, Palombi Editore, 2014, p. 254-272. There were three conflicting theses on this issue. In addition to the abovementioned "distinguishing system", there were the "privatists" who tended to apply article 543 of the Civil Code to minor waterways, and the "demanialists" who favored the prevalence of the Law on Public Works. See, also, A. Crosetti, "Il difficile percorso della nozione di acqua pubblica", *Dir. e proc. amm.*, no. 2, 2018, p. 453-458.

9 The major work on Italian water legislation between the XV and XIX centuries remains L. Moscati, *In materia di acque. Tra diritto comune e codificazione albertina*, Rome, Fondazione Sergio Mochi Onory per la storia del diritto italiano, 1993, which also emphasises the influence that Italian legislation had on national disciplines in Europe and even on other Continents (e.g. USA, India, Chile, etc.).

10 See, V. Cerulli Irelli, "Acque Pubbliche", in *Enc. giur.*, vol. I, Roma, Treccani, 1988, *ad vocem*; R. Jannotta, "Acque Pubbliche", in *Dig. disc. pubbl.*, vol. I, Turin, Utet, p. 51 *sq.*

11 In the literature, however, it has been highlighted how the reform was tautological. It has been argued that this formula simply shifts the problem of identification from physical characteristics to the identification of the characteristics of the notion of "public general interest". Moreover, it would merely confer, tautologically precisely, a public character to waters that are

suited for public use. See, U. Pototschnig, "Vecchi e nuovi strumenti nella disciplina pubblica delle acque", *Riv. trim. dir. pubb*., no. 4, 1969, p. 1016.

12 *Ibid.*

13 According to G. Pastori, "Tutela e gestione delle acque: verso un nuovo modello di amministrazione", in *Studi in onore di Feliciano Benvenuti*, vol. III, Modena, Mucchi Editore, 1996, p. 1287 *sq*., water was considered by the legal system on par with a "means of production".

14 In this sense, see, V. Cerulli Irelli, "Beni pubblici", *op. cit*., p. 254 *sq*. On the principle of inalienability, born as a reaction to monarch's prodigality in the 14th century, see A. Rousselet, *La règle de l'inaliénabilité du domaine de la couronne, Étude doctrinale de 1566 à la fin de l'ancien régime*, Paris, LGDJ, 1997.

15 The Galli Law was anticipated by the Law no. 319, 10 May 1976, "Rules for the protection of water from pollution", also known as the Merli Law; the Law no. 183, 18 May 1989, on the protection of soil; and Legislative Decree no. 275 of July 12, 1993, "Reorganization of the concession of public water".

16 See V. Cerulli Irelli, "Acque pubbliche", *op. cit*., p. 2, who argues that: "exceptional uses are not such, given the repercussions they entail on collectivity". On the inability of the concessionary instrument, by its nature based on a case-by-case evaluation, to guarantee an overall governance of the resource, the contribution of U. Pototschnig, "Vecchi e nuovi strumenti nella disciplina pubblica delle acque", *op. cit*., p. 1021-1022 and C. De Bellis, *Acque e Interessi territorali*, Bari, Cacucci, 1984, remain fundamental, in the wake of the reflections of F. Benvenuti, "Il demanio fluviale", now in *Scritti Giuridici*, vol. III, Milan, V&P, 2006, p. 2011 *sq*.

17 See E. Boscolo, *Le politiche idriche nella stagione della scarsità: la risorsa commune tra demanialità custodiale, pianificazioni e concessioni*, Milan, Giuffrè, 2012, p. 219. The generalised declaration of public property as per Royal Decree 1775/1933, functional only to the assignment of withdrawal-derivation titles, would have been guilty, through "an unconscious heterogenesis of the ends", of the dramatic impoverishment of the resource.

18 See, recently, E. Boscolo, *op. cit*., p. 277-290; A. Crosetti, *op. cit*., p. 478.

19 Constitutional Court, 19 July 1996, no. 259.

20 See F. Caporale, "Acque. Disciplina pubblicistica", in *Enc. trecc. (online)*, 2014; F. Cazzagon, "La demanialità idrica e la categoria residua delle acque private", *Giur. merito*, no. 7-8, 2008, p. 2046; S. Palazzolo, "Acque

pubbliche", in *Enc. Dir.*, agg. IV, Milan, Giuffrè, 2000, p. 37-39 where the "abnormal" effects of an acquisition of all waters to state property are shown: "this not only (for the consequences) on small springs, country wells, irrelevant brooks and streams or isolated and precarious ponds, tanks and so on, including waters mobilized in artificial lakes and canals, but for the fact that it does not seem conceivable to own water without its container and… perhaps in the clouds or in the sea"! The Author, however, does not deny a "virtual publicity…referring to all waters and to none in particular".

21 Italian Court of Cassation, Criminal Division, sec. III, 9 April 2012, no. 12998.

22 On this point, however, some concerns are expressed by B. Tonoletti, *op. cit.*, *passim*, which argues that the permanent validity of Consolidated law on Public Water, which is inspired by different logic compared to the subsequent laws, might create some systematic uncertainties on the subject.

23 *Verbatim*, U. Pototschnig, "Commento all'art. 1", in U. Pototschnig and E. Ferrari (eds.), *Commentario alle disposizioni in materia di risorse idriche (leggi 5 gennaio 1994, nn. 36 e 37)*, Padua, Cedam, 2000, p. 10.

24 See Constitutional Court, 19 July 1996, no. 219, as well as the subsequent sentence of the Constitutional Court, 27 December 1996, no. 419, on the issue of the absence of any provision for compensation to private entities, which is held not to be in conflict with article 24 of the Constitution (the right to take legal action), inasmuch as "in the regime of water publicity one is outside the scheme of expropriation, but falls within the hypothesis in which the law regulates in a general way dominical rights in relation to certain purposes in order to ensure the social function of property in relation to entire categories of goods".

25 On the importance, not only in a symbolic sense, of using the term "resource" instead of the term "good", see A. Di Majo, "Le risorse idriche nel vigente ordinamento", *Rass. giur. en. elettr.*, no. 1, 1996, p. 1 *sq.*

26 The lexical intuition is owed to E. Boscolo, *op. cit.*, p. 296, p. 328 *sq.*, for whom the expression may be valid as an interpretative criterion rather than as a positive normative datum.

27 See chapter C-6.2 of the law mentioned in the text: "Considerant que l'État, en tant que gardien des intérêts de la nation dans la ressource eau, se doit d'être investi des pouvoirs nécessaires pour en assurer la protection et

la gestion". See, also, M. Cantin Cuyn, "Recent developments to the law applicable to Water in Quebec", *Vermont law review*, vol. 34, 2010, p. 859 *sq.*

28 See P. Urbani, "Il recepimento della direttiva comunitaria sulle acque, (2000/60): i profili istituzionali di un nuovo governo delle acque", *Riv. giur. amb.*, no. 2, 2004, p. 209 *sq.*

29 See M. Renna, "I principî in materia di tutela dell'ambiente", RQDA, no. 1, 2012, p. 70. A perspective on the relation between public goods and environmental law is shown in V. Caputi Jambrenghi, "Tutela dell'ambiente e beni pubblici. (Provocazioni per uno studio sul dominio ambientale eminente)", in *Scritti in onore di Alberto Predieri*, vol. I, Milano, Giuffrè, 1996, p. 311 *sq.*

30 In the report "Our Common Future", widely known as the Brutland Report, for the first time the concept of "sustainable development" was defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs". On this general principle, see F. Fracchia, *Lo sviluppo sostenibile. La voce flebile dell'altro tra protezione dell'ambiente e tutela della specie umana*, Naples, Editoriale scientifica, 2010.

31 See Art. 144 co. 4, Legislative Decree 152/2006. On the innovations introduced at the conceptual level and in terms of the legal regime by the Code, see A. Pioggia, "Acqua e Ambiente", in G. Rossi (ed.), *Diritto dell'ambiente*, Turin, Giappichelli, 5th ed., 2021, p. 277-294.

32 *Ibid.*, 281. For a substantive reconstruction of the concept of public ownership of certain categories of assets, see A. Angiuli, "Diritto e processo nella tutela del paesaggio. Percorsi di una integrazione tra ordinamenti", in *Studi in Onore di Alberto Romano*, Naples, Editoriale scientifica, 2011, p. 1016-1020.

33 See G. Carapezza Figlia, "Tecniche e ideologie nella disciplina delle acque. Dagli 'usi di pubblico generale interesse' ai 'beni comuni'", in F. Macario, A. Addante, D. Costantino (eds.), *Studi in memoria di Michele Costantino*, vol. I, Naples, Edizioni scientifiche italiane, 2019, p. 194. See, also, N. Irti, "L'acqua tra beni comuni e concessioni (o la pluralità delle appartenenze)", *Dir. soc.*, no. 3, 2013, p. 381 *sq.* where the Author demonstrates a plurality of ownerships of the common asset because it belongs to the authority, but at the same time it also belongs to the individual *uti singuli*; C. Micciché, "L'acqua e il problema della sua (ri)qualificazione giuridica ai

tempi dei beni comuni", in E. Balboni, S. Vaccari (eds.), *Acqua. Bene e servizio pubblico*, Naples, Jovene, 2019, p. 119 *sq.*

34 About the topic of the commons, there is an extensive literature. To delve deeper into the topic in the Italian legal system, see, among others, U. Mattei, *Beni comuni. Un manifesto*, Rome/Bari, Laterza, 2011; M T. Bonetti,"I beni comuni nell'ordinamento giuridico italiano tra 'mito' e 'realtà'", *aedon.it*, 2013; V. Caputi Jambrenghi, "Bene comune (obblighi e utilità comuni) e tutela del patrimonio culturale", *Giustamm.it*, no. 9, 2015; M. Bombardelli (ed.), *La cura dei beni comuni come uscita dalla crisi*, Naples, Editoriale scientifica, 2016. Some foreign sources include E. Ostrom, *Governing the commons: The evolution of institutions for collective action*, Cambridge, Cambridge University Press, 1990; E. A. Clancy, "The tragedy of global commons", *Indiana J. Glob. Leg. Stud.*, vol. 5, iss. 2, art. 12, 1998, p. 601 *sq.* More recently, see J. Meersman, *Contribution à une théorie juridique des biens communs*, thèse, Université Côte d'Azur, 2022.

35 On the difficulties of legal science incorporating theories born in the field of economic science, see P. Otranto, *Internet nell'organizzazione amministrativa. Reti di libertà*, Bari, Cacucci, 2015, p. 262-272.

36 See G. Napolitano, "I beni pubblici e le tragedie dell'interesse commune", in *Annuario AIPDA 2006*, Milan, Giuffrè, 2007, p. 134-140. In the text, a reconstruction of the economic analysis of law applied mainly by American scholars to public property offers insights of considerable interest in the direction of relations between public and private property. As far as relevant in this context, a school that the author defines as "neo-communitarian" has shown that the traditional arguments in favor of public ownership have solid bases not only in normative but also in economic terms. In a more general sense, see V. Caputi Jambrenghi, "Beni pubblici tra uso e interesse finanziario", in A. Police (ed.), *I beni pubblici: tutela, valorizzazione e gestione*, Milan, Giuffrè, 2008, p. 459 *sq.* The Author argues that: "the publicity of public goods has become the most natural regulatory framework, as its salient feature lies not in ownership but in the collective enjoyment of the thing and its utilities, even non-economic ones. This results in regulatory and policing powers over collective uses vested in the public entity" (see p. 489).

37 G. Hardin, "The tragedy of the commons", *Science*, 162, no. 3856, 1968, p. 1244 *sq.*

38 See, among the others, M. Dugato, "Il regime dei beni pubblici: dall'appartenenza al fine", in A. Police (ed.), *I beni pubblici: tutela,*

valorizzazione e gestione, *op. cit.*, p. 18 *sq.*, who argues for the "impossibility of addressing the study of public goods by placing the classificatory theme at the center"; M. Renna, "Le prospettive di riforma delle norme del codice civile sui beni pubblici", in G. Colombini (ed.), *I beni pubblici tra regole di mercato e interessi generali. Profili di diritto interno e internazionale*, Naples, Jovene, 2017, p. 27 *sq.* ; A. Lucarelli, "Crisi della demanialità e funzione sociale dei beni pubblici nella prospettiva costituzionale. Verso i beni comuni", *DPERonline*, no. 1, 2016, p. 131 *sq.*

39 Valid reasons are put forward by supporters of both positions. For a reconstruction of the issue, see, extensively, N. Lugaresi, "Esiste un diritto fondamentale all'acqua?", in L. Carbone *et al.* (eds.) *Annuario di diritto dell'Energia - 2017*, *op. cit.*, p. 318-320, 325; and F. R. De Martino, "L'acqua come diritto fondamentale e la sua gestione pubblica", *Munus*, no. 1, 2017, p. 163 *sq.* For a configuration of a precise obligation incumbent on states towards their citizens through international sources, see D. Bonetto, "Property, sovereignity and exclusion in national and international water law", *Federalismi.it*, no. 2, 2020, p. 6.

40 See D. Zolo, "Il diritto all'acqua come diritto sociale e come diritto collettivo. Il caso palestinese", *Dir. Pubbl.*, no. 1, 2005, p. 133-134.

41 See G. Caia, "I servizi pubblici", in L. Mazzarolli *et al.* (eds.), *Diritto amministrativo*, *op. cit.*, p. 923 *sq.*, in part. 954-956. This definition has been chosen for the sake of convenience in exposition. In fact, the notion of public service, for which there is no definition in positive law, is one of the most debated concepts in the Italian legal system. Among others, see M. Cammelli, "I servizi pubblici nell'amministrazione locale", *Le Regioni*, no. 1, 1992, p. 7; V. Caputi Jambrenghi, "I servizi pubblici: Dal monopolio alla concorrenza", in M. R. Spasiano (ed.), *Il contributo del diritto amministrativo in 150 anni di Unità d'Italia*, Naples, Editoriale scientifica, 2012, p. 123 *sq.* On the local public services, see M. Dugato, "I servizi pubblici locali", in S. Cassese (ed.), *Trattato di diritto amministrativo. Parte speciale*, vol. III, Milan, Giuffrè, 2nd ed., 2003, p. 2581 *sq.*; G. Piperata, *Tipicità e autonomia nei servizi pubblici locali*, Milan, Giuffré, 2005; A. Police, "Spigolature sulla nozione di servizio pubblico locale", *Dir. amm.*, no. 1, 2007, p. 79 *sq.*; A. Romano Tassone, "I servizi pubblici locali: aspetti problematici", *Dir. e proc. amm.*, no. 5, 2013, p. 855 *sq.*

42 On the IWS, see M. A. Sandulli, "Il servizio idrico integrato", *Federalismi.it*, no. 4, 2011.

43 See, A. Lucarelli, "Il governo pubblico dell'acqua tra l'eterodossa nozione di interesse economico generale ed il regime delle competenze Stato-Regioni", *Giur. cost.*, no. 2, 2012, p. 867 *sq.* In order to reject the overextended dimension of competition, the Author uses the arguments of social cohesion as outlined in Article 14 of the TFEU and the needs of users as addressed in Protocol 26 on service of general interest; see, also, A. Lucarelli and L. Longhi, "La gestione del servizio idrico e la determinazione delle tariffe tra riparto delle competenze legislative e incertezze normative", *Giur. Cost.*, no. 3, 2015, p. 911 *sq.* In the sense of overcoming the anthropocentric perspective, see M. Pennasilico, "L'uso sostenibile delle risorse idriche: ripensare l'acqua come 'bene commune'", *Persona e Mercato*, no. 2, 2023, p. 198 *sq.*

44 See, among the others, C. Miccichè, "L'acqua e il problema della sua (ri)qualificazione giuridica ai tempi dei beni comuni", *op. cit.*, p. 137-138 who emphasizes the principle of horizontal subsidiarity codified in Article 118 paragraph 4 of the Constitution, even before it was provided for by the new Consolidated law on local public services; S. Staiano, "Note sul diritto fondamentale all'acqua. Proprietà del bene, gestione del servizio, ideologie della privatizzazione", *Federalismi.it*, no. 5, 2011, p. 1 *et. sq.*, in part. 18, notes that the only trend that emerges unequivocally is towards the irreversible publicization of water, with its inclusion in the public domain. Therefore, referring to "water privatization", in the strict sense, with regards to the resource, can be considered improper; F. Caporale, "Tendenze, controtendenze e ipostatizzazioni nel governo e nella gestione dei servizi idrici", in *Munus*, no. 1, 2013, p. 1 *sq.*, in part. p. 24-31, highlights the risks of maladministration by public parties, especially in the case of confusion between management and control functions (a situation often observed in practice before the establishment of the independent regulator); G. Napolitano, "Acqua e cibo tra diritti e sistemi amministrativi", in *Gior. dir. amm.*, no. 3, 2015, p. 302-303, underscores the circumstance that, in the absence of prudent political guidance, even public companies may engage in opportunistic behaviors. In fact, the author speaks of a debate pervaded by "bucolic romanticism"; G. Caia, "I modelli di gestione del servizio idrico integrato", in L. Carbone *et. al.* (eds.), *Annuario di diritto dell'Energia - 2017*, *op. cit.*, p. 166, points out how in-house companies, following the enactment of the Consolidated law on Public Owned Entities Company (see, *infra*, no. 53), maintain a public law profile only on the passive side due to the controls they are subjected to. However, when they enter the legal traffic, they are effectively capital companies.

45 In Italian, “gestioni in economia”.

46 In Italian, “aziende speciali”.

47 CJUE, 18 November 1999, case C-107/98. Later, the characteristics of in-house companies have been specified by European case law. See, among others, CJUE, 11 January 2005, *Stadt Halle*, C-26/03; CJUE, 11 May 2006, *Carbotermo* C-340/04; CJUE, 13 October 2005, *Parking Brixen Gmbh*, C-458/03.

48 The public law academic literature on in-house companies is vast. Without any claim of exhaustiveness, including some critical perspectives, see G. Greco, “L’influence du droit communautaire sur le droit administrative”, *Riv. dir. pubb. com.*, no. 3-4, 2007, p. 849 *sq.*; M. Comba, S Treumer. (eds.), *The In-House Providing in European Law*, Copenhagen, DJØF Pub., 2010; F. L. Hausmann, G. Queisner, “In-House contracts and inter-municipal cooperation - Exceptions from the European Union Procurement Law should be applied with caution”, in *European procurement & public private partnership law*, vol. 8, iss. 3, 2013, p. 231 *sq.*; D. U. Galetta, G. Carulli, “Gestione dei servizi pubblici locali e *in house providing*: novità, auspici e scenari futuri in una prospettiva di de-frammentazione del sistema”, *Riv. it. dir. pubbl. com.*, no. 1, 2016, p. 371 *sq.*; G. Caia, “Le società ‘in house’: persone giuridiche private sottoposte a peculiare vigilanza e tutela amministrativa”, *Giur. comm.*, no. 3, 2020, p. 457 *sq.*; M. Karpenschif, C. Roux (eds.), *L’exception in house, 20 ans après l’arrêt Teckal - Actes du colloque EDPL/EDIEC du 12 février 2020*, Lyon, JCP A, no. 28, 2020, vol. études 2197 to 2208; L. Richer, “Transparence et opération in house”, AJDA, no. 2, 2020, p. 118 *sq.* For a more general discussion of public companies, see A. Angiuli, “Le società in mano pubblica come organizzazione”, in A. Contieri, F. Cafagno, M. Immordino (eds.), *L’interesse pubblico tra politica e amministrazione*, Naples, Editoriale scientifica, 2010, p. 157 *sq.*

49 Directive of the European Parliament and of the Council 26 February 2014, no. 23.

50 *Verbatim*, V. Cerulli Irelli, “Servizi pubblici locali: un settore a disciplina generale di fonte europea”, *Giur. Cost.*, no. 4, 2012, p. 2910.

51 For an examination of this principle regarding its influences on the IWS, see V. Parisio, “Service of general economic interest, integrated water service ‘in house’ management in light of directive 2014/23/EU: a general overview”, *Munus*, no. 3, 2018, p. 1135 *sq.* See, also, A. Verhoeven, “Privatisazion and EC law: Is the European Commission

neutral with respect to public versus private ownership of companies"?, *Int. Comp. L.Q.*, 1996, vol. 45, iss. 4, p. 861 *sq.*; J. D. Dreyfus, "Externalisation et liberté d'organisation du service", AJDA, no. 28, 2009, p. 1529 *sq.*; M. Cafagno, "Vincoli europei e modelli di gestione dei servizi pubblici locali a rilevanza economica. Coordinate generali", *Munus*, no. 3, 2016, p. 565 *sq.* In Italian case law, the principle of equal ordination of management models is appropriately emphasised in, among others, Council of State, Sez. V, 8 April 2019, no. 2275.

52 Absolutely central, even more than a decade later, is Constitutional Court ruling no. 325/2010, which considered the notions of "SGEI" and "local public services of economic importance" to be homologous and included the IWS in the latter. The relationship between SGEI and services of economic importance, also because of their different names, similar but not identical, has been quite controversial. On this point, see D. Sorace, "I servizi pubblici economici nell'ordinamento nazionale ed europeo, alla fine del primo decennio del XXI secolo", *Dir. amm.*, no. 1, 2010, p. 1 *sq.* Anyway, the contrast can be said to have been resolved with the approval of the new Consolidated law since it refers to "services of general economic interest provided at a local level" (see Art. 1, para. 1).

53 See, G. A. Primerano, "Gli oneri di motivazione analitica nel testo unico sulle società a partecipazione pubblica", *Il diritto dell'economia*, no. 3, 2018, 3, *passim*, in part. 772, who frames the intervention in a path of "progressive rationalisation and reduction of public expenditure", from the perspective of "a progressive downsizing of direct public intervention in the market". See, also, M. Allena, F. Goisis, "The 2016 Italian Consolidated Law on Public Entities Owned Companies: towards a more consistent private law approach", *The Italian law journal*, no. 2, 2017, p. 533 *sq.* This was similar to the (never inacted) Consolidated Law on Public Services of General Economic Interest. See, in this regard, F. Fracchia, "Pubblico e privato nella gestione dei servizi pubblici locali: tra esternalizzazione e municipalizzazione", *Federalismi*, no. 14, 2016, p. 1 *sq.*

54 For an understanding of how pervasive judicial control over the motivational framework can be, see Council of State, sec. III, 12 March 2021, sent. no. 2102 as well as on the IWS, Tar Lombardia, Milan, sec. III, 3 October 2016, sent. no. 1781.

55 CJEU Order, 6 February 2020, C-89/19, C-90/19, C-91/19, to which the question had been referred for a preliminary ruling by the Council of State, sec. V, Orders, 7 January 2019, no. 138 and 14 January 2019, nos. 293 and 296.

56 Constitutional Court, 20 May 2020, sent. no. 100.

57 However, it should be highlighted that there is a different provision in the new public procurement code (see art. 7, Legislative Decree 31 March 2023, no. 36, entitled Principle of Administrative Self-Organization), which appears to align with more neutral positions. However, for local public services, the special regulation contained in the new Consolidated Law applies.

58 In addition, case law has sometimes safeguarded the special status of the IWS. See Council of State, Sec. I, 7 May 2019, opinion no. 1389, which resolved a contrast between EU law and national administrative law in the sense that the first did not allow private capitals to enter into in-house companies as long as a national legislation had not prescribed it.

59 Law no. 103/1903, known with the name of the Ministry of the Interior of that epoch which for the first time established the direct assumption of public services by municipalities.

60 See, *supra*, no. 52.

61 On how the principle of competition as applied to modern administrative law is potentially anti-democratic and anti-liberal, see T. Perroud, "Essai sur les caractères néolibéraux du droit administratif contemporain", in *Culture société territoires: Mélanges en l'honneur du professeur Serge Regourd*, *Lextenso*, Paris, Institut universitaire Varenne, coll. "Colloques et Essais", 2019.

62 See Art. 33 para. 3 of Legislative Decree 201/2022, which refers to the sectorial disciplines set forth in Art. 147 para. 2 bis (lett. a and b) and para. 2 ter.

63 Art. 17 of the mentioned Consolidated Law.

64 See F. Fracchia, P. Pantalone, "The governance and independent regulation of the integrated water service in Italy: Commons, ideology and future generations", *Federalismi.it*, no. 2, 2018.

65 Council of State, sec. VI, 26 may 2017, no. 2481; with a comment by S. Vaccari, "La regolazione tariffaria del servizio idrico integrato tra ideologie e vincoli normative", *Munus*, no. 3, 2018, p. 1262 *sq*. Herein, the reconstruction of the contentious, highly complex especially from a technical standpoint. The author provides a demonstration of the paradoxical effects of differentiating between equity and debt capital. In fact, without differentiation, economic agents would use equity capital for

other activities and debt capital, which inherently more expensive, for IWS. Therefore, this choice would transfer the higher cost onto the users, who would bear an increase in tariffs. In critical terms with respect to the ruling and the failure to respect the referendum's outcome, see M. Della Morte, "Il servizio idrico integrato al consiglio di stato: modulazione o svilimento dell'esito referendario", *Quaderni cost.*, no. 2, 2017, p. 639 *sq.* who argues about: "minimization of the political, symbolic and social significance of the referendum"; S. Marotta, "Dalla 'adeguatezza della remunerazione del capitale investito' al 'full cost recovery': Il settore dell'acqua diventa un mercato regolato", *Munus*, no. 3, 2017, p. 751 *sq.*

66 See, among the others, T. Prosser, "Theorising utility regulation", *Modern l. review*, vol. 62, no. 2, 1999, p. 196 *sq.*

67 This issue is, in fact, much debated in constitutionalist doctrine. For a reconstruction, see S. ARU, "La gestione del servizio idrico tra Europa, Stato, regioni e volontà popolare", *Federalismi.it*, no. 6, 2019, p. 51-53. On the inadequacy of the referendum instrument with respect to the goal pursued, see A. Travi, "La disciplina tariffaria nel servizio idrico integrato", *Riv. reg. merc.*, no. 1, 2014, p. 135-138.

68 The total investment needs of the sector have even been estimated at €65 billions until 2043. See "ARERA Consultation Document", no. 339/2013/R/IDR of 25 July 13.

69 At present, see procedures 2004/2034; 2009/2034; 2014/2059; 2017/2181.

70 Not coincidentially, the Decree of the Prime Minister of 20 July 2012, which conferred the regulatory functions to ARERA, does not refer at all to the issue of competition or to functions pre-determining the establishment of an open market for water services.

ABSTRACTS

Français

Les régimes de propriété publique et privée se sont toujours opposés sur le statut de propriété de l'eau. Dans le système juridique italien, ce contraste a été particulièrement marqué tant du côté des biens que du côté des services d'approvisionnement. En effet, bien qu'il s'agisse de deux systèmes de régulation autonomes qui doivent être analysés séparément, la régulation du bien finit par irradier de tensions la régulation du service, à tel point que leur autonomie complète peut être remise en question.

English
Public and private ownership regimes have always clashed over the proprietary status of water. In the Italian juridical system, this contrast has been particularly harsh on both the asset side and the supply service side. Although these are two autonomous regulatory systems that need to be analyzed separately, the regulation of the good causes tensions for the regulation of the service, so much so that the two systems' autonomy is in doubt.

INDEX

Mots-clés
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Keywords
water, Italian public law, administrative law, public property, commons, local supply service, in-house providing

AUTHOR

Francesco Paolo Grossi
PhD student in administrative law at the University of Bari Aldo Moro, department of Law. Co-supervision with Jean Moulin Lyon 3 University, Public Law Team.
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