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False friends and comparative law: the case of public goods/beni pubblici.

Relatore

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Abstract

This paper has two basic objectives: 1. to provide an overview of difficulties encountered in translating technical and specific legal texts from one natural language to another one and describe the nature of those difficulties; 2. to provide an interesting and specific case of linguistic incongruency of the dichotomy beni pubblici/ public goods. At this purpose, the exposition is divided in two parts:

a) Introduction to comparative law as subject, the pitfall of translating from one language to another one taking account of linguistic and legal problems related to legal context, study the case of false friends and its linguistic phenomenon;
b) Comparative analysis of false friends *beni pubblici / public goods.* Apparently, they could mean the same thing despite belonging to two different legal systems (Civil Law and Common Law). My purpose is to point out similarities or differences between governments which have the power to allocate public goods or so called environmental goods and administrate them in order to have the majority to enjoy those properties.

Introduction

Translation is a complex operation especially when it comes to specialised areas of study, such as comparative law. Lawmakers and jurists who work in a comparative way, they need linguistic knowledge so that they can cooperate with other lawmakers from juridical systems' countries. Therefore, translation plays a significant role. However, translation between two different natural languages is complex, but in legal field, as any other kind of specialised context, it can be harder. The reason is that translation supposedly means to translate to one natural language to another one. In this context translation is intralinguistic because of the specific language. In order to correctly translate it is necessary to have knowledge about legal and linguistic aspect.

In my paper I will deep in the aspect of linguistic problems related to translation in legal field. Specifically, I would analyse the false friends' phenomenon. False friends are an interesting phenomenon quite common when it comes to translation. Sometimes, there are some expressions which are similar, but they do not have same meaning. It is the case of public goods and beni pubblici. By comparing what are their meaning in their relevant juridical system, I will highlight similarities and differences between how the concept of public is expressed in Civil Law and Common Law systems. Since public goods is strictly connected to the concept of public law/sector, I will indeed explain the role of public law in those two systems. According to civil law system, public law represents a significant aspect of law. Therefore, it is regulated by legal articles and laws which explain and describe item by item. On the other hand, public law in common law does

not have as much importance as it does in civil law system. The idea of a public sector is almost non-existent. Hence, the goods are regulating by specific regimes which regulate the title of possession and the use of those goods. The aim is point out what meaning has public goods in common law., what are rules and laws which regulate them, and compare this to the civil law system. The structure which organizes goods are definitely different from one to another.

1. Comparative law and language

The discipline of law involves various areas of study and research. One of these is certainly comparative law. Comparative law took on a scientific dignity around the nineth century as a result of the institutionalization and internationalization of the subject. As a matter of fact, the first ever event was founded by Laboulaye[1]. He founded the *Societé de législation comparée* in 1869 and always in Paris in 1900 the first International Congress of Comparative Law. Comparative law arose as a result of the need and curiosity to know different and foreign legal models. The historical moment in which comparative law asserts itself as a discipline is precisely that following the birth and consolidation of nations. The consolidation of a central power and its organizations and its institutions soon became fertile ground for the comparatists. Thus, comparative law is a discipline whose object of study are legal systems. By legal system is meant: "an operational set of institutions, procedures, and legal rules in force in a given territory or for a particular group of people." (un complesso operativo di istituzioni, procedure e norme giuridiche vigenti in un dato territorio o per un gruppo particolare di persone.)[2]" Moreover, it should be added that comparative law is not only concerned about the study of legal models belonging to other nations. It is their interest to study the similarities and differences between these elements from a foreign country to their own country. Therefore, this is the reason why it is incorrect supporting the theory according with, doing

[1] Édouard René Lefèbvre de Laboulaye was a French lawmaker, and he was chosen as professor of comparative law at the Collège de France in 1849.
[2] N. Brutti, *Diritto privato comparato*,15, 2018.

comparative research implies that someone is only analysing foreign elements of a foreign jurisdiction.

order to be comparative research, it requires a specific degree of scientific validation.

"[..]The work written by a Pole for Poles is not a comparatist work merely because it accidentally fell into the hands of an Italian-in the original, or in translation. It may be the case, however, that research conducted by an Italian on Polish law has some comparatist value, because the Italian, before using Italian terms to express Polish reality, will have to ascertain that one corresponds to the other. [...] forced the author to measure himself with categories or classifications unusual to him."[3]

("[..]l'opera scritta da un polacco per i polacchi non è opera comparatistica per il solo fatto di essere caduta casualmente nelle mani di un italiano- in originale, o in traduzione_. Può però avvenire che la ricerca condotta da un italiano sul diritto polacco abbia una qualche valenza comparatistica, perché l'italiano, prima di adoperare i termini italiani per esprimere la realtà polacca, dovrà accertare che gli uni corrispondano all'altra. [..] abbia costretto l'autore a misurarsi con categorie o classificazioni a lui insolite."[4])

If anyone should be interested simply in knowing a foreign law, it regards other topics, but it cannot be known as comparative law. In this way, comparison is obviously also seen as the primary research method of this discipline. As it is, after all, also for many other disciplines. There are many subjects that have a subcategory that uses comparison to bring innovation to the subject itself. In this case, comparison would support the renewal and improvement of law in specific contexts. Subjects such as anthropology, linguistic, economic and several others have their own and independent method of work characterised by the use of comparison. Why would it not be the same for law? The use of this method by lawmakers and comparatists is a tool to enhance their field of research.

"Those who use comparative methods to study law have yet to realize that comparison must play the same role for them as it does in these other comparative sciences. Comparison follows from a knowledge of the phenomena to be compared. You can only compare what you are acquainted with. What the other comparative sciences realize, and

[3] R. Sacco, *Introduzione al diritto comparato*, Utet, 17, 1992.
[4]Mia proposta di traduzione.

what they can teach us, it that knowledge of these phenomena develops by comparison. Only through comparison do we become aware of certain features of whatever we are studying."[5]

Sure enough, comparatists and lawmakers who want to do this type of research sometime need to cooperate with other disciplines.

"The long isolation of legal studies, motivated by the need to draw on purity of method, has been broken: at the very least, it is no longer considered a cause for scandal that a jurist considers collaboration with scholars in the other social sciences indispensable."

("Il lungo isolamento degli studi giuridici, motivato con la necessità di attingere la purezza del metodo, è stato rotto: almeno, non è più considerato motivo di scandalo il fatto che un giurista ritenga indispensabile la collaborazione con gli studiosi delle altre scienze sociali.[6]")

The cooperation with other disciplines is necessary in order to complete the work of comparison. One of the areas that we come up against during comparison is definitely the language and its many uses, especially when it comes to translation. Whenever comparatists have to know, understand and work out solutions for common social problems, language is an element that both support and deceive the comparatist.

Nowadays, the work of a comparatist includes the obligatory knowledge of languages. "Wherever the individual comparatist may see the uses of his discipline, he needs to deal with language."[7] The language in legal field has been played an interesting role. There are, actually, several factors that have influenced both law and language. First of all, to think of the phenomenon of globalization as the element that, more than any other, and certainly not the only one, has accelerated the spread of a vehicular language, which today we can identify in the English language. This process of great importance has not only involved issues of a cultural nature or issues related to intercultural and transcultural communication. Law has also been

[5] R. Sacco, *The American Journal of Comparative Law*, Vol. 39, No. 2, .5, (Winter, 1991).
[6] S. Rodotà, *Il diritto privato nella società moderna*, il Mulino,81, 1971.
[7] O. Brand, *Translation Issues in Language and Law,* Palgrave Macmillan, 19, 2009.

involved, especially in the introduction of an international perspective, of which comparative law is obviously an expression. This new intercultural perspective and the need to be open to new legal approaches provided by different legal models, which cannot fail to collide with the use of language.

"Nowadays many of the texts in use at a local level are the result of a process of translation or adaptation of more general documents formulated at an international level. This is the consequence of the fact that in the context of cooperation and collaboration in international trade, law too is fast assuming an international perspective rather than remaining a purely domestic concern."[8]

This international perspective and the growth of legal texts written in foreign languages is an increasingly important phenomenon that leads to the need for people who are not only specialized in the legal field, but who possess the linguistic competence to produce new texts with an adherence to the legal language. It should be remembered that legal language is considered a specialized language and that every natural language has one. Sometimes, even countries that have the same language, such as Germany, Switzerland and Austria, the legal language has discrepancies. A further example of the cooperation between law and language is certainly that of the European union. One might think that the lawmaker would translate every disposition or rule enacted into the different languages of the countries to which they belong in order to do the job. However, the matter is not so simple. In legal translation there are translation difficulties related to both law and language. "[…] especially when one needs to interpret such issues as human rights, international agreements and contracts, freedom of speech, freedom of trade, protection of intellectual property, all of which have very strong socio-political and cultural constraints."[9] Indeed, the cultural aspect influences the language of a country because these two aspects are strictly linked and keep

[8]M. Gotti, Translation *Issues in Language and Law,* Palgrave Macmillan,56, 2009.
[9] Ibidem.

evolving each other over years. “To translate into English technical words used by lawyers in France, in Spain, or in Germany is in many cases an impossible task, and conversely there are no words in the languages of the continent to express the most elementary notions of English law.”[10] Legal translation is therefore linked to multiple factors that make it complex. These factors, be they legal or linguistic, involve the comparison of legal models that fundamentally do not correspond in their structure and organization, just as mentioned above between civil law and common law.

[10]M. Gotti, Translation *Issues in Language and Law,* Palgrave Macmillan,57, 2009.

1.1 Concrete problems in legal translation

Before entering in the details and problems that affect the law and its language while translating, we should ask ourselves, which are the reasons that make comparatists and lawmaker need to translate and even more is everything translatable in legal field?[11] The first question is somehow easy to answer to. As I said earlier, the globalisation spread all over the world has increased the necessity to uniform the language in order to make the communication quick and comprehensible.

> "La nostra è l'epoca dei mercati globali, ma è anche l'epoca delle carte universali dei diritti, accettate da un numero crescente di paesi: prevalgono sulle leggi degli stati; ed è l'epoca dei tribunali internazionali, che difendono i diritti umani al di là di ogni confine nazionale."[12]

There is an evident transformation even about the work field of law and many elements are questioned. Afterall, law is expression of the needs of a group of people. Therefore, in this historical moment of cultural e political and social transformation where everyone struggles to push down boarders, law has no other way that adequate itself and acknowledge own to the internationalisation. Unfortunately, even if lawmakers work hard to make that happen, there are some obstacles. As I said above, the language is the main obstacle to make this happen. The world is regulated by different legal jurisdictions and each of them has a natural language or more than one, and their legal jurisdiction has of course their technical language. The idea of being able to translate everything just translating one legal term from a SL[13] to another one TL[14], is unrealistic.

[11] R. Sacco, *Introduzione al diritto comparato,* 50, Utet, 1992.
[12] F. Galgano, *Le insidie del linguaggio giuridico*, Il Mulino, 167, 2010.
[13] Source language
[14] Target language

Comparative law implies the use of different texts of a legal nature, but potentially formulated in different natural languages, consequently making it possible to speak of comparison. However, it must be remembered that the problems that concern translation are not only those related to translation itself from a linguistic point of view. That is, all those linguistic phenomena that translation cannot avoid due to the specificity and technicality of legal language. As a matter of fact, all those linguistic phenomena that translation is unable to avoid are because of the specificity and technicality of legal language. “The specificity of legal translation derives, first of all, from the relationship of "dependence" that exists between language and law. This means that the language, for law, plays a fundamental function as a "vehicle," a means of transmission.”[15]

Another fundamental and clear aspect of translation is certainly also linked to the interpretation of law. According to what Sacco[16] argues in his work[17], he divides the issues related to translation into two phases: those arising from law and those arising from language. From a legal point of view, translation is complex because it must necessarily take into consideration that law is a discipline, which, although strictly regulated by prescriptions and norms, is subject to the interpretation of those who perform the function of lawmakers. In fact, “the translation of a legal text undergoes two interpretive operations, that of the original language and that of the translated language.” (“la traduzione di un testo giuridico sconta due operazioni interpretative, quella della lingua originale e quella della lingua tradotta.”[18])

[15] D. Longinotti, Problemi specifici della traduzione giuridica: traduzione di sentenze dal tedesco e dall’inglese, 3, 2009.
[16] He was professor emeritus at the University of Turin, Faculty of Law. He is arguably one of the country's best known legal scholars and one of Europe's most famous comparative lawyers.
[17] R. Sacco, Introduzione al diritto comparato, Utet, 30-32, 1992.
[18] N. Brutti, *Diritto privato comparato*, Giappichelli, 53, 20118.

What does this entail? When we speak of legal interpretation, we are already talking about a form of translation that is not inter-linguistic but intra-linguistic[19]. Therefore, it means that already an initial analysis is required when translating from a natural language to the specialized language of a legal nature in the first place. In addition, this type of process is assumed to be necessary both for a normative text in a legal system that provides for the in two or more languages, as well as in the case of the translation, for example for comparative purposes, of a legal text in natural languages other than that in which it was originally drafted.[20] Languages other than that of its original drafting. Precisely in this context, it seems appropriate to point out that translation, therefore, is not a precise and mechanical operation. It is an operation that involves many factors that determine with effort the drafting of a normative text, of a law, and so on. It is appropriate here to mention:

"In the legal sphere, in fact, translation has with interpretation a more complex link that [...] can be characterized as a 'double bind,' a double link. Double bind because there is no translation without interpretation of the legal text to be translated, and there is no translated legal text that in turn does not (or at least cannot) itself become the object of legal interpretation."[21]

("In ambito giuridico, infatti, la traduzione ha con l'interpretazione un legame più complesso che […] può essere caratterizzato come un 'double bind', un doppio legame. Doppio legame perché non si dà traduzione senza interpretazione del testo giuridico da tradurre e non si dà testo giuridico tradotto che a propria volta non diventi (o almeno non possa diventare) esso stesso oggetto di interpretazione giuridica."[22])

For the sake of completeness, it is therefore necessary to specify that interpretation is in some way itself the outcome of legal language. Let's repeat, since law is a human artifice, the nature of the language that defines

[19] T. Mazzarese, *Interpretazione e traduzione del diritto nello spazio giuridico globale*, Diritto e questioni pubbliche,90, 2008.
[20] T. Mazzarese, *Interpretazione e traduzione del diritto nello spazio giuridico globale*, Diritto e questioni pubbliche,90, 2008.
[21] Mia proposta di traduzione.
[22] Ibidem.

it is articulated, composite and differs in time and space in the context taken into consideration and with reference to the legal family to which it belongs. Always bearing in mind the role that law plays in the translation process, there is a need to emphasize the difficulty of reconciling language with the plurality of legal systems that exist today. In some cases, we even speak of hybrid systems that involve the use of more than one natural language in the same legal system. There are even states in which several legal systems coexist, each of which possesses its own, essentially autonomous legal terminology. Just think, for example, of the case of Canada, where, as is well known, two different legal systems, the common law and the civil law practiced in the province of Quebec, and two official languages, English and French.[23]

"In so-called hybrid systems or mixed jurisdictions, different legal traditions coexist, each referring to its own language, but at the same time the law becomes the object of translation [...] think of realities where common law, customary law and Muslim law overlap (e.g., Malaysia) [...]."[24]

("Nei c.d. sistemi ibridi o *mixed jurisdictions* coesistono diverse tradizioni giuridiche ognuna delle quali fa riferimento a una propria lingua, ma contemporaneamente il diritto diviene oggetto di traduzione […] si pensi a realtà dove si sovrappongono *common law*, diritto consuetudinario e diritto musulmano (es. Malaysia) [..]. [25])

Earlier, I mentioned English as a vehicular language that has asserted itself with vigour, especially in recent decades. Some scholars would argue the double value of the use of English or it would be better spoken about it as abuse. [26]

[23] D. Longinotti, Problemi specifici della traduzione giuridica: traduzione di sentenze dal tedesco e dall'inglese, 4, 2007.
[24] Mia proposta di matrimonio.
[25] N. Brutti, *Diritto privato comparato*, Giappichelli, 50, 2018.
[26]The extreme use of some English expressions also known as "servilismo linguistico."

1.2 Pitfalls of legal translation

The comparison purchased by comparative law implies and involves at the same time at least two different legal dimensions. Problems that come to light while translating represents an obstacle for comparatist.

"Language becomes the comparative lawyer's most important instrument in choosing, describing and analysing the objects of his comparison. Language, however, is not only a tool in the hand of the comparatist. A particular language can also have a coining influence on the legal terms it expresses."[27]

As a matter of fact, the main issue is evidently not the knowledge of second language or the knowledge about a different legal system, but it is the pitfalls produced by the use of specific languages used in legal fields. Very often, the concrete problem about translation are the ideas, concepts and the use of words and the consequently translation. "Legal terminology is the most visible and striking linguistic feature of legal language as a technical language, and it is also one of the major sources of difficulty in translating legal documents."[28] There are many areas in which legal terminology is an effective linguistic problem in legal translation: legal conceptual issues and the question of equivalence and non-equivalence of legal concepts in translation; legal terms that are bound to law and legal institutions; legal language as a technical language in terms of ordinary vs. legal meanings, and legal synonyms; and terminological difficulties arising from linguistic uncertainty such as vagueness and ambiguity. Moreover, one of the most significant aspects of legal language, which profoundly differentiates it from other special languages, is the so-called performative, prescriptive and

[27] O. Brand, *Translation Issues in Language and Law*, Palgrave Macmillan, 19, 2009.
[28] D. Cao, Translating Law, Multilingual Matters LTD, 53, 2007.

binding nature of its utterances. In no other field, in fact, language determines the establishment of duties and obligations, the non-observance of which entails, in most cases, criminal implications. A fundamental peculiarity of legal language, therefore, of which the translator must be aware of and must take into account for translation purposes, is its ability to produce "extralinguistic effects".[29] Nonetheless, the main obstacle of legal translation legal lies in the divergence, and in some cases the absence, of the concepts legal concepts between the source language and the target language, that is, between the legal system legal system of which the source text is an expression and the legal system in which the target text is to the target text is to be produced. Consequently, the main reason for the difficulty of legal translation lies in the untranslatability not of terms, but of concepts, particularly those concepts that are peculiar to some systems legal systems but not of others.[30] Faced with this situation, the legal translator must make important and responsible choices, including either to "invent," i.e., to create a special neologism in his own language, or to adopt the existing conventions The translator of legal texts, in fact, is constantly confronted with the activity of legal comparison: during the translation process he finds himself having to verify the exact meaning of a concept that is to be translated from the source language, in order finally to be able to look for, in the target language, a concept with a comparable meaning. Legal translation, moreover, is a very broad field, encompassing within its interior various genres and text types. Before beginning the translation of a text, the translator must document himself or herself in order to learn what are the conventional rules of drafting that particular text type in the target culture. Textual analysis is all the more

[29] D. Longinotti, Problemi specifici della traduzione giuridica: traduzione di sentenze dal tedesco e dall'inglese, 8, 2009.
[30] D. Longinotti, Problemi specifici della traduzione giuridica: traduzione di sentenze dal tedesco e dall'inglese, 10, 2009.

important in view of the fact of the fact that, to date, there is no text typology that is comprehensive and free of contradictions.

The first ambiguity to analyse is the one regarding the concepts. They are often related to the legal jurisdiction they belong to. For instance,

> "The concept of 'theft' in English law and its equivalent *Diebstahl* in German law. There are considerable differences in the respective laws as to what constitutes 'theft', […] in English law, 'theft' is the 'dishonest appropriation of property belonging to someone else with the intention of keeping it permanently' under the English Theft Act 1968. Under the German law, a person is guilty of *Diebstahl* (theft) if he or she takes away movable property belonging to another with the intention of appropriating it unlawfully."[31]

The problem encountered here does not concern the terminology, but the concept, the idea behind the word. Over years, there were born some tools that helped lawmakers, comparatist and translators of these fields to develop multilingual glossaries such as UNTERM[32] and other CAT tools[33] in order to avoid this problem. Unfortunately, even if these kinds of tools do, they are a significant support for translation in specific fields, they do not recognise these pitfalls in juridical translation. They can help to speed the process of translation, or they can help you with the storage of a thousand of specific words, but they do not recognise different concept. Also, because these words hid a bond with their legal system. It is not only about the meaning of word from SL to TL. Legal translation does not amount to a transcoding operation, that is, a translation of a sequence of words from one language to another. As with other types of translation, the unit basis of legal translation

[31] D. Dao, *Translating Law*, Multilingual Matters LTD,54, 2007.

[32] UNTERM is a multilingual terminology database maintained jointly by the Secretariat and certain specialized agencies of the United Nations system, including the International Maritime Organization, the United Nations Educational, Scientific and Cultural Organization, the World Health Organization and the World Meteorological Organization. It provides terminology and nomenclature in subjects relevant to the work of the United Nations system. Information is provided in the six UN official languages, and there are also entries in German and Portuguese.

[33] CAT tools: Computer-aided translation (CAT), also referred to as machine-assisted translation (MAT) or machine-aided human translation (MAHT), is the use of software to assist a human translator in the translation process. The translation is created by a human, and certain aspects of the process are facilitated by software.

is the text, not the word.[34] According to Sacco, the mainly problem about translation regards the relationship between word and concept is not the same in all the legal languages. An important case is offered by a synecdoche specifically of French language.

"If a Frenchman says 'tourner ses épaules' to mean 'to turn one's back,' an Italian can translate 'to turn one's back,' because the Italian language admits this specific synecdoche. But one can do the same for all synecdoche admitted by the French language?"[35]

("se un francese dice 'tourner ses épaules' per dire 'voltare la propria persona', un italiano può tradurre 'voltare le spalle', perché la lingua italiana ammette questa specifica sineddoche. Ma si può fare lo stesso per tutte le sineddochi ammesse dalla lingua francese?"[36])

This interesting example described Sacco is useful to understand the linguistic operation and work behind the translation of a simple sentence. The task of a translator is to be canny and precise and study in order to find equivalent expressions in their language. still, another phenomenon analysed by Sacco is the example 'risparmio[37]'. It would be wrong, affirms Sacco, translate this word into 'capitalisation' even if the belonging to the two categories is the same. Furthermore, the metaphors are explained by Galgano who affirms that even if the translation is quite complex especially in legal field, they should be not eliminated.

"[...] that they do not yet roar (first metaphor), but that theirs has become (second metaphor)'the mouse's roar. Observe then that a translator of mine had saved the first metaphor, but not the second: he had translated 'the mouse's squeak.' ' Lexical purism, which deprived the phrase of all meaning.[38]"

("[…] che esse non ancora ruggiscono (prima metafora), ma che il loro è diventato (seconda metafora)'il ruggito del topo. Constati poi che un mio traduttore aveva salvato la prima metafora, ma non la seconda: aveva tradotto 'lo squittio del topo'. Purismo lessicale, che privava la frase d'ogni significato."[39])

[34] D. Longinotti, Problemi specifici della traduzione giuridica: traduzione di sentenze dal tedesco e dall'inglese, 9, 2009.
[35] Mia proposta di traduzione.
[36] R. Sacco*, Introduzione al diritto comparato*, 34-35, Utet, 1992.
[37] Ibidem.
[38] Mia proposta di traduzione.
[39] F. Galgano, *Le insidie del linguaggio giuridico*, Il Mulino, 22 2010.

A second ambiguity we can analyse regards the ordinary meaning and the legal meaning. Earlier, I spoke about the fact that the legal language is already somehow a translation, because the legal language is not the natural language used to express some facts related to law, but it is special. "For instance, in translating English contracts or documents related to contract law, legal terms frequently encountered include 'offer', 'consideration', 'performance', 'remedy', and 'assignment'. These words in English have an ordinary meaning used in non-legal settings. They are also legal technical terms that carry special legal significance in contract law.[40] This particular case exists because the English language in law I strictly bounded to the common law and its structure. For instance, 'equity'[41], is another word that has both ordinary and legal meaning. The confusion here exists within one language.

When it comes to compare and so translate some legal documents the translation has to take account not only the language used in the document, but also the legal systems which they are related to. The two major legal models, at least in Wester continent are common law and Civil law. The distinction between these two models do not affect only the structure and the institutions which they are made of. The distinction is evident even in the use of the language. Each legal document is the result of its peculiar jurisdiction of belonging and so its language and its structure. "For instance, contracts and agreements in Common Law jurisdictions, especially the US, tend to be long, and this is partly because such documents often include provisions covering possible contingency issues litigated in the courts."[42] Translation of legal documents brings to the attention of the comparatist

[40] D.Dao, *Translating Law*, Multilingual Matters LTD, 67, 2007.
[41] D.Dao, *Translating Law*, Multilingual Matters LTD ,69, 2007.
[42] Ivi, 98.

some elements significant. Even if we take account some legal documents that have same work language, the task of comparison and translation it would not be that simple. For instance, the legal jurisdiction of Australia and UK should be quite similar and easy to translate. They have same language; they belong to the same jurisdictional family. Yet, the comparatist will need some peculiar knowledge about the dispositions regards Australian law. Even if the jurisdiction can be the same, a translating problem could be derived from law too.

Another interesting episode described by Dao; it is the one in which the effective structure of legal document is totally different from one culture to another one. "An American company and a Belgian company wanted to engage in a share exchange transaction. The American party drafted a contract of 10,000 words. The Belgians refused to continue with the transaction because they were shocked by the length of the draft. In contrast, the Belgian draft had 1400 words, and was 'found by the American party to include all the substance that was really needed'.[43] This interesting episode is indicative of how different can be the idea of something so simple. Yet, the belonging to one legal family or the language they all have their weight on formulate and elaborate legal contracts or document, but it is surprisingly taking account of these differences, for some the most negative consequence. Actually, the writer published more examples like the previous quoted. Such as a study in which the main focus was questioning how Germans can draft contract with just few words compared to the American ones. "They have found that:

- The US contracts are very long.

[43] D.Dao, *Translating Law*, Multilingual Matters LTD,98, 2007.

- There is a great deal of explanation, qualification and limitation in the language.
- There is a great deal of legalese.
- The legalese is similar from agreement to agreement, but not exactly the same.
- Contracts of a particular type of transaction are similar in general coverage, but the specific language varies considerably from contract to contract.

In contrast, the German contracts are characterised as follows:

- The German agreements are much lighter, about one-half or two-thirds the size of otherwise comparable US agreements.
- There is much less explanation, qualification and limitation in the language.
- There is much less legalese.
- The legalese is almost identical from contract to contract.
- Many provisions are quite similar from contract to contract.[44]

The point of this paragraph was to enlighten the differences between different legal models, different legal languages, but also enlighten the fact that law is quite complex and several aspects contribute to make this subject very challenging. Even if by the use of a common work language as English, even the use of this language is worldwide, still there are so many difficulties and challenges which comparatist need to cope with. The translation is an operation which requires several competences, but it comprehend all these problematic aspects from law.

[44] D.Dao, Translating Law, Multilingual Matters LTD, 96-97, 2007.

1.3 False Friends in comparative law

A characteristic aspect of the English language is the presence of numerous terms of French origin. this presence is significant so much so that it leads to the presence of false friends. Despite this, the presence of false friends also affects the translation of an Italian text. The origin of this linguistic phenomenon can be explained starting with the history of English law. Beginning with the Norman conquest, those who administered justice in England were francophone and French remained the language of the courts until 1731. The exclusive use of English was then introduced. Examples that can provide confirmation of this historical legacy are numerous:

- 'tort' which in English means *crime* and not *torto*.
- 'justice' in the sense of *judge*
- 'evidence' in the sense of *prova*
- 'property' as good and not *proprietà*[45].

The last example will be the focus of all my future analysis.

False friends it is an expression used to state a particular linguistic phenomenon. Schlesinger defined it as "acoustic agreement among legal systems.[46]" It is a word that is often confused with a word in another language with a different meaning because the two words look or sound similar[47]. It is a quite common linguistic phenomenon

[45] M. Viezzi, Introduzione alle problematiche della traduzione giuridica con particolare riferimento alla traduzione di testi in lingua inglese, 33, 1994.
[46] M. Viezzi, Introduzione alle problematiche della traduzione giuridica con particolare riferimento alla traduzione di testi in lingua inglese, 19, 1994.
[47] Definition from Cambridge Dictionary.

and it is considered tricky even for those who study languages. However, this type of linguistic phenomenon can also be observed in the legal field. False friends can be the product of different nature, let's see in the legal field which are the most common:

- Legal terms of a natural language that it does not have a correspondent in other languages;
- Legal terms of a natural language that have a correspondent even in the legal field of other languages, but with a different meaning;
- Legal terms of a natural language that have a correspondent in other languages, but it is uncertain the value of the meaning they have in legal field.

The first case of false friends, it is the simplest one even if it can appear the most challenging because of lack of correspondence. When one speaks about translation in comparative law, surely it implies the use of a source language and target language. Currently, the false friends indicated here is caused by the lack from the target language of a legal notion, disposition or rule. The lack of a correspondent rule or institutions produces a linguistic discrepancy.[48] An interesting solution to the lack of an equivalent in the target language of a term, is to produce new words, so-called neologisms. An alternative is to borrow a term from another language. It is the case of the phenomenon mentioned above, nowadays quite widespread, increased by the spread of English that produces a significant number of English words, sometimes ending up in an abuse of English itself. However, returning to the first case, if the translator were to create a new term, a neologism would be born. For instance,

[48] N. Brutti, *Diritto privato comparato*,54, Giappichelli, 2018.

"Towards the end of the 19th century and beginning of the 20th century, many Chinese legal terms were borrowed from the Japanese, which had earlier been translated from Continental Europe. Legal terms that were introduced to China from the West during this period include such major concepts as renquan (human rights), zhuquan (sovereignty), minfa (civil law) and xianfa (constitution), among many others."[49]

Another example of a loan can be inferred instead "many terms in modern secular legal Hebrew have been coined directly from foreign law by way of lexical or semantic loan, for instance, the English legal terms, 'precedent', 'good faith', 'restraint of trade' […]. [50]

The second type is represented by the particular case in which one legal element does exist in the target language and then in the legal environment of that country, but it has different meaning. This implies, that comparatist must have knowledge about the foreign legal model and be able to recognise the false friends in order to avoid any kind of misunderstandings. The explanation of this type of false friends is well described by Sacco[51] which is the most popular example as well. Sacco takes as example two words: the English word 'contract' and the French one 'contrat'. According to Sacco explaining a linguistic problem in an official international document produce by UNIDROIT[52]: "Article 2 of the draft dealt with "contract" and contrat, which are not the same thing. A deed transferring property or creating a mortgage and an agreement for the management of an estate by a nominee are "contrats" in France but are not

[49] D. Cao, *Translating Law*, Multilingual Matters LTD, 55-56, 2007.
[50] D. Cao, *Translating Law*, Multilingual Matters LTD, 56, 2007.
[51] Rodolfo Sacco is professor of Law, University of Turin, Italy.
[52] Unidroit (formally, the International Institute for the Unification of Private Law; French: *Institut international pour unification du droit privé*) is an intergovernmental organization whose objective is to harmonize international private law across countries through uniform rules, international conventions, and the production of model laws, sets of principles, guides and guidelines and it was established in 1926.

"contracts" in England or the United States where they are regarded as "conveyances" or "trusts."[53]

In the end, the third case regards those words that have a correspondence in both legal languages, but they do not have the same legal meaning. An interesting example could be: the word 'stupro' and 'rape' are usually translated as correspondence of both Italian-English language, in legal field it is uncertain if they define the same type of crime.[54] Other examples could be: the term *trust*, but also terms like *common law* and *equity,* other terms which refer to the English juridical system, such as *barrister* or *solicitor*. However, untranslatable means, of course, that for a term there are no exact correspondences in the other juridical system nor is there any possibility of finding *close natural equivalents*. It does not mean, however, that the redefinition of existing words or even the use of neologisms cannot be used.[55] The classification I have just given is an example of what may represent one of the many problems regarding comparative legal translation. in this case, I am examining false friends as the main element of challenge present in comparative translation, but it must be specified, it is certainly not the only one. However, many other interesting examples of false friends can be reported as support of this analysis. Sacco again reports:

"*Possession* and *possesso* are French and Italian expressions used by the French and Italians, respectively, to indicate de facto power over a thing with animus domini. Yet the same French and Italian expressions are used by the Swiss to mean de facto power over

[53] R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, The American Journal of Comparative Law, Vol. 39, No. 1. (Winter, 1991),13.
[54] N. Brutti, *Diritto privato comparato*, Giappichelli, 54, 2018.
[55] M. Viezzi, Introduzione alle problematiche della traduzione giuridica con particolare riferimento alla traduzione di testi in lingua inglese, 37, 1994.

a thing with animum domini. The German word *Besitz* is used by the Germans and Swiss to mean defacto power over the thing generally"[56]

Truth to be told, there are many examples I could take that can show and prove this phenomenon. The origin of this linguistic phenomenon is quite ancient. Truth to be told, the natural language of a group of people and the legal language, therefore a specialised language, do not have the same context. As a consequence, the words used in a specialised fields often change their meaning. In addition to, over the centuries the legal field has been experienced several foreign influences. This uninterrupted contamination from other legal systems languages has brought consequences even in the specialised language used in other countries. For instance,

"The reception of rules and institutions first from France and later from Germany has forced Italians to develop legal categories that are supposed to be the same as those developed in these countries. Thus, Italian legal vocabulary has twice bent to the need to do so. The word "nullita" once meant "invalidity" because of the parallel with the French "nullità." More recently it has been used to mean that a transaction is ab initio void because of the parallel with the German "Nichtigkeit."[57]

False friends are a typical characteristic of a language. However, in legal field this could be challenging not only for comparatist and translators who have the actually task to cope with them, but they have a valuable implication through their meaning. The wrongful translation of these words in legal field could be harmful and could have serious consequences. Although this problem of translation would seem to be the concern of specialized figures such as translators, the work of a translator and a comparatist are quite distinct. although the comparatist is accustomed to having the support of other disciplines and collaborating with the support of different sources, the

[56] R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, The American Journal of Comparative Law,11, Vol. 39, No. 1. (Winter, 1991).
[57] Ibidem.

competence in this regard lies with the comparatist rather than the translator. And it is once again Sacco who talks about it stating that:

"Translation, then, requires the work of the lawmaker. To translate, one must establish the meaning of the phrase to be translated and find the right phrase to express this meaning in the language of the translation. Both the first and the second of these operations are the work of the lawmaker, who is the only person competent to decide whether two ideas taken from different legal systems correspond to each other and whether a difference in rules is tantamount to a difference in concepts. The translator, however, must take account of other problems as well which cannot be reduced to finding correlations between words."[58]

Besides, in this field so specialised the translation is seen as a tool to achieve a major task that is the formulation and elaboration of dispositions and rules.

"In law, as in other fields (economic-business, IT, etc.), it is very important to be able to translate, but one should not fall into the misunderstanding of overlapping the two, albeit closely intertwined, planes of translation and comparison. Translation is an important goal, to the attainment of which comparison consubstantially concurs."[59]

("Nel diritto, come in altri settori (economico-commerciale, informatico, etc.) è molto importante poter tradurre, ma non si deve cadere nell'equivoco di sovrapporre i due piani, pur strettamente intrecciati, di traduzione e comparazione. La traduzione è un importante obiettivo, al raggiungimento del quale concorre in modo consustanziale la comparazione."[60])

Despite all the difficulties bonded to this phenomenon known as false friends, there are of course some kinds of tools that support the work of comparatists supplied from translators. Such instance, bilingual glossaries or specialised translations or even software that store thousands of data and supply the specialised translation. Though, even if it is a remarkable support and help for comparatists, sometimes these tools do not have the ability to identify false friends and for this reason they result to not be as useful as one could think.

"Legal translation can be a challenge, especially when it involves the English language. in this case, the translator must mediate between two cultures, between two legal

[58] R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, The American Journal of Comparative Law, Vol. 39, No. 1. (Winter, 1991), 13-14.
[59] Mia proposta di traduzione.
[60] N. Brutti, *Diritto privato comparato*, Giappichelli, 2018.

traditions. […] The translator will know how to realize the peculiarity of juridical translation and thus know how to act as a comparatist."[61]

[61] M. Viezzi, Introduzione alle problematiche della traduzione giuridica con particolare riferimento alla traduzione di testi in lingua inglese, 48, 1994.

1.4 The case of public goods/ beni pubblici

One of the examples that I am going to explore in this analysis is the ambiguity in legal matters of the expression's public goods and beni pubblici. In the previous paragraph I have extensively described both the ambiguities produced by the language that can be of different nature, and this linguistic phenomenon called *false friends*. There are many examples that I can quote: Rechtsgeschäft[62] and its 'equivalent' expression of negozio giuridico, the popular *false friends* equity/equità, jeopardy[63] and estoppel[64], contract and contratto already mentioned above, trust[65] and fedecommeso.[66] All these examples, and many others are the perfect examples of linguistic ambiguity which heaps over into the legal sphere when translation from one language to another is involved, certainly but also from one legal system to another, in this case the comparison is between common law and civil law.

I will deepen this specific case: public goods/ beni pubblici. The linguistic ambiguity that arises from the dichotomy of this pair of nouns, in the legal field, is quite interesting. Not only because they cannot be considered equivalent as terms, i.e., they do not represent the same object in the two legal systems of reference. In common law public goods has a legal dimension and economic and political implications quite different from the

[62] Rechtsgeschäft: A legal transaction or transactional act (Latin: *negotium juridicum*), under German jurisprudence, is the main type of lawful legal act. The concept is important in civil law jurisdictions based on or influenced by the German law of obligations.
[63] Jeopardy: is a procedural defence that prevents an accused person from being tried again on the same (or similar) charges following an acquittal and in rare cases prosecutorial and/or judge misconduct in the same jurisdiction.
[64] Estoppel is a judicial device in common law legal systems whereby a court may prevent or "estop" a person from making assertions or from going back on his or her word; the person being sanctioned is "estopped".
[65] Trust: A trust is a legal relationship in which the holder of a right gives it to another person or entity who must keep and use it solely for another's benefit.
[66] N. Brutti*, Diritto privato comparato*, Giappichelli, 2018.

definition of public goods in civil law. Moreover, the very interesting fact is even they have considered as false friends, the very first ambiguity is the lexicon. As I said above, the equivalent of beni in English language is property. The expression public goods are indeed currently used, but the concept that is referred to by the Italian expression public goods is much broader than the English equivalent of public goods. the expression property, is then definitely the one that most advocates to the conceptual value of good.

2. Basic concepts in Civil law

I would like to begin my comparative analysis regarding the phenomenon of false friends as the case of public goods in common law and civil law, giving a definition of good. Or at least try to circumscribe its meaning at the legal level in Italian law of course. Before analysing the adjective public, I would like to focus on the concept of *goods*. In Italian legal language *goods* have the following definition: "qualunque cosa che possa formare oggetto di diritti."[67]. Goods can be divided into various categories, according to their nature and content[68]. The main issue regards of whom they belong to and who has use of them. The strictly topics connected to goods and their classification is therefore property and ownership.

Before talking about the classification of goods and what are public goods in detail, I think I will introduce some definitions. First of all, the rules on property stem from Art. 42 of the Constitution:

"La proprieta' è pubblica o privata. I beni economici appartengono allo Stato, ad enti o a privati. La proprieta' privata è riconosciuta e garantita dalla legge, che ne determina i modi di acquisto, di godimento e i limiti allo scopo di assicurarne la funzione sociale e di renderla accessibile a tutti."[69]

In addition to, the article refers to the economic property as belonging to the State, to bodies or private person. The expression bodies can mean either public or private bodies, whether de facto or de jure.[70] The main distinction about property is between private and public. A fundamental element is that the private property is provided by Constitution and this is significant because it means "it affords it a protection that could only be removed by

[67] Articolo 810 del Codice Civile
[68] G. Alpa, V. Zeno-Zencovich, *Italian Private Law,* Routledge-Cavendish, 107, 2007.
[69] Gazzetta Ufficiale.
[70] G. Alpa, V. Zeno-Zencovich, *Italian Private Law,* Routledge-Cavendish, 108, 2007.

laws to change the Constitution."[71] On the contrary the public property is regulated by the Civil Code with specific articles. Nevertheless, there is not a very well-defined classification of public or private property. In fact, the civil code gives a distinction between categories of property that belong to private persons or to the State or public bodies. Public property is further divided into *domain* and *patrimony*[72]. The latter one is divided again in disposable and non-disposable. For sake of completeness, the word *demanio* in italian "derives via French 'domaine' from the Latin 'dominium' meaning property owned by the State. Formally public property (public property by title) is thus either domain, disposable patrimony, or non-disposable patrimony."[73] The public activity for which state-owned and non-disposable property is intended can be pursued through distinct ways: exclusive (or direct) use by the Administration itself; general use, by any public or private entity (one imagines transit on public roads or on property forming part of the maritime domain such as the lido, beach, ports and road steads); and, in addition, through special use by public or private entities to whom a certain use of the property is reserved. Moreover, law has affirmed that state property may be the subject of rights in favour of third parties only in the manner and within the limits established by the rules of public law, and not according to the rules of private law. [74]

It is necessary to say that there are linguistic inconsistencies in this subject: in this chapter and in the following ones, what is meant by public property does not coincide with the italian concept of *diritto di proprietà*, in

[71] G. Alpa, V. Zeno-Zencovich*, Italian Private Law,* Routledge-Cavendish, 108, 2007.
[72] Ibidem.
[73] Ibidem.

[74] A. Pellicanò*, Le concessioni demaniali marittime in Italia alla luce della Direttiva Bolkenstein e il principio di concorrenza,* Il diritto amministrativo, 2022.

English this concept is expressed by the term *ownership*. In the same way the italian concept of public goods and the further classification of public goods in English is defined by public property. As a matter of fact, "Va sottolineato che l'espressione proprietà pubblica se riferita a tali contesti non ha lo stesso significato che ha assunto nella nostra tradizione giuridica"[75]. As I said above, my research regards public property. Public property is defined in the Third Book of Civil Code (CC)[76] and it deals with properties.[77]

[75] A. Lalli, *I beni pubblici. Imperativi del mercato e diritti della collettività,* Jovene Editore, 47, 2015.
[76] G. Iudica, P. Zatti, *Language and Rules of Italian Law*, Cedam, 49, 2020.
[77] Property in this case means in Italian beni. For this reason, instead of talking about public goods (literal translation) I will use the expression public property which is the English equivalent.

2.1 Concept of things

I have given some definitions about key concept regarding this research. However, I think it would be clearer if I would point out another concept which embrace both concepts of properties and public goods. We have seen that the word *properties* are the actual translation of "beni" in the Civil Law. However, there is another concept extremely significant: *things*. This word "refers to the material objects that surround us; in that sense, snobbery, health, fame is not considered as *things*. Hence, under 810 CC- and then art. 816-820 CC – clear reference is made to material reality."[78] Whatever is empirically verifiable and quantifiable, whatever pertains the world of matter.[79] Even gases and energy are things that belong to the category of things defined in art. 810 CC.

As we have seen property is a thing that may be subject matter of rights. By the power of this definition, the air and the water from the sea are thing but they are not property. They are things belonging to everybody. Consequently, fossil fuels are property since "their renewability takes several centuries, whereas solar energy is not property since it endlessly renewable source of energy and hence it is not under the risk of relative scarcity."[80] "There are physical things to which rights can attach, such as earth, a house, trees and fruit: these are goods also but air by the same token is not, nor would we normally describe such non-physical phenomena as the energy put into work, products of the intellect, […]. [81]

[78] G. Iudica, P. Zatti, *Language and rules of italian private law: an introduction*, Cedam, 37, 2003.
[79] Ivi, 37.
[80] Ivi, 38.
[81] G. Alpa, V. Zeno-Zenovich, *Italian Private Law*,106, Routledge, 2007.

Still, a fish in the sea does not belong to anybody but once it has been caught by a fisherman, they acquire the right of ownership by way of possession or occupancy. Things are also differentiated by being replaceable or irreplaceable things. The distinction is made by "the perception of the thing itself the parties involved have or have not."[82] Furthermore, a thing can be non-consumable or consumable. "Things that, for traditional or religious reasons, are worth much more than their mere economic value- such as holy object, sepulchres, and family memorabilia – are exempted from the general rules governing appropriation, possession and use of property and are disciplined by other special rules, distinct ad separate."[83]

However, we have seen that "rights can attach not only to things in a physical sense, but can be activities such as the work done by a paid employee, products of the intellect, [...]."[84] Thus, things are not synonymous of goods, but they have some mutual aspects. Nevertheless, this subject is regulated by private law, at least in the Civil Law.

[82] G. Iudica, P. Zatti, *Language and rules of italian private law: an introduction*, Cedam, 39, 2003.
[83] Ivi, 39-40.
[84] G. Alpa, V. Zeno- Zenovich*, Italian Private Law*, 107, Routledge, 2007.

2.2 Public property over time

The history of public property and private property as a dichotomy is quite recent. If we wanted to trace correctly and minutely the whole evolution of the law that deals with and regulates public property and the goods attributed to it, we should certainly start from the civilization of the Romans. In order to be more incisive, I will briefly reformulate the main stages that have led to the current legal organization. Property or that of public property is constructed as a kind of private property. The basic idea was almost the same. The difference was in the different regime of the goods that the doctrine reformulated keeping in mind the destination of these goods, therefore on the use and functionality of these goods. Destined therefore to the community and the realization of public functions. The state and other public forms become the main subjects that protect the collective interests in relation to the use of certain goods. In this historical period therefore the rights of the single ones on the public property were nearly insignificant because absorbed from the state.

"Una proprietà pubblica, contenutisticamente diversa dalla privata, ha senso e si distingue dalla proprietà privata […] solo se i beni che ne costituiscono l'oggetto sono inalienabili. […]. La proprietà pubblica, nella concezione tardo ottocentesca, è istituto che si colloca nell'ambito del più generale regime della proprietà privata che resta il modello di riferimento; ha pertanto carattere di proprietà individuale, con imputazione naturale agli enti territoriali …"[85]
("A public property, content-wise different from private property, makes sense and is distinguished from private property [...] only if the property that constitutes its object is inalienable. [...]. Public property, in the late nineteenth-century conception, is an institution that is part of the more general regime of private property, which remains the model of reference; it therefore has the character of individual property, with natural imputation to territorial entities").[86]

[85] A. Lalli, *I beni pubblici. Imperativi del mercato e diritti della collettività*, Jovene Editore, 44-45,2015
[86] Mia proposta id traduzione.

This is because if in private property the legal person who owns the good is a private individual, in public property the legal person who owns the property and is responsible for protecting and administering it is identified in the state and public institutions. The legal person is identified in the abstract figure of the state / public bodies. This since the development of the civil code in the late nineteenth century. The distinction is relevant to understand that the state and all other public legal persons play a role extremely necessary to the "concretizzazione e di tutela degli interessi collettivi in relazione a determinate categorie di beni."[87]

In this historical period, private individuals had essentially very few rights over public property for collective use. The justification for this type of regime of public property lies in the fundamental definition of state goods as inalienable.

"[…] le proprietà pubbliche sono funzionalizzate necessariamente all'interesse pubblico di cui è esclusivo titolare l'ente pubblico; i beni oggetto di proprietà pubblica non possono essere oggetto di negozi di trasferimento di diritto comune a favore dei privati […] infine si ammette che i beni oggetto di proprietà pubblica possono essere protetti con gli strumenti del diritto amministrativo e non solo con gli ordinari mezzi di tutela giurisdizionale a garanzia della proprietà privata. […].[88]

("[...] public property is necessarily functionalized to the public interest of which the public entity is the exclusive owner; property subject to public ownership cannot be the subject of common-law transfer negotiations in favour of private parties [...] finally, it is admitted that property subject to public ownership can be protected by the instruments of administrative law and not only by the ordinary means of judicial protection to guarantee private property. [...].)[89]

However, the most interesting aspect of my research is how public property is regulated in Italian jurisprudence and how in the same historical period, in common law countries, this relationship between public property and public bodies takes on a completely different path. In common law countries at the

[87] Ivi, 43.
[88] Ivi, 45.
[89] Mia proposta di tradzuione.

end of the nineteenth century, legal doctrine affirms the existence of things (goods) on which several interests of the community coexist. In fact, in the United States and England, two types of public property are identified, alongside private property, of course. I will discuss the evolution of the relationship between public goods and public property in common law countries in the next chapter in order to complete my comparative research.

Since the Civil Code of 1942, the fact that a good can be an object of right by a public bodies or state remains linked to the tasks that the public administration has historically reserved for itself. Despite the fact that a good is attributed the characteristic of state ownership the relationship that regulates public administration and certain goods is the fact that the latter can only belong to the territorial authorities. Ultimately, it is the state and other public bodies that are the exclusive owners of the management and protection of these properties. However, they are to take in consideration also those properties whose ownership is not attributed to public institutions or even to private subjects, the guarantee of the public function is imputable always to the state or to other agencies like the provinces in virtue of the public interest[90] and finally those assets belonging to the unavailable patrimony of which the ownership is of the state, which cannot be removed to their destination[91]. With the elaboration of the code of '42 a significant element of novelty was introduced: a new concept of governing public property in relation to public bodies. If the condition of use of the property was the fundamental criterion for the classification of properties, now some properties are defined as such to their different origin. The legal protection is guaranteed by the state. [92] This is possible because these properties have a

[90] Articolo 325.
[91] A. Lalli, *I beni pubblici. Imperativi del mercato e diritti della collettività*, Jovene Editore, 49-50,2015.
[92] Ivi, 59.

public function thank to their nature: “I beni pubblici che possono anche appartenere ad altri soggetti, perfino privati, ma possono conservare un regime di demanialità quanto alla destinazione alla funzione pubblica cui obiettivamente servono, per la loro natura intrinseca come strade e ferrovie.”[93] With these brief outlines of how public property are in some way defined following the elaboration of the civil code of 1942, already then emerged all the complexity of a society worried to identify the belonging and the protection of public interests referred to their goods which cannot be realised only create one category. But, the regulation about the public property is not that clear as we would like. As a matter of fact, there are controversial debates regarding either the classification of goods either their way to be regulated.

[93] Ibidem.

2.3 Public property and its classification

"Public property is that belonging to a public authority (public property by title) or those distinguished from private property by some characteristic feature (public property by nature)."[94] According to what was said in the previous paragraph, public property is divided in three main categories, as we can see as figure 1:

Figure 1[95]

The domain cannot: "[…]be sold (Art 823 civil code), nor can third parties acquire rights over them (Art 1145(2) civil code). The property rights enjoyed by the State and public bodies over property belonging to others are subject to the same restriction, if it is connected to domain or if they are for the attainment of public objectives (Art 825 civil code)."[96] The agency of the

[94] G. Alpa, V. Zeno-Zencovich, *Italian Private Law,* Routledge, 107, 2007
[95] G. Castelli, Università di Teramo.
[96] Ivi, 109.

domain is the institution that is responsible for identifying the goods that belong to this domain. As the image shows, in the Italian legal system there is an article in the civil code that provide a factual list of these goods. First, I would quote the article 822 of the civil code:

"Appartengono allo Stato e fanno parte del demanio pubblico il lido del mare, la spiaggia, le rade e i porti; i fiumi, i torrenti, i laghi e le altre acque definite pubbliche dalle leggi in materia; le opere destinate alla difesa nazionale.

Fanno parimenti parte del demanio pubblico, se appartengono allo Stato, le strade, le autostrade e le strade ferrate; gli aerodromi; gli acquedotti; gli immobili riconosciuti d'interesse storico, archeologico e artistico a norma delle leggi in materia; le raccolte dei musei, delle pinacoteche, degli archivi, delle biblioteche; e infine gli altri beni che sono dalla legge assoggettati al regime proprio del demanio pubblico."[97]

On the other hand, the rules regarding the patrimony are less strict. As showed, the patrimony is divided in non-disposable and disposable patrimony, and so are the goods. While the non-disposable goods are those that cannot be alienated, that is subtracted from the patrimony of the State. All the goods that belong in this category must absolutely have two requisites: they are destined to a public service and that they are effectively used for that public service. Moreover, these goods can be taken away. (Eminent domain)[98]. I would therefore like to mention also article 826 which lists and describes the non-disposable goods:

"I beni appartenenti allo Stato, alle provincie e ai comuni, i quali non siano della specie di quelli indicati dagli articoli precedenti, costituiscono il patrimonio dello Stato o, rispettivamente, delle provincie e dei comuni.

Fanno parte del patrimonio indisponibile dello Stato le foreste che a norma delle leggi in materia costituiscono il demanio forestale dello Stato, le miniere, le cave e torbiere quando la disponibilità ne è sottratta al proprietario del fondo, le cose d'interesse storico, archeologico, paletnologico, paleontologico e artistico, da chiunque e in qualunque modo ritrovate nel sottosuolo, i beni costituenti la dotazione della Corona, le caserme, gli armamenti, gli aeromobili militari e le navi da guerra.

Fanno parte del patrimonio indisponibile dello Stato o, rispettivamente, delle

[97] Articolo 822 c.c. Gazzetta Ufficiale.
[98] Nel linguaggio giuridico italiano il termine è: espropriabile.

provincie e dei comuni, secondo la loro appartenenza, gli edifici destinati a sede di uffici pubblici, con i loro arredi, e gli altri beni destinati a un pubblico servizio."[99]

Furthermore, "non-disposable property cannot be put to any other than its allotted use, except by the processes laid down by law (Art 828 civil code). It is therefore bound only by an allotted use."[100] Last but not least, the disposable goods do not have some tie of destination but they are distinguished because the possessor is a public institution. "Disposable patrimony is property, such as office furniture, that the State and other public bodies acquire as private parties. Specific laws and, where there are none, the principles of private property apply."[101] The article 856 regarding disposable goods:

> "Nelle materie indicate dagli articoli 850 e seguenti è salva la competenza dell'autorità giudiziaria ordinaria per la tutela dei diritti degli interessati. L'autorità giudiziaria non può tuttavia con le sue decisioni provocare una revisione del piano di riordinamento, ma può procedere alla conversione e liquidazione in danaro dei diritti da essa accertati.
>
> Il credito relativo è privilegiato a norma delle leggi speciali."[102]

Thus, we can conclude that the further differentiation of public property into subcategories is due to the use of public property. There is therefore a distinction of public property also in the use of these: whether there is an interest in collective use or not. As a matter of fact, by condition of use I mean the power that the state and its public bodies possess in the management and administration of public property.

"There is property which the State and other public bodies have the power to use and dispose of (property which the State and other public bodies use for public purposes such as military property and the railways) and other

[99] Articolo 826 c.c. Gazzetta Ufficiale.
[100] G. Alpa, V. Zeno-Zencovich*, Italian Private Law,* Routledge, 110, 2007.
[101] Ibidem.
[102] Articolo 856 c.c. Gazzetta Ufficiale.

property which belongs to the State or public bodies for the use and enjoyment of the wider public or part of it. This latter category includes the seashore and national heritage, but also mines leased to private interests."[103] The second condition is characterized by the fact that originally these goods were reserved for the state and other public bodies, but serve a collective function or private commercial use, such instance the mining example. [104] It is appropriate to specify that this distinction has no consequences from the legislative point of view.[105] Or rather the citizens who are those who use the good, who are therefore the natural beneficiaries of collective use are not distinguished legislatively.

The traditional classification of public property according to the tradition of Italian jurisprudence has been criticized. The literature shows us how often the categorization of these goods can be uncertain and lacunose especially from the legislative point of view. Lalli explains perfectly of how misleading it is, for example, that the things of archaeology found in the subsoil are subject to the constraint of destination and therefore belonging to the non-disposable patrimony. But they untransferable as well as the state property. Then continues Lalli there are goods as the roads that are transferable goods. this makes that these goods can be object of right in favour of thirds.[106] It seems therefore to lack a real and clear distinction between the two categories. Since the '60s reforms have been attempted that could reduce the faultiness of the subject. For example, trying to modify the classification criteria based on different conceptual orders. The theoretical

[103] G. Alpa, V. Zeno-Zencovich*, Italian Private Law,* Routledge, 111, 2007.
[104] Ibidem.
[105] G. Sanna, *L'azione popolare quale strumento municipale-mediterraneo per la tutela del bene pubblico ambiente*, in *Atti del* IV[ème] *Congrès International*: *Environnement et Identité en Méditerranée*, Corte 2004 (Corte 2005).
[106] A. Lalli, *I beni pubblici. Imperativi del mercato e diritti della collettività*, Jovene Editore, 62 ,2015.

proposals cited by Lalli are those of Sandulli, Cassese and Giannini[107] who attempt to reform the subdivision between the two categories. This theme remains open to theoretical reformulations by scholars and lawmakers.

A further distinction to take into consideration, in addition to those already mentioned, is that between moveable or immoveable property. The criterion for the distinction is quite simple. Moveable property is defined as: "if it can be physically shifted it is moveable, otherwise not."[108]This type of property has evolved over the years, has acquired a value also from the economic perspective and with it has developed a significant legal value especially in terms of the consequences that these have in the legal field. Originally in a predominantly simple economy, characterized by agriculture, real estate had a much higher value than movable property. This is because real estate was, for example, the land and the buildings constructed on it. movable things, do not have the same value because they can be moved or destroyed. The fact that real estate usually then have a significant value in economic terms. For these reasons, from the legal point of view comes the need to regulate this type of property through a regime that regulates its circulation.

"Transfer of immoveable property has to be supported by a written document and registered and extended limitation periods apply. Moveable property, on the other hand, can circulate with much more fluidity and less formality, limitation periods are shorter and simple possession, suitable evidence of title and good faith are sufficient to secure ownership of the property, even if the purported transferor was not in fact the owner."[109]

Even if it has been regularized from a legal standpoint, nowadays this distinction is not always followed by law. For instance, the land and trees and buildings built and united to it, it is considered as immoveable goods.

[107] Ivi, 83.
[108] G. Alpa, V. Zeno-Zencovich*, Italian Private Law,* Routledge,109, 2007.
[109] G. Alpa, V. Zeno-Zencovich*, Italian Private Law,* Routledge, 113, 2007.

The article 812 affirms: “Sono beni immobili il suolo, le sorgenti e i corsi d'acqua, gli alberi, gli edifici e le altre costruzioni, anche se unite al suolo a scopo transitorio, e in genere tutto ciò che naturalmente o artificialmente è incorporato al suolo.”[110] It can be seen that once immoveable goods are defined, movable goods are defined by exclusion and there is not an article which can list them.

[110] Gazzetta Ufficiale.

2.4 Public property and economy

Economics and politics are disciplines that play a fundamental role in the preservation and administration of public properties. Especially in recent decades with globalization and the rapid diffusion of goods, scholars have realized that the free market or more generally the market alone is not able to best manage goods. The wealth of a country and its consequent well-being depends not only on market laws, it is impossible to achieve if not with the help of a public agency such as the state. How can we not quote Adam Smith[111] who already in the mid-eighteenth century with his theory affirmed that?

"The impossibility for nations to reach a socially optimal level of wealth, if the operation of the free market (the famous "invisible hand") was not matched by the provision by the state of those socially indispensable goods that because of either their poor economic potential, or their too high costs, would have ended up being under-provided by the socially indispensable market that because of either their poor economic potential, [...]"[112].

"l'impossibilità per le nazioni di raggiungere un livello di ricchezza socialmente ottimale, se all'operato del libero mercato (la famosa "mano invisibile") non fosse corrisposta la fornitura da parte dello Stato di quei beni socialmente indispensabili che a causa o del loro scarso potenziale economico, o dei loro costi tropo elevati, avrebbero finito con l'essere sotto-forniti da parte del mercato socialmente indispensabili che a causa o del loro scarso potenziale economico, […]."[113]

Indeed, Smith was the first to introduce in those goods national defence, justice, public order, hospitals and schools. From the economic point of view, the definition of public property changes for clear reasons. However, there are some clarifications to be made regarding how public property are studied by economists. First of all, I would start with some concepts and

[111] A. Smith was a Scottish economist and philosopher who was a pioneer of political economy. Also known as "The Father of Economics"[or "The Father of Capitalism". Smith laid the foundations of classical free market economic theory.
[112] Mia proposta di traduzione.
[113] K. Bizzarri, *Beni pubblici globali. Come gestire la Globalizzazione nel 21˚ secolo*, Martin Koehler, 8, 2015.

definitions that depart from strictly legal matters. First of all, in the economic sphere the definition of public good changes completely from the legal one: "Il bene pubblico in senso ampio per l'economista è il bene che il mercato non produce e che quindi deve essere necessariamente prodotto dall'"offerta pubblica", mentre invece la nozione di bene pubblico sul piano giuridico rinvia – sempre in senso lato – essenzialmente al regime del bene."[114] In addition to, the classification I was referring to in the past paragraphs is now not effective anymore. Economists have their way to analyse and classify the goods. They can be characterised by being:

- Non-exclusion – intended as the technical, political or economic impossibility of excluding an individual from consuming the good. For example, the impossibility of excluding an individual from consuming street lighting, national security, or viewing a monument;
- Non-rivalry – intended as the consumption of a good by one individual without restricting its consumption by others. The example of knowledge is typical: an individual is not deprived of his knowledge of the Pythagorean theorem if he shares it with others.[115]

(Non esclusione – intesa come l'impossibilità tecnica, politica o economica di escludere un individuo dal consumo del bene. Per esempio l'impossibilità di escludere un individuo dal consumo dell'illuminazione stradale, della sicurezza nazionale o dalla vista di un monumento; Non rivalità – intesa come il consumo di un bene da parte di un individuo senza che questi ne limiti il consumo da parte di altri. L'esempio della conoscenza è tipico: un soggetto non viene privato della sua conoscenza del teorema di Pitagora se la condivide con altri.)[116]

It is then useless to underline how at the antipodes of public goods, also in the economic-financial field, there are private goods, also with certain

[114] E. Cardi, *Mercati e Istituzioni in Italia Diritto pubblico dell'economia*, Giappichelli, 158, 2005.
[115] Mia proposta di traduzione.
[116] K. Bizzarri, *Beni pubblici globali. Come gestire la Globalizzazione nel 21˚ secolo*, Martin Koehler, 8, 2015.

characteristics.[117] According to Bizzarri, these properties can be explained as we can see as table[118]:

Table 1

The basic properties of goods: a conventional approach to public goods

	RIVAL	NONRIVAL
EXCLUDABLE	QUADRANT 1[a] Examples: • Milk • Land • Education	QUADRANT 2 Examples: • Research and development • Noncommercial knowledge (such as the Pythagorean theorem) • Norms and standards • Property rights regimes • Respect for human rights • Television signals
NONEXCLUDABLE	QUADRANT 4 Examples: • Atmosphere • Wildlife	QUADRANT 3[b] Examples: • Moonlight • Peace and security/conflict • Law and order/anarchy • Financial stability/excessive financial volatility • Economic stability/flagging growth • Growth and development potential (such as an educated workforce) • Efficient/inefficient markets • Communicable diseases spreading/ controlled or eradicated

[117] I beni privati sono per loro natura puri, rivali ed escludibili.
[118] I. Kaul, *Providing Global Public Goods: Managing Globalization*, 85-86,

In addition to this traditional classification, even in the economic sphere the division between those goods that belong to one category rather than another is not always so clear-cut. A part from this, there are a spectrum of public property that lie in the middle of these two categories. Such instance, the so called *beni misti.* They are public property which have in part the characteristics of rivalry and excludability. They could be produced by private individuals, but the state prefers to provide them directly because they are affected by market failures. Some examples of these type of assets: bureaucratic services, healthcare, postal service.

It is necessary to learn that in economics the expression *public property* has a totally different connotation. As a matter of fact, in economics public property is defined as something that is provided to satisfy the needs of the community. E. Cardi writes in fact:

"Public good in the economic sense is in fact that which is provided to satisfy general interests of the community, not that which is produced or owned by the state or public entities."[119]

("Bene pubblico in senso economico è infatti ciò che viene fornito per soddisfare interessi generali della collettività, non ciò che viene prodotto o che è posseduto dallo Stato o dagli enti pubblici.)"[120]

In general, it is the state that, in various ways, helps the market in the production/protection of goods. The ways may be different: the direct production of services, economic aid and/or subsidies, and the regulation of economic activities. Here I would draw attention to one element: in the first cited case of direct production of services, we can take health care as an example on Italian territory. The interesting case is that this type of system is also valid for England despite the fact that this has not only a different concept of what is defined as a public good, but an entire state organization

[119] mia proposta di traduzione.
[120] E. Cardi, *Mercati e Istituzioni in Italia Diritto pubblico dell'economia*, Giappichelli, 163, 2005.

that differs significantly from the Italian one. Yet in this case, it is the state that is responsible for the expense and delivery of health services and for coordinating its activities[121]. Generally speaking, the institutions that deal with the administration of these goods and services for public use are the state and private companies. Sometimes the latter are helped in the ways mentioned above.

"Molte delle istituzioni (che operano in contesti in cui vengono utilizzate risorse collettive) che hanno avuto successo sono articolate combinazioni di istituzioni 'di natura privata' e 'di natura pubblica' che non possono essere classificate in una sterile dicotomia."[122]

("Many of the institutions (operating in contexts where collective resources are used) that have been successful are articulated combinations of institutions 'of a private nature' and 'of a public nature' that cannot be classified into a sterile dichotomy."[123])

With globalization, the role of the state has implicitly agreed to downsize its role in favour of businesses by creating mixed-natured companies in response to a strong need on the part of the market. Both institutions, aware that they cannot administer sufficiently, have scaled back their power.

"[...] Nation-states rather than disappearing from the scene adhere "to the global project of reducing their role in the regulation of economic transactions" to the point of being reduced to acting as representatives "of a technical administrative capacity which, at the moment, cannot be carried out by any other institutional arrangement." In other words, the state has placed itself at the service of the market that is developing on a global level by also using what remains of the technical-bureaucratic power and organization of nation-states."[124]

("[...] Gli Stati nazionali piuttosto che scomparire dalla scena aderiscono "al progetto globale della riduzione del proprio ruolo in materia di regolazione delle transazioni economiche" fino a ridursi a fungere da rappresentanti "di una capacità tecnica amministrativa che, al momento, non può essere svolta da nessun altro dispositivo istituzionale." In altre parole lo Stato si è posto al servizio del mercato che si sta sviluppando su un piano globale utilizzando anche ciò che resta del potere e dell'organizzazione tecnico-burocratica degli Stati nazionali.")[125]

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[121] K. Bizzarri, *Beni pubblici globali. Come gestire la Globalizzazione nel 21˚ secolo*, Martin Koehler, 9, 2015.
[122] S. Marotta*, La via italiana ai beni comuni*, Aedon, Fascicolo 1, gennaio-marzo, 2013.
[123] Mia proposta di traduzione.
[124] Mia proposta di traduzione.
[125] S. Marotta, *La via italiana ai beni comuni*, Aedon, Fascicolo 1, gennaio-marzo, 2013.

Just in the economic field in the search to protect this public property I find interesting to mention also those goods that being public concern a multitude of people that goes well beyond the national territory. These goods are defined global just for the highlighting the fact that the wider definition of collectivity is the primary recipient of the good.

"[…] Global public goods as those which tend towards universality in the sense that they benefit all countries, population groups and generations. They have the following characteristics 'at minimum': their 'benefits extend to more than one group of countries'; and they 'do not discriminate against any population group or any set of generations, present or future'". [126]

Nonetheless the theories formulated by both law and economics have evolved over time and have formulated various hypotheses of reform and correction. What I mean by this is that even the formulation of common goods brought forward by the Rodotà commission, or the proposal for a modernization of the institutions that are decisive for the protection of public property by Ostrom, are attempts that followed the awareness of the failure of classical economic theory, in which the administration of these goods was entirely in the hands of the state. With market demand growing faster and faster, with globalization and the power of the state unable to satisfy it, with the increase in privatization, we have tried to make up for these shortcomings with new economic formulas. Something that, as I have already mentioned, were neither public nor private. Besides it is here in this controversial topic that I would like to insert a reflection on a further element of novelty: how is it fair that these goods be managed? Following the economic perspective or the legal one? How much should the state being included in the management of these goods? Is it a political matter as well?

"Are they exhaustible natural resources whose sustainable use over time should be protected, as seems to prevail in the understanding of the economic literature, or

[126] S. Deneulin; N. Townsend, *Public goods, global public goods and the common good*, International Journal of Social Economics Vol. 34 No. 1/2, 22, 2007.

fundamental rights of the individual, as seems to prevail in the legal definition? Tangible assets (the natural resources) or intangible assets (knowledge)? Local (a pasture, a lake for fishing) or global (defence against air pollution or global warming)?"[127]

"si tratta di risorse naturali esauribili di cui tutelare l'uso sostenibile nel tempo, come sembra prevalere nella accezione della letteratura economica oppure di diritti fondamentali della persona, come sembra prevalere nella definizione giuridica? Beni tangibili (le risorse naturali) o intangibili (conoscenza)? Locali (un pascolo, un lago per la pesca) o globali (la difesa dall'inquinamento atmosferico o dal riscaldamento del pianeta)?"[128]

In this research I believe I must also emphasize that regardless of the theory with which one wishes to analyse the issue under consideration, political intervention and governmental choices play a fundamental role. The guarantee of the preservation of certain goods such as water supply or health services are extremely delicate systems that are also the result of governmental choices as well as theoretical matter. returning to the central point of my analysis, I continue by citing the contradictions related to intangible common goods such as knowledge. The commingling of politics and the market is inevitable. If an asset has a collective purpose or it has as addressee the collective, they should be public or in some way guaranteed and regulated by public bodies. However, it seems some of those intangible goods are quite challenging to classify. What are the intangible goods in the Italian jurisprudence? The goods belong to the intellectual production, that is all those assets who can't be touched or viewed. "[…] erano classificati beni immateriali tutti quei beni che fossero privi di corporeità (quae tangi non possunt), quali eredità, usufrutto ecc.".[129] As we can see already in the roman law there is some connection to this concept. Nowadays, the issue

[127] Mia proposta di traduzione.
[128] V. Termini, *Beni comuni, beni pubblici. Oltre la dicotomia Stato-mercato*, Luiss University Press, 22, 2016.
[129] C. Ferrari, *La gestione pubblica dell'economia. Problemi vari in materia di beni pubblici*, Giuffrè Editore, 2, 1992.

regards the protection of rights of intellectual property. This a perfect example for the comparative analysis I have been doing so far:

"Unlike the U.S., the European Commission has been inclined to apply to intellectual property rights the essential facility doctrine used to guarantee access to networks (communications, energy, water) and consequently to require freedom of access to other operators in order to prevent the holding company from exploiting, upstream, the competitive advantage to the detriment of the system's innovativeness and consumer welfare."[130]

"A differenza degli Stati Uniti, la Commissione europea si è mostrata propensa ad applicare ai diritti di proprietà intellettuale la dottrina dell'essential facility utilizzata per garantire l'accesso alle reti (di comunicazione, dell'energia, idriche) e di conseguenza a prevedere l'obbligo della libertà di accesso agli altri operatori, per impedire che l'impresa detentrice possa sfruttare, a monte, il vantaggio competitivo a detrimento della capacità innovativa del sistema e del benessere del consumatore."[131]

In this case we can speak of a legal regime that organizes this type of property. The so-called intangible goods would belong to this type of property in the form of things. "Rights can attach not only to things in a physical sense, but can be activities, such as the work done by a paid employee, products of the intellect, aspects of personality such as privacy, identity, sex and so on. […]. Not all things, however, can be the object of rights."[132] This quotation is useful to understand the fact that, intangible goods, are seen in legal field and thus they cannot be objects of rights as public property so far described. Moreover, the intangible goods are classified between producer and consumers goods. This distinction helps to point out that ownership of the former can have a social function whereas that of the latter cannot: the owner has 'total control' over its use.

[130] Mia proposta di traduzione.
[131] V. Termini, *Beni comuni, beni pubblici. Oltre la dicotomia Stato-mercato*, Luiss University Press, 31, 2016.
[132] G. Alpa, V. Zeno-Zencovich*, Italian Private Law,* Routledge-Cavendish, -, 2007.

3. Introduction to the Common Law system

In the previous chapter I analysed the concept of *beni pubblici*. They belong to the public sector. Therefore, in the civil law systems, there is a clear and significant distinction between private and public law. "Private law traditionally includes relations between private persons. It is divided into two main branches civil law (from the Latin civis, citizen) and commercial law."[133] On the other hand, public law:

> "[…] concerns of public authority are not confined to internal security and defence of frontiers, but expand in a far more intrusive way to embrace economic process, taking measures to benefit the economy, with direct administration of social services (transport, public assistance, medical services and so on) […]."[134]

However, this distinction is decreasing and it is transforming into a special regime which combines law applicable both to public and private subjects. As a matter of fact, I would say that in Common Law systems this type of special regime already exists. The fact is that the distinction we traditionally do in Civil Law systems between these two sectors, is almost non-existent.

"The differences from Civil Law thus lie not so much on the structural level, but rather on the level (with cultural significance) of the relationship between the different components of the legal system."[135] ("Le differenze rispetto al Civil Law non stanno quindi tanto sul piano strutturale, quanto piuttosto su quello (a valenza culturale) del rapporto fra le diverse componenti dell'ordinamento giuridico.")[136] As a matter of fact, the Common Law system does not share with the Civil Law system the division

[133] G. Alpa, V. Zeno-Zencovich*, Italian Private Law,* Routledge, 1, 2007.
[134] Ivi, 4.
[135] Mia proposta di traduzione.
[136] U. Mattei, *Il modello di Common Law*, Giappichelli, 186, 2004.

of law. I have already pointed out that the distinction between public and private law has a different value or at least completely different meaning from the one existent in Civil Law which even organizes around this distinction an entire judicial system. The very big division of law in Common Law is between private law and criminal law. Everything else which does not concern criminal law, it ends up to be subject of civil law. The reasons why the division of law is significantly different from Civil Law is basically because of history. However, the key element of my research is the public sector. Then nowadays, in Common Law systems, it is becoming more and more significant. Thus, it means that these two systems are becoming more similar to each other, or at least it is making an effort to homogenize them even from this point of view. Nevertheless, the public law is now differentiated itself from the private law becoming a new element in between the traditional division between private and criminal law. "il public law è venuto conseguentemente differenziandosi dal private law, introducendo un tertium genus fra diritto privato e diritto penale. Si tratta indubbiamente di un fenomeno di convergenza classificatoria non trascurabile, [..].[137]The private law in common law is described as follow: common law and equity. Equity regards the subject of trust which covers a significant role in the field of family law. In addition to, with the word equity we mean the entire field of private law patrimony. This one is again divided in three branches: the law of property, the law of contract, and the law of torts. Each of them has precise and defined statues. Hence, I can definitely say that I will describe the law of property which is the subject my research is based on, in the field of private law.

[137] U. Mattei, *Il modello di Common Law*, 218, Giappichelli, 2004.

"Il sistema statunitense (come quello inglese e come i sistemi di quasi tutti i paesi di aerea anglofona) non possiede struttura pubblica e di conseguenza non contiene neanche un diritto pubblico."[138] Therefore, it is appropriate to clarify an important distinction with the civil law system: common law is an equitable customary law both private and commercial, consequently there is nothing public. All relationships are regulated on the same level both relationships between private parties and relationships between governmental authorities and private parties. There is no public apparatus or public authority that can mediate relationships between public expression and private parties. All kinds of relationships are therefore matters of private law.

Another important differentiator is that the government is not an expression of public law[139] as it is for civil law systems. As a result, there is to be said that even those apparatuses that support the central government such as the ministerial organization are lost. But there are offices such as chief executive or collaborative secretariats of the president that support and organize the activities of the individual federated states. Furthermore, any legal subject acts as a legal entity of private law by private means of private law such as the contract. "In sostanza non esistono diritto pubblico e atto amministrativo, né pubblico funzionario e pubblica funzione, per come intesi nello stato di diritto positivo."[140] As a consequence, the concept of public employment is also dropped, for obvious reasons. There is a privatization of services that is inherent in common law. It is always the private law that prevails even in this type of labour relations. There are private agencies that are accountable for the harms and administration of these categories for

[138] Ivi, 298.
[139] Ivi.
[140] P. D'Amico*, Common Law*, Giappichelli, 299, 2004.

example in the area of teaching. Yet again, in civil law systems we rely on the public agency while in the U.S. common law we are in the area of private law. Even if there is not a distinction between private and public law and all the apparatuses and structures around public law are lacking, the importance of constitutional law in the United States of America should not be overlooked. Nonetheless the impropriety of the expression *public law* in the civil law meaning continue to exist. Each judicial relationship either public or private is regulated by private law.[141]

[141] Ivi,311.

3.2 The law of property

'Property' is a particular term which meaning is quite complex. Truth to be told, a several definitions have been advanced. Some of them have defined property as "the legitimate power to initiate decisions on the use of economic assets."[142] The aspects I would like to emphasize are two:

- What actions can be lawfully taken by the holder of rights (the owner of 'property');
- What are the objects ('scarce values' or 'economic asset') with respect to which such actions can be taken.[143]

Hence, the property is intended here as something valuable which can be bought sold, or given away. What distinguishes property law from other kinds of law is that property law deals with the relationships between and among members of a society with respect to "things." The things may be tangible, such as land or a factory or a diamond ring, or they may be intangible, such as stocks and bonds or a bank account. Property law, then, deals with the allocation, use, and transfer of wealth and the objects of wealth. Moreover, the legal system defines what is intended for property, but it also defines what is not property.[144] Some assets stand outside the property system because they are publicly owned. For examples, government or business corporation they are considered as legal entities even if they are not individuals. As a result, they would be considered as owners of some

[142] S. F. Kurtz, H. Hovenkamp, Cases and Materials on American Property Law, West Publishing Company, 2, 1987.
[143] Ivi.
[144] For examples, Brooklyn Bridge or a judgeship.

properties which obviously cannot be bought or sold because of their public function. I will deepen in acquisition of rights later.

Property law governs nearly every aspect of life. "The law of property is only one- admittedly a very important one- of the various sets of rights which govern social continuity.[145]" Before analysing the intricacies of this concept, it is perhaps necessary to step back in time by recalling the figure of William Blackstone. He was an eighteenth-century English jurist who trained at All Souls College of Oxford university. "William Blackstone fu il primo grande common lawyer a dedicarsi a tempo pieno all'insegnamento universitario del diritto inglese."[146]

"His success, unhinged by an effort to reorganize university legal education, had the somewhat paradoxical effect of encouraging common lawyers for still about a century in the self-taught character of their education. This was due to the exceptionally smooth instrument of common law knowledge that Blackstone produced: the Commentaries on the law of England."[147]

("Il suo successo, scompagnato da uno sforzo di riorganizzazione dell'insegnamento giuridico universitario, ebbe l'effetto in qualche modo paradossale di incoraggiare i common lawyers per ancora circa un secolo nel carattere autodidatta della loro formazione. Ciò fu dovuto allo strumento eccezionalmente agevole di conoscenza del common law che Blackstone produsse: i Commentaries[148] on the law of England.")[149]

William Blackstone tried through his essays and commentaries to explain English law by delving into certain aspects instead of others. He also talked about the right of property. He wrote that the right of property is a bundle of rights that sometimes it is also known as bundle of sticks. So, what is within this bundle? Some of the rights he mentioned are: the right to possess, the

[145] S. F. Kurtz, H. Hovenkamp, Cases and Materials on American Property Law, West Publishing Company, 4, 1987

[146] U. Mattei, *Il modello di Common Law*, Giappichelli, 48. 2004.

[147] Mia proposta di traduzione.

[148] I Commentaries sono stati pubblicati tra il 1765 e il 1769 e sono organizzati in quattro volumi. Il primo volume "Rights of Persons" dedicato alle persone fisiche e giuridiche. Il secondo "Rights of Things" si occupa della law of property. Il terzo volume "Private Wrongs" riguarda il restante diritto privato, sostanziale e processuale. Il quarto "Public Wrongs" riguarda il diritto penale, sia sostanziale che processuale.

[149] U. Mattei, *Il modello di Common Law*, Giappichelli, 49, 2004.

privilege of use, the right to exclude, the power of transfer, and the right to quiet enjoyment of property. In Blackstone's vision this bundle of rights continues forever to the sky and to the centre of the earth. This type of conception is called a Fee Simple[150]. However, this conception he created is not entirely appropriate. Some of those rights and their value have been reconsidered. There are situations in which you can own property but not possess it, there are a lot of rules about what you can do about property. You can't keep everyone off of your property as Blackstone conceived at the time speaking of right to exclude. The law might also stop you from transferring property in certain ways including indiscriminatory ways and finally you might have the right to maintain ownership to your property or you might not have right at all.

Property law is the area of law that governs the various forms of ownership in real property (land) and personal property. Property refers to legally protected claims to resources, such as land and personal property, including intellectual property. Property can be exchanged through contract law, and if property is violated, one could sue under tort law to protect it. The law of property was the result of summa divisio[151] between *real property* and *personal property*. In order to comprehend the origin of the law of property, it is necessary to introduce some historical background.

Real property is bounded to the concept of estate.[152] Over the years, the concept has evolved in a very complex way. Nowadays, the evolution

[150] Fee Simple: an estate of inheritance (land or other realty) over which a person has absolute ownership.
[151] U. Mattei, Il modello di Common Law, 222, Giappichelli, 2004.
[152] The term "estate" is a remnant of the English feudal system, which created a complex hierarchy of estates and interests in land. The allodial or fee simple interest is the most complete ownership that one can have of property in the common law system. An estate can be an estate for years, an estate at will, a life estate (extinguishing at the death of the holder), an estate pur auter vie (a life interest for the life of another person) or a fee tail estate (to the heirs of one's body) or some more limited kind of heir (e.g. to heirs male of one's body).

has been influenced the modern law of property and through the equity is still functioning. The law of property Act[153] of 1925 has decreased the possible estates in *term of years absolute* and *fee simple absolute.* On the other hand, the personal property is essentially the concept we are researching. Personal property comprehends a different category of legal assets.[154] In this field the primary distinction is between *choses in possession* and *choses in action*.[155]

The start of an English law of real property, however, came after the Norman Invasion of 1066, when a common law was built throughout England. The new King, William the Conqueror, started standardising England's feudal rules, and compiled a reference for all land and its value in the Domesday Book of 1086. This was used to determine taxes, and the feudal dues that were to be paid. Feudalism meant that all land was held by the Monarch. Estates in land were granted to lords, who in turn parcelled out property to tenants. The start of an English law of real property, however, came after the Norman Invasion of 1066, when a common law was built throughout England. The new King, William the Conqueror, started standardising England's feudal rules, and compiled a reference for all land and its value in the Domesday Book of 1086. This was used to determine taxes, and the feudal dues that were to be paid. Feudalism meant that all land was held by the Monarch. Estates in land were granted to lords, who in turn parcelled out property to tenants.

[153] It is a statute of the United Kingdom Parliament. It forms part of an interrelated programme of legislation introduced by Lord Chancellor Lord Birkenhead between 1922 and 1925. The programme was intended to modernise the English law of real property. The Act deals principally with the transfer of freehold or leasehold land by deed.

[154] Legal asset traduzione inglese di bene giuridico.

[155] U. Mattei, Il modello di Common Law, 224, Giappichelli, 2004.

Feudalism had not always been a part of English society, rather than being positively imposed by the monarchs prior to the Norman Invasion. First, serfs could go undergo "commutation", where the lord simply agreed to accept money rents from tenants instead of labour services. This did not mean freedom itself, but abandoning forced labour and payments in kind to landlords meant the open evidence of servility was concealed. In disputes, royal courts were increasingly bias toward declaring a peasant was free. Second, through an act of manumission lords could voluntarily grant freedom and this was increasingly done, after the plague, if the serf or a relative made a payment of money. Third, the common law stated that if a serf lived on free soil, as in a chartered town or Royal demesne land, for a year and a day, they would become free. legal developments in the law of property revolved around the split between the courts of common law and equity. The courts of common law (the Court of Common Pleas and the Court of the King's Bench) took a strict approach to the rules of title to land, and how many people could have legal interests in land. However, the King had the power to hear petitions and overturn cases of common law. He delegated the hearing of petitions to his Lord Chancellor, whose office grew into a court. During the crusades, landowners who went to fight would transfer title to a person they trusted so that feudal services could be performed and received. But some who survived had returned only to find that the people they entrusted were refusing to transfer title back. They sought justice with the Lord Chancellor, and his Court of Chancery determined that the true "use" or "benefit" of the land did not belong to the person on the title (or the feoffee who held seisin). Unlike the common law judges, the Chancellor held the *cestui que use*, the owner in equity, could be a different person, if this is what good conscience dictated This recognition of a split in English law, between legal and

equitable owner, between someone who controlled title and another for whose benefit the land would be used, was the beginning of trust law. Over the 18th century, the law of real property mostly came to a standstill in legislation, but principles continued to develop in the courts of equity. English land law draws on three main sources to determine property rights: the common law and equitable principles developed by the courts, a system of land registration and a continuing system for unregistered land. First of all, the courts of common law and equity gave people with "property" rights various privileges over people who acquired mere "personal" rights. To acquire property over land (as with any other object of value), as opposed to a contract, for example, to use it, a buyer and seller simply needed to agree that property would be passed. The law then recognised a "property" right with various privileges over people with purely "personal" claims. The best form of property would involve exclusive possession, and it usually bound anyone who attempted to interfere with an owner's use, particularly in cases of insolvency, if other people with interests in the land sold their stake to a third party, or in getting remedies to enforce one's right. Before 1925, property rights in land (unlike, for example, a company's shares) only had to be evidenced in paper title deeds. It was therefore believed that a system of land registration was desirable, so that people's rights over land would be certain, and conveyancing would be simpler and cheaper. So, the second system of land began with the Land Registration Act 1925[156], and the rules

[156] Land Registration Act 1925: acquisition of title by possession. The Limitation Acts shall apply to registered land in the same manner and to the same extent as those Acts apply to land not registered, except that where, if the land were not registered, the estate of the person registered as proprietor would be extinguished, such estate shall not be extinguished but shall be deemed to be held by the proprietor for the time being in trust for the person who, by virtue of the said Acts, has acquired title against any proprietor, but without prejudice to the estates and interests of any other person interested in the land whose estate or interest is not extinguished by those Acts.

were recast in the Land Registration Act 2002[157]. Instead of paper title deeds determining people's property rights in land, the entries in the registry were the source that determine people's property rights.

Land law is also known as the law of real property. It relates to the acquisition, protection and conflicts of people's rights, legal and equitable, in land. This means three main things. First, "property rights" (in Latin, a right *in rem*) are generally said to bind third parties, whereas personal rights (a right *in personam*) are exercisable only against the person who owes an obligation. English law acknowledges a fixed number, or *numerus clausus* of property rights, which create various privileges. The main situations where this distinction matters are if a debtor to two or more creditors has gone insolvent (i.e. bankrupt), or if there is a dispute over possession of a specific thing. If a person or a business has gone insolvent, and has things in their possession which are the property of others', then those people can usually take back their property free of anyone else's claims. But if an insolvent person's creditors are merely owed personal debts, they cannot take back their money freely: any losses have to be divided among all creditors. Often, creditors can contract for a proprietary right (known as a security interest) to secure repayment of debts. This gives the same result as having another proprietary right, so the secured creditor takes priority in the insolvency queue. he most contentious method of acquiring property, albeit one that has played a huge role in the history of English land, is adverse possession. Historically, if someone possessed land for long enough, it was

[157] Land Registration Act 2002 is an Act of the Parliament of the United Kingdom which repealed and replaced previous legislation governing land registration, in particular the Land Registration Act 1925, which governed an earlier, though similar, system. The Act, together with the Land Registration Rules, regulates the role and practice of HM Land Registry.

thought that this in itself justified acquisition of a good title. This meant that while English land was continually conquered, pillaged, and stolen by various factions, lords or barons throughout the Middle Ages, those who could show they possessed land long enough would not have their title questioned. A more modern function has been that land which is disused or neglected by an owner may be converted into another's property if continual use is made. Squatting in England has been a way for land to be efficiently used, particularly in periods of economic decline. Before the Land Registration Act 2002, if a person had possessed land for 12 years, then at common law, the previous owner's right of action to eject the "adverse possessor" would expire. The common legal justification was that under the Limitation Act 1980[158], just like a cause of action in contract or tort had to be used within a time limit, so did an action to recover land. This promoted the finality of litigation and the certainty of claims. Time would start running when someone took exclusive possession of land, or part of it, and intended to possess it adversely to the interests of the current owner. Provided the common law requirements of "possession" that was "adverse" were fulfilled, after 12 years, the owner would cease to be able to assert a claim. However, in the LRA 2002 adverse possession of registered land became much harder. The rules for unregistered land remained as before. But under the LRA 2002 after 10 years the adverse possessor was entitled to apply to the registrar to become the new registered owner. The registrar would then contact the registered title holder and notify them of the application. If no

[158] The Limitation Act 1980: is an Act of the Parliament of the United Kingdom applicable only to England and Wales. It is a statute of limitations which provides timescales within which action may be taken (by issuing a claim form) for breaches of the law. For example, it provides that breaches of an ordinary contract are actionable for six years after the event whereas breaches of a deed are actionable for twelve years after the event. In most cases, after the expiry of the time periods specified in the Act the remedies available for breaches are extinguished and no action may be taken in the courts in respect of those breaches.

proceedings were launched for two years to eject the adverse possessor, only then would the registrar transfer title. Before, a land owner could simply lose title without being aware of it or notified. This was the rule because it indicated the owner had never paid sufficient attention to how the land was in fact being used, and therefore the former owner did not deserve to keep it. Before 2002, time was seen to cure everything. The rule's function was to ensure land was used efficiently.

3.3 Australian law of property

The law of property described so far, it was born in England and then have spread in other countries such as America. Australia, is another common law country which have been influenced by English law and has been under English law forever. Since we have analysed how property of law influences the land and the ownership model, I would like to analyse the Australian on as well. the concept of property is a complex one and we have understood the reasons. However, I would like to explain in which way Australian government has been administrate natural resources and in which way it deals with the allocation of resources. The court of Australia defines property:

> The word 'property' is often used to refer to something that belongs to another. But […] 'property' does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of 'property' may be elusive. Usually it is treated as a "bundle of rights.[159]"

The concept behind the term property as we can see is definitely from the English law. A quite significant definition we can comprehend is that the term property is used to describe a "range of legal and equitable estates and interests, corporal and incorporeal."[160] The ownership model keeps to continue to be fundamental even for Australian governments. Since these clarifications, the idea of property keeps to be a bundle of rights which they can excluded, lost or gained.

[159] Australian Government: https://www.alrc.gov.au/
[160] Ivi.

A further illustration of property rights being lost may come through the operation of statutory limitation over time. So, for example, a person may be held to acquire title to land by long *adverse possession*.[161] The adage 'possession is nine-tenths of the law' is reflected in the acquisition of title by possession in the limitation of actions legislation. Under such legislation, the claim of a person may be barred after a designated period, generally between 12 and 15 years. There is authority that even under Torrens title systems, title may be gained by adverse possession. In the context of personal property, the right of the possessor may be defended against all but the rightful owner—expressed in the adage, 'finders' keepers."[162] The modern common law doctrine is expressed in the principle that the rights of a land owner in the air space above the land are limited 'to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it' Cases involving intrusions on privacy have also raised questions concerning the extent of land owners' rights: for example concerning unmanned surveillance devices flying over land and cameras overlooking land. [163]

[161] Adverse possession: is a legal principle in the Anglo-American common law under which a person who does not have legal title to a piece of property—usually land (real property)—may acquire legal ownership based on continuous possession or occupation of the property without the permission (licence) of its legal owner. The possession by a person is not adverse if they are in possession as a tenant or licensee of the legal owner.

[162] https://www.alrc.gov.au/

[163] Ivi.

3.3 Property rights

"The most extensive or primary right in civil law systems is the right of ownership. This right is the paramount entitlement a person can have with regard to an object."[164] English property follows a different approach regarding these rights and a distinction should be made between land law and personal property law. The distinction goes back in time, to the origins of common law. A real action is the actual power over the land. Therefore, the land law is also known as real property law.[165] Tangible objects other than land, however were not protected by real actions. These objects are protected by specific torts.

Property law considers claims to an object to be relative. One of the classic English cases that demonstrate relativity of title is Armory v. Delamirie[166] (1722). The court says that the owner will always be the rightful owner of the jewel, but here the court says the finder is the keeper. However, the court says differently if the scenario would have been different, for instance if the jewel would have found in a property. in that case the courts answers that it might depend on whether the jewel was lost or mislaid or abandoned. All of this is to say that finders do not necessarily have absolute property rights because a true owner's claim will trump all others. However, the finder has rights greater than third parties who are not the true owner unless the owner of the premises might be in the court's estimation. Someone

[164] K. Hoofs, *Property rights: a comparative view*, 33, 2010.
[165] Ibidem, 35.
[166] Armory v. Delamirie: in that case there's a chimney sweep who finds some kind of jewel mounted in a socket. He takes it to a goldsmith whose assistant takes the gemstones out of the socket and then gives it back to the chimney sweep saying" what you brought in is worth very little."

who may be the more responsible party for ultimately getting the property back to the true owner. Hence, titles are relatively.

In addition to, there is intangible or intellectual property: it means that there is something you work so hard to create that you are entitled to own those things. The creation path includes artistic works but also intellectual properties and the world of ideas. As a matter of fact, there are three regimes which regulate intellectual property:

- Patent
- Copyright
- Trademark

Patents are protections on property and they are given primary to inventions that are new useful and non-obvious. Copyright protects from copying works that original for instance books and music. Trademark is used in business. For instance, the Nike swoosh is a symbol of a brand which cannot be copied or used without permission. It protects an idea combined with a logo. The primary reason that these three entitlements are not the same in the intellectual property context is the idea of what is called non-rivalry goods. Information is non-rivalry consumed in the way other properties is. Ideas can be shared without diminishing the value of the idea. Thus, if an idea can be shared why protect intellectual property? Article 1, Section 8, Paragraph 8 of the United States Constitution says: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[167]

Finally, there is: eminent domain. It comes from the taking clause which says that government may not take private property unless there is a

[167] US Constitution.

public use and unless the government gives just compensation. Eminent domain is a proactive condemnation of government for land it does not own and wants to own. The question in eminent domain case is usually whether there is a public use.

The case of Kelo v. City of London[168], Connecticut in 2005 answers to this question. The case took place in new London, a town with a high unemployment and very low income. At the time of the case had a population of 24 thousand which was the slowest since 1920. To revive the town the city decided through a local development corporation to develop a new plan: 90 acres of a neighbourhood in fort Trumbull. To realize this plan, the city delegated its power of eminent domain to the new London development corporation. The area where the plan was slated for there were 155 privately owned properties. None of them are blighted, but the development corporation starts the process pf eminent domain. This case was brought by nine petitioners who own fifteen pieces of property in that area. The justice said that economic development constitutes a public purpose that is reasonable in light of precedent. The existence of a private benefit does not itself disqualify a government action from meeting the public use requirement. The court will not second guess the city's determination that these properties were needed to effectuate the purposes of the plan. The city's exercise of eminent domain was constitutional. Thus, the majority takes care to say that they are not considering purely private takings. Takings which transfer property from one private owner to the other. The question of whether property can be transferred from one private owner to the other just because it might be upgraded. In the end, there was some negotiation and they did walk away with some compensation for the condemnation of their

[168] 545 U.S. (2005)

property. The planned development however was never built with all the delays of litigation probably became less feasible. The aftermath of this case went much further than the original plaintiff or the city's dash.

3.3 The Public Trust Doctrine

We come back around to the question of the Blackstonian bundle of sticks. One of those was the right to exclude other from using your property. If fee simple, were really absolute you could exclude the whole world from using your property forever. But in reality, there are constraints on property owners' ability to exclude. The right to exclude from place we recognize as shared public places. Do people or governments who own these kinds of places have the right to exclude? Property law recognizes and protects public use in several different ways. One of the most important ways is the Public Trust Doctrine[169]. This doctrine is rooted in English law and it is going back further in Roman Law. It involves the public's right to use or access common resources like water and beachfront property. Hence, this is an ancient doctrine that we have incorporated into modern laws.

The Public Trust Doctrine actually has an ancient origin. During Justinian's empire, he commissioned jurists to simplify the jumble of laws governing his empire.

> "Justinian added these words to one section: 'by the law of the nature these things are common to all mankind, the air, running water, the sea and consequently the shores of the sea.' The public trust doctrine, as this notion, came to be known, suggest that certain resources usually water, but now much more, are common, shared property of all citizens." [170]

Later, this document was codified in England and king John was forced to revoke his cronies' exclusive fishing and hunting rights, because he violated the public's right to access common resources. After this episode, in England

[169] Public Trust Doctrine: The principle that certain natural and cultural resources are preserved for public use, and that the government owns and must protect and maintain these resources for the public's use.

[170] D. Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property,* New York Environmental Law Journal, 2008.

the king was vested by the function of owner of public lands. This concept of ownership of resources "held in trust as commons is a shared precept in all places where the Public Trust Doctrine persists."[171] Formally the Public Trust Doctrine entered in American jurisprudence in 1821 since the case known as Arnold v. Mundy. They contended that the right to the soil of navigable rivers, where the tide ebbs and flows, is in the people of New Jersey, and belongs to the state. a test case in which Arnold, a riparian landowner who had planted oysters in a tidal reach of the Raritan River, claimed that Mundy, who harvested the oysters, trespassed in doing so. In a decision that the U.S. the court ruled that Mundy had no title to the submerged land in question because the sovereign owned the beds of tidal waters in New Jersey, just as it did in England. New Jersey Supreme Court began to establish a lineal definition of the public trust doctrine by delineating between public and private rights in submerged lands according to tidal influence. In the nineteenth century, this idea was quickly extended to all waterways that are navigable-in-fact. The U.S. Supreme Court quickly ratified this result, a considerable expansion in scope that brought the concept of state sovereign ownership to vast inland waterways. "The upshot of Arnold and its progeny was a lineal division of public and private rights."[172]The Public Trust Doctrine took hold in this country in the middle 19th century, but it was not until an 1892 its Supreme Court case, Illinois central Railroad Company v. Illinois[173] that it was more deeply enshrined into our judicial canon. It involves the Chicago lakefront which at the time was very rapidly developing. As that development was happening, Illinois

[171] D. Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property,* New York Environmental Law Journal, 3, 2008.
[172]D. Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property,* New York Environmental Law Journal,8, 2008.
[173] N. Brutti, *Diritto private comparato. Letture interdisciplinari*, 29, Giappichelli, 2019.

central starts to take more and more land, starts to build more and more tracks, and starts to build infrastructure along and into the river. The company undertook this development pursuant to a claim to riparian rights to develop into the lake. Therefore, part of the justification for its development was the legal property right that they claim they had to develop some distance into the water itself. The company also received an explicit blessing from the state legislature which passed the Lakefront Act[174]. It granted the railroad a lot of power development of the land and the harbour. Nonetheless, there is a lot of economics rights that are entwined with the property rights that the legislature gave to the railroad. The case makes it all the way to the Supreme Court. The courts says that the railroad cannot encroach to navigable waterways into waterways that are meant for public passage and public use. The railroad can only develop the shoreline and areas close to the shore where they are not interfering with navigability. In addition to, the state has no authority to give away the submerged lands because they are held in trust for the public. Since this case, we see two elements that will inform encourage a development in American jurisprudence: "[175]the sovereign holds certain resources in trust for common good, the public has some kind of right to protection of these resources."

[174] It places limitations on the use or transfer of the property.

[175] D. Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property,* New York Environmental Law Journal, 11, 2008.

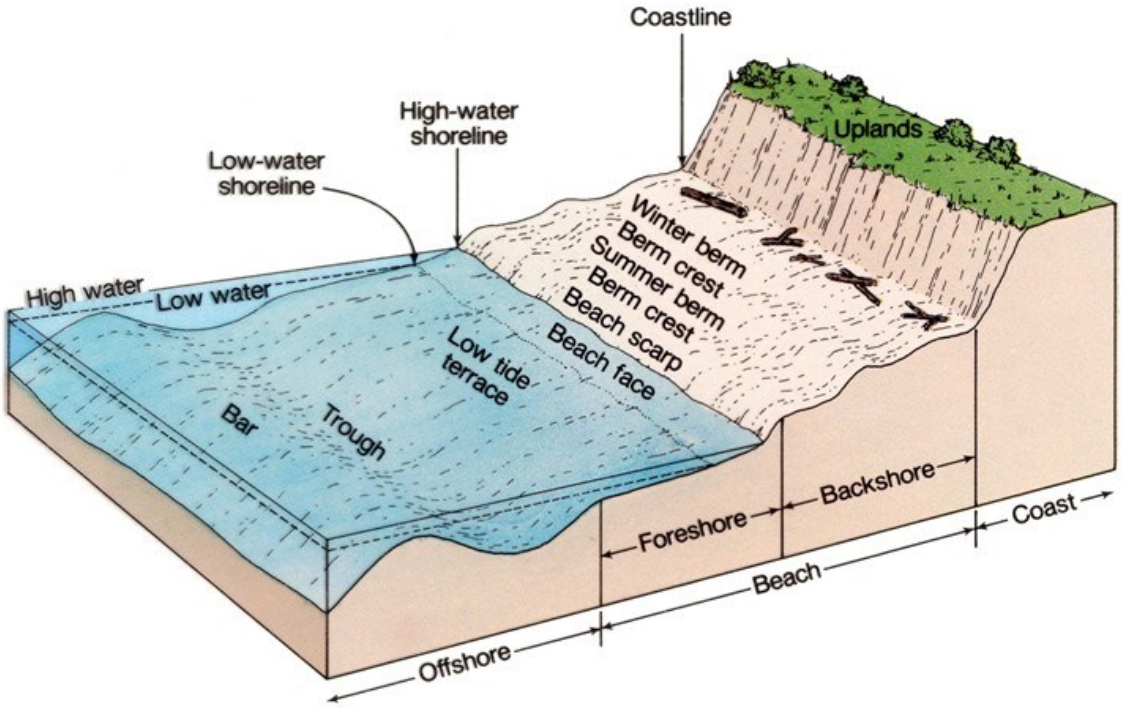


Figure 5

Since that case, the public trust doctrine has been extended by courts and argued to be extended by scholars to include other natural resources.[176] Environmentalists love the public trust doctrine because it's helpful for them to fight for environmental interests of all kinds and it also embeds into the law the human access to connection to nature. "The Public Trust Doctrine's power comes from the longstanding idea that some parts of the natural world are gifts of nature so essential to human life that private interest cannot usurp them [..]."[177]

The public trust doctrine has also been used to justify public access to resources like beachfront property and many people see it as an opportunity

[176] D. Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property,* New York Environmental Law Journal, 13, 2008.
[177] D. Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property,* New York Environmental Law Journal, 2008.

to help us to protect our air, public parks, forests, wildlife and other natural resources that may not be available without it. Furthermore, the public trust doctrine has been questioned by some as being made up doctrine outside of the constitution, outside of what critics would consider to be a traditional developing doctrine in the law. Besides these critics, the doctrine has served an important purpose.

Beaches are the type of property most of us consider to be public. Whether you can access a beach is a question of property law. In this case it's the states, whether state legislature or state courts, who decide how the public's property interest in beaches are allocated or granted. Some states look generally at public policy. Some states look to the concept of custom or dedication to public use or prescriptive easements. Other states expand the public trust doctrine also covered to generally different award access to the public. Generally different states treat access to different parts of beaches differently. There many ways to dived place on the beach and as a member of the public which part of the beach is most useful to you? Obviously not the wet sand. If you want access to the beach, you want it on the dry sand. Most states only allow members of the public to access the wet sand. In some states, even the wet sans are owned privately. Meanwhile upland is almost always private property and dry sand I mostly private property. In a few states, for instance Florida, New Jersey, Oregon, the dry sand id considered to be public ownership. In some of those states, the dry sand I s considered to be public ownership because it is customary. So as for the oceans themselves, states own ocean beds for a couple of miles outward from their state. Hence, on the one hand owners of beachfront property might argue that their property is being diminished in value if the state forces them to give up too much of their land to public access. On the other hand, the public benefits

tremendously from access to land, maybe more than private property owners are burdened. There are three different cases from three different states which I will discuss that illustrate the range of judicial decisions protecting public access to private property.

3.4 Beach access laws

One of main focus of the principle called public trust doctrine is definitely the administration of natural resources such as access beach. Since the public trust doctrine has been influenced different country of common law, let's see how they dealt with the administration, protection and conservation of beaches and foreshores. It will follow various legal

cases in which supreme court had to decide the enjoyment of baches and try to grant the public use.

The first case is called Matthews v. Bay Head Improvement Association.[178] It comes out New Jersey. A non-profit homeowners-type association holds fee simple title or leasehold interest in nearly all of the parcels of beachfront property on the Atlantic Ocean. The association restricts its portion of the beach to members who live in the area and have to apply for membership. The question in the case is whether the public can gain access through and use the dry-sand area owned by this quasi-public body at times other than these extremely early-morning hours. The courts finds that dry sand even if publicly owned should be held in the public trust. It says that the public has a right to wet sand, and the right would be meaningless if they didn't have some access to dry sand. Moreover, in a town without a public beach which is the case, a limiting membership to residents is in conflict with the public good and is contrary to public policy. The court remedy is ordering membership to be open to the beaches. It does not go so far as to say that the private beachfront property must be turned over to public ownership. It basically assumes that opening the association and membership in the association will be enough to satisfy the public need or right to the beaches.

The second case comes from Oregon and it is called State ex rel. Thornton v. Hay.[179] It got same the conclusion but on different basis, on the basis of custom. When it uses by courts to make decision custom normally refers to situations where something has happened for as long as someone can remember. According to the Thornton court dry sand has been enjoyed by

[178] S. M. Kennedy, *A Practical Guide to Beach Access and the Public Trust Doctrine in New Jersey,* 11*,* Monmouth University, 2017.
[179] D. Petrosian, Law 402-BState Ex. Rel Thornton v. Hay case brief. 2018.

the general public as "a recreational adjunct of the wet sand or foreshore area, since the beginning of the state's history.[180]" It's a tailored custom approach that it applied in Oregon.

Last, the third case is a 2001 case Leydon v. Town of Greenwich.[181] It essentially held that the beachfront of an exclusive town like Greenwich is like a public park and therefore all people should have access to it. The case rested on the public trust doctrine, as well as the first amendment. The case is ongoing to this day, of opening beachfront access for public use. Along the Connecticut coast in community after community access fees for non-residents sometimes ten times more than for residents. Also parking permit fees and parking prohibitions near the beach that prevent more expanded access by the public generally.

Comparatively, the access to the beach is a complex issue even in other common law countries. for instance, in England and Wales. I will report some measurement they took about regulate the access to the beach. First of all, let's introduce some concept in order to understand the dynamics. By *foreshore* is intended the area between high and low water mark on the seashore. I would then introduce a significant concept: crown estate.[182] I

[180] Ivi.

[181] T. L. D. Shaw, *Water Log*, Vol. 20. no 2, 2000.

[182] The Crown Estate is a collection of lands and holdings in the United Kingdom belonging to the British monarch as a corporation sole, making it "the sovereign's public estate", which is neither government property nor part of the monarch's private estate. The sovereign is not involved with the management or administration of the estate, and exercises only very limited control of its affairs. Instead, the estate's extensive portfolio is overseen by a semi-independent, incorporated public body headed by the Crown Estate Commissioners, who exercise "the powers of ownership" of the estate, although they are not "owners in their own right" .The revenues from these hereditary possessions have been placed by the monarch at the disposition of Her Majesty's Government in exchange for relief from the responsibility to fund the Civil Government. These revenues thus proceed directly to Her Majesty's Treasury, for the benefit of the British nation. The Crown Estate is formally accountable to the Parliament of the United Kingdom, where it is legally mandated to make an annual report to the sovereign, a copy of which is forwarded to the House of Commons. In Scotland, the Crown Estate is managed by Crown Estate Scotland, a body formed in 2016.

quoted the crown estate because we could think foreshore as property of crown estate. On the contrary, even if the majority of the foreshores belong to the crown estate, some of them is now also hold by private landlords. The confusion may arise from "from the fact that the Crown Estate is the *prima facie* owner of all foreshore (and seabed) by virtue of prerogative right. This, in effect, means that the Crown Estate owns all of the foreshore unless it has in the past sold it or given it away."[183] The access to the beach is mainly private in US and we could say the same for New Zealand and Scotland. However, in England and Wales the access to the beach is ruled differently. What is questioned is whether there are some restrictions about access to the beach for recreational purposes. For instance, the crown estate permit "broad right of access to the foreshore, subject to certain conditions (e.g., no commercial business).[184]" also, some organizations which have acquired beaches from the crown estate follow these guide lines. Another point to discuss, is whether is possible to bath on the foreshore or whether not. The legal position is here uncertain and still controversial. The answer would be negative. There is no common law right of access to the foreshore for recreational purposes. This principle came from an 1821 case, known as Blundell v. Catterall. The defendant used a beach 'between the high-water mark and the low-water mark of the river Mersey' at Great Crosby in Lancashire for the purpose of providing bathing facilities (including bathing machines and carriages for members of the public who wished to swim in the sea). The plaintiff, the Lord of the Manor of Great Crosby and owner of the beach in question, sought an injunction to restrain this use. The defendant argued that all members of the public had the right to use a beach for the purpose of gaining access to, and bathing in, the sea. However, it was

[183] https://www.brecher.co.uk/news/troubled-waters-rights-of-access-to-the-foreshore/
[184] https://www.brecher.co.uk/news/troubled-waters-rights-of-access-to-the-foreshore

reaffirmed that there is no common law right which grant the use and the access to the foreshore for recreational purposes. It was a decision criticised. Even scholars would not ague with the decision. However, the supreme court took the case again a few years ago. In 2015 there was a meeting in order to consider the presence of bathers for recreational purposes on the foreshore legit or not. This happened after a case in Newhaven. The supreme court had to decide the functions of bather in that circumstance by following one of this three options:

- by some kind of common law right;
- by some kind of common law presumption that bathers have access unless it is explicitly revoked by the landowner; or,
- that all of the bathers were trespassers and there is no right unless it is specifically granted.

The first option would clash with the judgment in *Blundell v Catterall*, unless one were to accept the argument that that decision should be limited to bathing machines. The second option also met with some scepticism by the majority of the judges who considered it to be "artificial", as this would put the legal status of land on the foreshore at odds with that of normal land. The judges considered that the last of the three options, that bathers are trespassers, was a strong possibility and this would appear to accord with the judgment in *Blundell v Catterall*. However, they also made reference to the considerable criticism and disapproval of that decision in various text-books[185]. What has the supreme court decided? Actually, it did not decide.

"The judges decided it was not necessary to determine which of the three options applied in order to decide the case. On the facts of the case, the owner of the Newhaven beach in question had a statutory function and had made a set of bye-laws which

[185] https://www.brecher.co.uk/news/troubled-waters-rights-of-access-to-the-foreshore/

governed the use of the beach by the public. Therefore, the argument that members of the public using the beach for recreational purposes were trespassers was rendered impossible. Those using the beach in question were therefore clearly doing so with implied permission – as they would have been on beaches owned by the Crown Estate, English Heritage or the National Trust." [186]

To sum up, the access to the foreshore is somehow harder to prohibit. Generally, the access by owners I granted, but the law about the recreational purposes and whether people can do on the foreshore is for some reason still uncertain and unclear. However, the main points are:

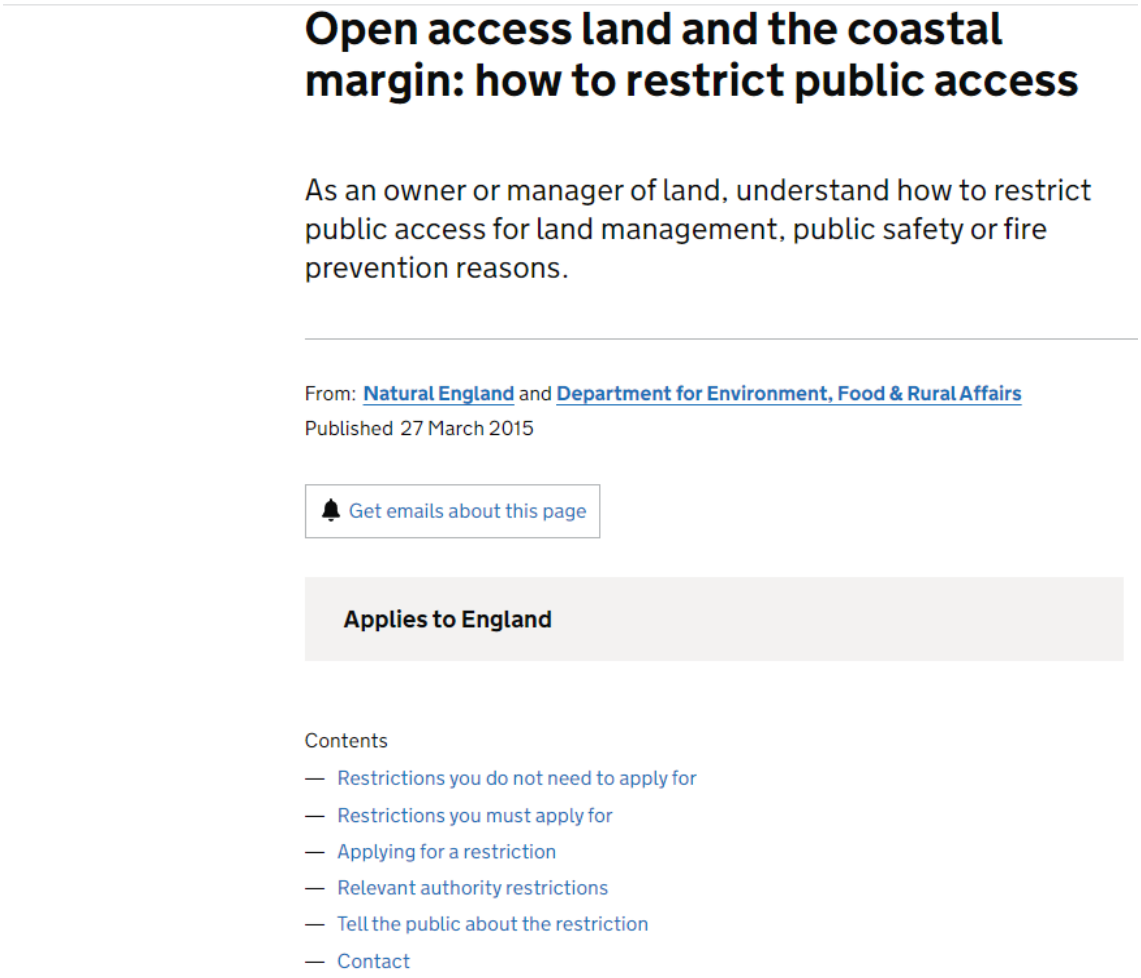
- It is possible for a private landlord to own foreshore land; and,
- there is no clearly-established general right of access for the public to the foreshore for recreational purposes.

Lately, a lot has been done to improve the access to the beach. The marine and coastal access act[187] 2009 provides for a coastal route round England and Wales with areas for recreation such as beaches, dunes and cliffs. It must first develop proposals for the line that the route should take along particular stretches of coast, and the recreation areas. It then has to consult locally about the proposals. The proposals will need to be approved by the Secretary of State. Natural England will then be responsible for work on the ground to make the route possible, like installing bridges, steps or gates. Once the route comes into force the public will have a right of access to the coastal route for open-air recreation on foot. The Act does not give a deadline for the coastal route. The government estimates that it will take about 10 years. The interesting point of this work, even if it is working progress to create a

[186] https://www.brecher.co.uk/news/troubled-waters-rights-of-access-to-the-foreshore

[187] Marine and coastal access act: an Act to make provision in relation to marine functions and activities; to make provision about migratory and freshwater fish; to make provision for and in connection with the establishment of an English coastal walking route and of rights of access to land near the English coast; to enable the making of Assembly Measures in relation to Welsh coastal routes for recreational journeys and rights of access to land near the Welsh coast; to make further provision in relation to Natural England and the Countryside Council for Wales; to make provision in relation to works which are detrimental to navigation; to amend the Harbours Act 1964; and for connected purposes

publica space accessible to the community, surfing on internet to get information about it, you can see a section entire dedicated to how to restrict public access. Even if the goal of the project should be to grant a space around the beach for recreational purposes, again we can affirm that the law is uncertain. Since, these spaces have a landlord the right to exclude someone is legit existent. They put a guide line for those who are owners or managers of the land. The web page is presented as the follow image[188]:



Open access land and the coastal margin: how to restrict public access

As an owner or manager of land, understand how to restrict public access for land management, public safety or fire prevention reasons.

From: Natural England and Department for Environment, Food & Rural Affairs
Published 27 March 2015

Get emails about this page

Applies to England

Contents

- Restrictions you do not need to apply for
- Restrictions you must apply for
- Applying for a restriction
- Relevant authority restrictions
- Tell the public about the restriction
- Contact

Figure 3

[188] Gov. UK, :Natural England and Department for Environment, Food & Rural Affairs, Published 27 March 2015.

As you can see from figure 3, there rules which describe the procedure needed to enable the right to exclude. Let's see in detail. The first *restrictions you do not need to apply for* says: the tenanted land, the farm tenant has 28-day restrictions allowance, not the land owner. Restrictions can't be used on Christmas day goods Friday and bank holidays and other festivities. It also says the amount of notice you need to give depends on circumstances. In addition to, there are restrictions about visitors with dogs: they need to keep their dogs on short lead of no more than 2 metres from March to July. Restrictions you must apply for concerns owner, tenants, individuals who hold rights over registered common land and individuals or organisation with sporting or other property rights over land held under licence or agreement.[189] The access restriction is given only for a period of the year and for reasonable reasons: public safety, fire prevention and land management. Third: land management concerns the application for a restriction for any type of land management activity on access land including: farming, events forestry, etc. The most important might be the fourth and fifth points about *public safety*:

"You may apply for a safety restriction on your land such as work operations involving machinery, but not to manage risks to public safety from natural features such as cliffs or potholes. Visitors to your land should take responsibility to keep themselves and their children safe. You don't need to apply for safety restrictions covered by a coastal access report, see applying for a restriction."[190]

This table of contents is followed by a list of liabilities given to the owner and guide lines to follow in order to prevent dangerous event such as fire.

[189] https://www.gov.uk/
[190] https://www.gov.uk/

Moreover, it also suggests which authorities you might need in case of dangerously events.

At common law, in Australian government, while the water itself was not capable of ownership, a landowner had certain rights in relation to it, depending on whether the water was under the land ('percolating' water), or in a watercourse that flowed through or adjoined the property. In the case of percolating water, the landowner was permitted to draw any or all of it without regard to the claims of neighbouring owners. It was treated 'as a feature of the land itself and the landowner was entitled to appropriate the resource without limitation'. In the case of water flowing through land, the 'riparian' owner had certain valuable, but limited, rights: to fish; to the flow of water, subject to ordinary and reasonable use by upper riparian owners and to a corresponding obligation to lower riparian owners; and to take and use ('abstract') all water necessary for ordinary purposes and other reasonable uses. In Embrey v Owen, Parke B explained that 'each proprietor of the adjacent land has the right to the usufruct of the stream which flows through. [..]It a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence[191]'.

The common law principles applied to Australia at colonisation, but from an early stage it was clear that 'the driest inhabited Continent needed a different approach. Water management regimes based on the assertion of state control and the grant of a range of licences were introduced Limits were also set on the amount of water that may lawfully be taken. Where the common law focused on individual rights in water, which was

[191] https://www.alrc.gov.au/

otherwise publici juris, the statutory regimes 'saw the re-emergence of the recognition of water as a "public responsibility"[192]. All levels of government 'now recognise that water must be managed in a manner which allocates water to users without compromising the environment'. Consequently, the introduction of statutory schemes which set up regulatory bodies capable of distributing water resources in a more equalised and efficient manner became a crucial step in the trajectory of Australian water management. The control of water, through statutory intervention, is traditionally a state responsibility in Australia. The Commonwealth has more limited scope to legislate in relation to water. There is also the constraint of the Constitution. The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation. Since 1915, a cooperative approach to water resource management in the Murray-Darling Basin has prevailed between the Commonwealth government and the governments of New South Wales, Victoria and South Australia. A combination of provisions has been relied upon to support Commonwealth intervention in water management, particularly the Water Act 2007[193], including a referral of power by New South Wales, Queensland, South Australia and Victoria. The Water Act was designed 'to enable the Commonwealth, in conjunction with the Basin States, to manage the [Murray-Darling] Basin water resources in the national interest'. This had been 'the primary focus of both Commonwealth and interstate attention to management of the water resources for decades.

[192] https://www.alrc.gov.au/
[193] https://www.alrc.gov.au/

The Water Act puts into place a framework that 'ensures continuity in Basin States' existing roles and responsibilities in Basin water management'. Water entitlements continue to be defined and managed under Basin State laws; and state agencies continue to manage storages, river flows and water deliveries. The Water Act was preceded by the agreement, in 1994, of the Council of Australian Governments to a framework to achieve the efficient and sustainable use of water. This was based on the 'separation of water property rights from land title and clear specification of entitlements in terms of ownership, volume, reliability, transferability and, if appropriate, quality'. It also made explicit provision for environmental water.[194] In 2004 this approach informed the National Water Initiative (NWI). Pursuant to this initiative, all governments in Australia made a number of commitments, including to:

- return over-allocated water systems to sustainable levels of use
- improve water planning, including through providing water to meet environmental outcomes
- expand permanent trade in water
- introduce better and more compatible registers of water rights and standards for water accounting
- improve the management of urban water.

A key aspect of the NWI was to provide statutory access entitlements, which have a number of features that are characteristic of 'property' rights: exclusivity, alienability, and enforceability. However, commentators' express uncertainty as to the precise nature of statutory water rights. As Michael McKenzie remarked:

"Looking at all the characteristics together, there is probably enough to suggest that the water rights under access licences do amount to rights of property. However, depending

[194] https://www.alrc.gov.au/

on the context and the type of access licence, it would not be such a surprise if a court found otherwise.[195]"

In *Western Australia v Manado* [2020] HCA 9 (Manado), delivered on 18 March 2020, the High Court unanimously held that state legislation which 'confirmed' access to and enjoyment of public areas, such as beaches and waterways as authorised by section 212(2) of the *Native Title Act 1993* (Cth) (NTA), must be recorded where those interests fall within a native title determination area. The Court found that such access and enjoyment was an 'interest' within the definition found in section 253 of the NTA, and therefore an 'other interest' within the meaning of section 225(c) of the NTA to be included in a native title determination.[196]

Native title determinations require, among other things set out in section 225 of the NTA, a determination of the nature and extent of any other interests beyond native title rights and interests in relation to the determination area. Section 253 of the NTA defines 'interest' as including "*...any other right…charge, power or privilege over, or in connection with: the land or waters; or an estate or interest in the land or waters*."[197] .Section 212(2) of the NTA provides that a law of the Commonwealth, State or Territory may 'confirm' public access to and enjoyment of areas such as waterways (including their beds and banks or foreshores), coastal waters, beaches, stock-routes, and other public areas as existing before the enactment of the NTA. In *Manado*, Western Australia had enacted the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA)* (TVA) which, at section 14, confirmed public access to those public areas in a form which followed the wording of section 212(2) of the NTA.[198] Native title claimants across

[195] https://www.alrc.gov.au/
[196] HWL EBSWORTH LAWYERS https://hwlebsworth.com.au/
[197] HWL EBSWORTH LAWYERS https://hwlebsworth.com.au/
[198] Ivi.

Australia seeking native title determinations will need to consider if any parts of the proposed determination area include public areas of the kind contemplated above, and the extent that similar 'confirming' State and Territory legislation may apply and can therefore be recorded in the native title determination.

The foreshore and beaches are incredibly matter of public properties and how the government should control e grant the access to them is a significant task by law. As we have seen, it is a complex debate. Even in the common laws' countries the law is different (we have seen some cases from some US states, England, Wales and Australia.). Even in Italy the entire system is not as simple as we will think. Even if the distinction between what has a public function and what no, thank to the Civil Code, the beaches are a quite controversial debate, even nowadays. In the second chapter, I spoke about *demanio* which is a sub-category of goods. The beach is categorised as of course *demanio marittimo.*

The term *demanio* is defined by article 822 of Civil Code. The article affirms that foreshores and beaches belong to the state. In addition to what I explained in the second chapter about public properties[199] and what are their rights, the focus here is to explore what happen about beaches and foreshores. It is necessary to say that beaches and foreshores belong to the state, but they can be object of contract between state and a private. This kind of contract is defined by *administrative concession*. According to the Italian juridic dictionary by administrative concession is meant:

"<<Administrative measure by which the P.A. confers ex novo active legal positions on the recipient, thus expanding its legal sphere>> And, translative and constitutive are the categories into which concessions are ordinarily divided. Thus, translative concessions can be: translative of powers or faculties over public property (so-called real

[199] In this case property means *beni*.

concessions); and, typical figures are: concessions of water, public land, state property, etc..... While, on the other hand, constitutive concessions can be distinguished into: constitutive of subjective rights, i.e., instituting subjective rights in the head of the recipient of the same; instituting rights to practice professions, for which the number of those exercising the profession is delimited by law."[200]

("*Provvedimento amministrativo con cui la P.A. conferisce ex novo posizioni giuridiche attive al destinatario ampliandone così la sfera giuridica".* E, traslative e costitutive sono le categorie in cui vengono ordinariamente divise le concessioni. Quindi, le concessioni traslative possono essere: traslative di poteri o facoltà su beni pubblici (cd. concessioni reali); e, tipiche figure sono: le concessioni di acque, di suolo pubblico, di beni del demanio ecc.… Mentre, invece, le concessioni costitutive possono essere distinte in: costitutive di diritti soggettivi, cioè istitutive di diritti soggettivi in capo al destinatario delle stesse; istitutive di diritti alla pratica di professioni, per le quali sia delimitato dalla legge il numero degli esercenti la professione").[201]

To be clearer, this concession is considered as a contract which have private nature. Both parts of the contract have specific rights and duties to respect to. Moreover, once the concessionaire become *owner*, he gains the right to exclude and he has every kind of tool to protect the good both as an executive authority and as a private property owner.

The article 28 of Italian Navigation Code[202], by the definition of maritime domain is intended: waterfront, beaches, ports and natural harbours. It comprehends lagoons, mouths of rivers flowing into the sea, the basins of salt and brackish water in communication, at least once a year, with the sea; channels usable for public maritime use as well. Furthermore, it is considered, according to Art. 329 of the Code of Navigation[203], to be pertaining to the state property itself, both the factories and other constructions present, within the limits of the coastal state property and the territorial sea.

[200] Mia proposta di traduzione.

[201] A. Pellicanò, Le concessioni demaniali marittime in Italia alla luce della Direttiva Bolkestein e il principio di concorrenza.

[202] Gazzetta Ufficiale, Codice della navigazione, art. 28.
[203] Gazzetta Ufficiale, Codice della navigazione, art. 329.

The main issue regarding Italy's beaches and foreshores relate to: assigning and performing administrative duties and the concession management system. Italy's regulatory framework for beach concession is rather complex, especially in term of responsibilities, procedures and criteria for determining parameters.

"Italy's regulatory framework for beach concessions is rather complex, especially in terms of responsibilities, procedures and criteria for determining parameters. Over recent years, also following intensive interventions by the European Commission against several Italian legislative actions, a number of corrective measures have been implemented and overlapped, starting from the original regulatory framework of the Codice della Navigazione (Italian Navigation Code) (R.D. 30 March 1942, no. 327) up to the recent "Disegno di legge recante delega al Governo per la revisione e il riordino della normativa relativa alle concessioni demaniali marittime lacuali e fluviali ad uso turistico ricreativo" (Bill of law delegating power to the government to review and reorganize the legal framework for the granting of concessions of State-owned maritime, lakeside and waterway property used for touristic and recreational purposes), approved by the Council of Ministers on 27 January 2017, envisaging a competitive selection procedure for concessionaires, thus surpassing automatic concession renewal.[204]"

The relationship between state and concessionaires is quite muti-faceted. The aspect I was focus on is the length of the concession which can be enjoy the concessionaire. The length of the concession depends on "different level of invasiveness of installations on state property."[205] Also, in order to adapt domestic law to Community principles. Specifically, Article 1(2) of Legislative Decree no. 400/93, has introduced a four-year licence, independently of the nature and type of facilities required for the carrying out of activities, without prejudice to the possibility for the concessionaire to request a different duration. This provision was subsequently amended by Article 10 of Law no. 88 of 16 March 2001, which set a term of six years for the duration of concessions, as well as automatic renewal for another six years at each subsequent expiry date: "the principle of "normality" of the

[204] C. Benetazzo, S. Gobbato, Italian state beach concessions and Directive 2006/123/EC, in the European context,9, 2017.
[205] C. Benetazzo, S. Gobbato, Italian state beach concessions and Directive 2006/123/EC, in the European context, 17, 2017.

renewal of concessions has thus been affirmed in the discipline of State-owned maritime property, in view of the "uniqueness" or "abnormality" or "atypical nature" of the extension time of the concession arrangement"[206]

Also, an important aspect to consider to, is decentralisation. That means that these territories have been charged to administrate the maritime domain by the public authority. It is the state that through concession give to regions, for example, the right and the power to administrate all those assets quoted in the article from italian navigation code.

"The Legislative Decree no. 85/2010 has established the transfer of a series of state-owned assets to territorial bodies, on the request of the latter, based on the identification and inclusion in special lists by the *Agenzia del demanio*. The identified assets may be transferred within the available assets of the territorial bodies, irrespective of the legal regime to which these are subject, except for State-owned maritime property assets, for which maintenance of the application of safeguards under current legislation is provided, namely the Civil Code, the *Codice della navigazione*, regional, state and European law, "with particular regard to those that protect competition.[207]"

More specifically, it is established that the ownership of such assets may be transferred from the State to territorial bodies, while preserving the character of inalienability. First of all, in accordance with the principle of "vertical subsidiarity"[208] and in compliance with the "Bassanini" reform[209], functions related to the granting of concessions are generally assigned to the Municipalities. In many instances, the latter are called upon to organise their

[206] C. Benetazzo, S. Gobbato, Italian state beach concessions and Directive 2006/123/EC, in the European context, 28, 2017.
[207] Ibidem, 21.
[208] The principle of subsidiarity is defined by Article 118 of the Constitution as a criterion for assigning administrative functions to ensure uniform operation at levels of government higher than the municipal level. There are three criteria on which the principle is based: 1) sufficiency; 2) necessity of reaching safer effects; 3) necessity of operating at a higher level. The principle of subsidiarity can be intended not only in the "vertical" sense (namely the distribution of power between centre and periphery), but also "horizontal" (in the relationships between public authorities and civil society organisations).
[209] It refers to some measures of Italy about Public administration. It is so called after the minister of public administration Franco Bassanini.

activities according to a planning logic to be carried out in accordance with urban development plans.

4. Public Goods

The linguistic ambiguity of the expression's public goods/beni pubblici is now evident and can be explained in the following way. If we talk about beni pubblici in Civil Law we are referring to a precise and specific category of law. They are regulated by Constitution and Civil Code and they are strictly categorised and as the adjective *pubblici* would suggest, they belong to the public law/sector. On the other hand, this specific law regarding goods is missing in Common Law. The reason is because of the distinction between public law and private law is almost non-existent. There are some regimes which regulate *properties* (the translation of beni). These regimes such as Trust and Law of property above described, cover a large and vast aspects of private law. They go far from the simple idea of goods. When we talk about goods/properties we are referring to different subject.

"Ma non è soltanto l'istituto del Trust a mostrarci che la law of property angloamericana si estende ben oltre i confini del nostro diritto dei beni. Property, infatti, nella terminologia giuridica inglese ricopre l'intera nostra nozione di patrimonio. Sono perciò property una larga varietà di istituti che nel diritto romanista non si sono sviluppati nell'ambito dei rapporti reali: una polizza assicurativa, un pacchetto azionario, un contratto di locazione immobiliare, ecc."[210]

("But it is not only the institution of Trust that shows us that the Anglo-American law of property extends far beyond the boundaries of our property law. Property, in fact, in English legal terminology covers our entire notion of property. Therefore, a wide variety of institutions that in Romanist law did not develop within the realm of real relationships are property: an insurance policy, a share package, a real estate lease, etc.")[211]

Hence, property is an umbrella term. When it comes the expression *property* a range of goods and services have been involved. Moreover, the concept of things, the issue about considering a thing as something over which to enforce certain rights, is missing as well. Common Law does not classify goods as Civil Law would do. From a legal point of view, goods are divided in movable and immovable goods. The issue regarding the fact if a thing is subject of law is solved like any other area of Common Law.[212] Likewise, there is not the concept of patrimony and its goods, such as in Civil Law.

However, we can speak about a categorization of goods, from an economic point of view. "The term good is used here in its basic economic sense to mean some thing or amenity to which individuals assign a positive value, whether out of simple desire or because it is necessary to life."[213] Goods can be differentiated by rivalry and excludability. Rivalry exists when goods are rival in consumption which means that a good cannot be consumed by more than one person. Excludability exists when a supplier can prevent people who do not pay from consuming it. Thus, we have four possible

[210] U. Mattei, *Il modello di Common Law*, 222, Giappichelli, 2004.
[211] Mia proposta di traduzione.
[212] P. D'Amico, *Il modello di Common Law*, 396, Giappichelli, 2005.
[213] D. C. Hole, *Property Law and Economics*, 227, - 2010.

combinations as we can as Figure 4.[214]

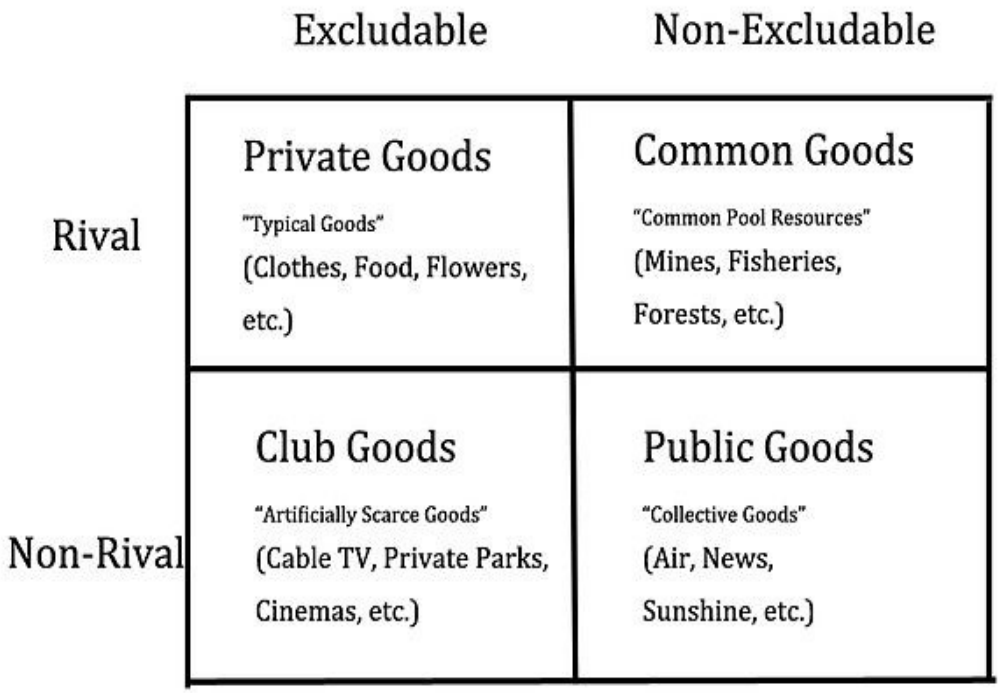


Figure 4

There are private goods which are rival and excludable. Goods that are all yours and you can be forced to pay in order to get it. Moreover, there are three more three ways of goods. There are goods that are excludable and non-rival and they are called club goods. These are not goods that we can consume simultaneously, but are forced to pay for them. traditionally club goods comprehended stuff like private clubs or toll roads and this is the reason why they are called club goods. Although, club goods, for instance, are non-rival up to a point of congestion and excludable. For such goods, the socially efficient level of provision may not correspond to the efficient level of provision for users beyond the point of congestion Goods can be non-excludable and rival and they are called common goods. They exist when

[214] S. Deneulin, N. Townsend, *Public goods, global public goods and the common good,* 20, Emerald Publishing Limited, 1974.

you have rivalry over a good that it is just for one individual agent but no can be precluded from participating. Lastly there is the intersection of non-rivalry and non-excludability. These are not goods we can consume simultaneously and we can consume them without paying for them. These characteristics prevent the provider of public goods from charging consumers for their consumption and so, if they are to be provided at all, they must be provided by the public sector.

Public goods are non-rival and non-excludable. I can quote some examples of goods that belong to this category: for instance, military, education system. This kind of goods are under-produced because of the non-excludability and non-rivalry matter. If you had to give the good you produced to everyone regardless if they pay or not who would bother to produce the good? Regarding non-rivalry, how you can charge a consumer when other enjoy the benefits at the same time? This is related to the popular problem called free rider. Economic agents are not willing to pay for a non-excludable good and others will use it for free. In this case, the role of the state is essential because it is the only one who can provide this type of goods. By economic point of view, firms cannot do this because there is no incentive to participate and there is no such thing like private donation that can generate enough revenue to run a public good.[215] The problem is that in large group, ana individual will enjoy the benefits without reducing the quantity or quality of good whether or not he or she contributes to producing it. And in a large population, whether you or not you contribute has no real impact on the quantity of the public good. Here we see the importance of the tragedy of the commons and its kin.

[215] Ibidem, 27-29.

In a perfect market, an efficient allocation of resources will be achieved by the forces of supply and demand, through the price mechanism, without the need for public intervention. However, public intervention may be justified in cases of market failure, where the price mechanism results in an allocation of resources that diverges from the social optimum.

4.1 Allocation of public goods

In 1952 the famous economist William Baumol[216] described for the first time the *free rider problem*. Essentially it is a market failure in which those who benefit from a shared often scarce resource do not pay for them. in other words, there is a benefit they get but they do not make a contribution to the cost.

"Samuelson noted that some goods, once they are made available to one person, can be consumed by others at no additional marginal cost; this condition is commonly called jointness of supply or non-rivalness of consumption, because your consumption of the good does not affect mine, as you're eating a lovely dinner would block my eating it."[217]

The free rider problem leads to under provision of a good or service and thus can be a key cause, an important cause of a market failure. So, the problem occurs when people can benefit from a good or service without paying anything towards it. They have little incentive to reveal how much they are willing and able to pay particularly for a public good because they can actually get that benefit a private benefit without making a contribution to the cost and often for example people can get away with making just a token contribution. Of course, if enough people can enjoy a good or service without paying for the cost there is a big danger that in a free market, where to make a profit, the good will be underprovided or not provided at all. It is about market failure in the sense that pure public goods are not provided in part because of the free rider problem. There is a wider context I think to the free rider problem for examples, national parks open spaces, city parks etc.,

[216] Baumol was an American economist. He was a professor of economics at New York University, Academic Director of the Berkley Centre for Entrepreneurship and Innovation, and Professor Emeritus at Princeton University. Baumol wrote extensively about labour market and other economic factors that affect the economy. He also made significant contributions to the theory of entrepreneurship and the history of economic thought.

[217] https://plato.stanford.edu/entries/free-rider/#PubGoo

particularly relevant at the moment. How can we overcome potentially the free rider problem? The obvious solution with pure public goods such as national defence, flood defence system and other pure public goods is a compulsory taxation to fund collectively. The provision of key services including national defence systems. A second approach could be to adopt a behavioural approach.

Therefore, the government is the only one who can provide public goods. It must decide if it should provide a public good and then it must decide how much of the public good to provide. However, what I want to emphasize, relative to my type of research as well, is how public goods in common law are inclusive of a group not only of goods that have expendability by society but how they also include a set of services. The linguistic difference I refer to in the first part of the paper exists precisely in identifying public good even services that in civil law do not correspond. let me explain in addition to air, roads, and other things that are provided by the state, in common law even the judicial service for example is considered a public good.

The facts that there is a lot of collective action even in many large-number contexts in which the individuals do not have rich relationships with each other and that, therefore, many people are not free riding in relevant contexts suggest at least three possibilities. First, there are ways to affect the incentives of group members to make it their interest to contribute. Second, motivations other than self-interest may be in play. Third, the actors in the seemingly successful collective actions fail to understand their own interests. Each is also supported by extensive empirical evidence.[218] When collective goods can be supplied by government or some other agency, political

[218] R. Hardin, The Stanford Encyclopaedia of Philosophy, Stanford University, 2020.

entrepreneurs might organize the provision. For example, Senator Howard Metzenbaum worked to get legislation on behalf of the poor and of unions, although he was certainly not poor and was not himself a working member of a union. Yet he benefited from his efforts in support of these groups if they voted to keep him in office. Because there is government, collective action of many kinds is far more likely than we might expect from the dismal logic of collective action.

Turn now to the assumption of self-interest. In generalizing from the motive of self-interest to the explanation and even justification of actions and institutions, Hobbes wished to reduce political theory to an analogue of geometry or physics, so that it would be a deductive science. All of the statements of the logic of collective action above are grounded in an assumption of the self-interested incentives of the actors. When the number of members of a group that would benefit from collective action is small enough, we might expect cooperation that results from extensive interaction, mutual monitoring, and even commitments to each other that trump or block narrowly self-interested actions. But when the group is very large, free riding is often clearly in the interest of most and perhaps all members.

Against the assumption of purely self-interested behaviour, we know that there are many active, more or less well funded groups that seek collective results that serve interests other than those of their own members. For a trivial example, none of the hundreds of people who have been members of the American League to Abolish Capital Punishment is likely to have had a personal stake in whether there is a death penalty (Schattschneider 1960, 26). In our time, thousands of people are evidently willing to die for their causes (and not simply to risk dying—we already do that when we

merely drive to a restaurant for dinner).[219] Perhaps some of these people act from a belief that they will receive an eternal reward for their actions, so that their actions are consistent with their interests.

Finally turn to the possible role of misunderstanding in leading people to act for collective provisions. Despite the fact that people regularly grasp the incentive to free ride on the efforts of others in many contexts, it is also true that the logic of collective action is hard to grasp in the abstract. The cursory history above suggests just how hard it was to come to a general understanding of the problem. Today, there are thousands of social scientists and philosophers who do understand it and maybe far more who still do not. But in the general population, few people grasp it. Those who teach these issues regularly discover that some students insist that the logic is wrong, that it is, for example, in the interest of workers to pay dues voluntarily to unions or that it is in one's interest to vote. If the latter is true, then about half of voting-age Americans evidently act against their own interests every quadrennial election year. It would be extremely difficult to assess how large is the role of misunderstanding in the reasons for action in general because those who do not understand the issues cannot usefully be asked whether they do understand.

Economists and scholars have been studying solutions to this economic and social problem. A major economist was Coase, who studied issues related to market failure. He published "The firm, the Market and the Law" in 1988. It was a collection of essays which was republished later by the title of "the problem of social cost" with some reflections about previous essays. Coase believed other economists who have been trying to analyse the

[219] R. Hardin, The Stanford Encyclopaedia of Philosophy, Stanford University, 2020.

social problem from an economic point of view have made some mistakes to not be practical. Coase goes on to explain that a world without transaction costs is a peculiar world in which, among other things, firms would not exist. In fact, economic institutions, according to Coase, do not matter in a world without transaction costs. Many critics of Coase have focused their attack on his apparent neglect of the existence of transaction costs in the real world. But this criticism is misplaced. Coase's discussion of the peculiar unreal world with no transaction costs was intended to draw out the strange implications of perfect competition, which he viewed as the central perspective in modern economic analysis. Sections II through IV of "Social Cost" were intended as a critique of economic theory circa 1960. They were not intended as a representation of the real world. Thus, much of the criticism that has been directed at "Social Cost" misses the mark.[220]

He pointed out that some kind of government action like the imposition of taxes was required in order to avoid those actions considered having harmful effects on others. "What I showed was that in a regime of zero transaction costs, an assumption of standard economic theory, negotiations between the parties would lead to those arrangements being made which would maximize wealth and this is irrespective of the initial assignment of rights."[221] The theorem proposed by him describes the economic efficiency of an economic allocation or outcome in the presence of externalities. The theorem states that if trade in an externality is possible and there are sufficiently low transaction costs, bargaining will lead to a Pareto efficient outcome regardless of the initial allocation of property. In practice, obstacles to bargaining or poorly defined property rights can

[220] G. Fox, The real Coase theorems, Cato Journal, 1995.
[221] Ivi.

prevent Coasean bargaining. However, Coase himself later expressed frustration because his theorem was misunderstood. In fact, other scholars were critical about his theorem and some of them described his theorem to be unrealistic. He was accused for ignoring the wealth and income effects from changes in ownership or liability.[222] The Coase theorem thus asserts that under perfect competition private and social costs will be equal. It is a more remarkable proposition to us older economists who have believed the opposite for a generation, than it will appear to the younger reader who was never wrong, here. This fact puts many of Coase's critics in a difficult position. Those who would argue that the conditions under which the Coase theorem would apply are unlikely to ever be realized must also argue, with equal enthusiasm, if they are to be consistent, that the conditions required for perfect competition are also unlikely ever to occur. If the Coase theorem cannot be used as a measuring stick against real world situations, then neither can perfect competition. Despite scholars arguing with Coase 'theorem, he was aware of the issues relating to transitional costs. So, a key criticism is that the theorem is almost always inapplicable in economic reality, because real-world transaction costs are rarely low enough to allow for efficient bargaining. That was the conclusion of Coase's original paper, making him the first 'critic' of using the theorem as a practical solution.

[222] G. Fox, The real Coase theorems, Cato Journal, 1995.

4.2 Commons

The main distinction we have analysed so far is the distinction between private and public goods. Apparently, both juridical systems would agree on this distinction. Even though they have different structure to preserve and protect those goods there are some rules which can definitely guarantee those rights. We have seen, in Italy, there are an entire legal apparatus that is public law which can guarantee for public goods and try to protect them giving to people access to hose goods. In USA, in common law system, the structure is quite different. There is a significant difference between the right over a land and rights over things which can be objects of rights. Each of them is regulated and provided by property rights. There are goods, a category of goods, which is defined as commons. This is a controversial issue which concerns all the legal systems took in account. I have said some goods like air land or water or even parks, which their public functions are the primary focus and their public access should be guaranteed. But there are some clarifications to make. Firs of all, we have already spoke about the concept of property. property[223]is a multi-faceted concept and quite complex. A new category as commons, or at least a defined distinction between public, private and common property should be high recommended. The reason why scholars are debating over this is because well-defined distinction would made clearer the actual governance measures regards some goods.

[223] In this case property has the follow meaning: proprietà.

If we wanted to be precise, we should recall the bundle of sticks by Blackstonian myth above quoted. The bundle of stick can well remind us the relationship between owner and the land describing the actual rights.

"The bundle of property "rights" over land that the law recognises will define, distribute and reflect different elements of resource utility that accrue to the "owner" of the right in question. This approach has considerable utility as a lens through which to view the dynamic interrelationship between property rights and instruments of environmental governance.[224]

The aim here is to express a taxonomy which can help to identify and define, more important, the relationship between "public goods", namely those benefits attributable to and derived from the land resource that are made available to the public at large, or (in the case of common rights) to a section of it, and are not reserved for the exclusive use of the "owner"[225]. Therefore, I will analyse different aspects of this matter by analysing English law and then Italian Law.

To establish a taxonomy for differentiating and organising different categories of property rule, including those creating what may be truly regarded as "public" property rights, we first need to consider the fundamental legal conception of "property" itself.[226] As I was saying before, property is a quite complex concept and scholars seem to agree on defining it as a system to determine the access to, the control of and to whom assign he same right in that resource. However, rights assigned to people over a resource ca be of a different nature. Sometimes, it could happen a recourse has a mix of common property rights. Moreover, it is necessary to say that even the expression 'public property' is a linguistic pitfall. The expression 'public property' is usually used to property collectively owned by the state

[224] C. Rodgers, Towards a taxonomy for Public and Common Property, Cambridge law journal, 78(1), march 2019.
[225] Ivi.
[226] Ivi.

or the government for the benefit for the citizens. Here it is, a significant difference between italian and English law. In italian la, we have analysed public goods as things which owner is a public body or a state and by virtue of that, the access to the good should be guarantee to everyone. On the other hand, for English law, when it comes to public property it does not mean that everyone has the right to access to it. It simply means that the owner is a public body or the government, it could be the crown as well, but this do not guarantee the access to the land resource just because the owner identify itself in a public body.

"The position in English law is very different to that in civil law jurisdictions, where land dedicated to public service use is treated as a distinct category of "public property" which is not alienable, and not subject to the acquisition of private or common user rights by prescription. This has its origins in the Roman law concept of res extra patrimonium – that is, land that could not be in the ownership of an individual. one of two forms: res communes or res publicae. Res communes comprised things of common enjoyment available to all citizens by virtue of their existence, and that were therefore incapable of private appropriation because their use was an incident of personality – for example air, sea or the seashore. Res publicae, on the other hand, belonged not to humanity as a whole but to the state, and included (for example) public roads, public baths, or flowing rivers. Citizens therefore enjoyed use and access to res publicae as citizens of the state. They were also treated as res extra commercium, in that they could not be bought or sold." [227]

Consequently, scholars may suggest a new taxonomy to figure this out. The proposal is to develop a model which comprehend public, private and public property. The key concept is to understand the different nature of resource, try to allocate it and the correct property right which can guarantee the utility of the resource.

"The taxonomy suggested here would organise different classes of property right by reference to whom access to elements of resource utility is given and on what terms – they may enjoy access to a resource subject to restrictions, or only for some and no other purposes, and the type of access may differ from case to case."

[227] C. Rodgers, Towards a taxonomy for Public and Common Property, Cambridge law journal, 78(1), march 2019.

In order to follow the proposal from scholars, we should distinguish three properties: public property, private property and common property.

- Public property rights: the access to the resource is controlled by a 'owner.' The very important thing is the owner is not necessary an individual, but it can be either a public body or corporate or a charity group. In addition to, there are the so-called non-profit owners bounded by their own institutions to use their assets only for a designed purposes and owners who can do whatever they think it is appropriate doing within their resources. In this case, the focus of the private property is the type of access to the resource is sanctioned by the owner "and not by reference to the identity of those by whom it is exercised."[228]
- Private property rights: in this case the access to the resource is shared by a defined category of users. These rights are both inclusionary and exclusionary.
- Public property rights: access to resources is granted to everyone. Although, it could be some restrictions about what they can do on the resource. For example, "Land held by public bodies for the benefit of the citizen is not subject to public property rights in this sense – unless the public are given direct access to the resource, such as for recreational use."[229]

The taxonomy I just reported had the goal to simply highlight a suggested way from scholars to identify property rules used in English law to rant recreational access to the public, mainly those applicable on common land

[228] C. Rodgers, Towards a taxonomy for Public and Common Property, Cambridge law journal, 78(1), march 2019.
[229] C. Rodgers, Towards a taxonomy for Public and Common Property, Cambridge law journal, 78(1), march 2019.

and town. Moreover, these are all cases where private property rights have been adjusted in order to protect and promote the "public interest" – to protect natural resources, to protect wildlife or wildlife habitats, or to promote public recreational access to privately owned land. As a matter of fact, we could talk about environmental goods. An interesting aspect which can prove the effort from public body/government to protect some natural resources.

Speaking of which, it was Garret Hardin[230] who coined the term *tragedy of the commons*. "Its thesis is that resource depletion and pollution problems both stem from the incentives created by 'open access' regimes (not-common property regimes) in which no one can exclude anyone else from using a given resource. Unless property rights are imposed, these incentives lead ultimate destruction of environmental goods."[231] What Hardin was suggesting was to figure out a solution to avoid the deployment of natural resources: privatization i.e., convert the open-access resource to private ownership. Or, government regulation. So that, economics incentives toward overexploitation might be reduced or eliminated through imposed restrictions.[232] The entire theory of Hardin has been argued because he suggested to relocate the common resources, but he does not express himself about the best allocation. He might say, later, it would be private or state the two only viable solutions. "An adequate theory of property rights on environmental goods must consider the full range of possible property-

[230]He was an American ecologist. He focused his career on the issue of human overpopulation, and is best known for his exposition of the tragedy of the commons, in a 1968 paper of the same title in Science which called attention to "the damage that innocent actions by individuals can inflict on the environment.

[231] D. H. Cole, *Property Law and Economics*, 232, -, 2010.

[232] Ivi.

rights, [..] and recognize that no single regime is likely to work for every resource and in every institutional and ecological setting."[233]

Most notably is the potential for overuse of land. Therefore, each individual person might see the commons as a land for them as an individual while ignoring the consequences of their use on everyone. At the same time, you have to wonder whether it was a common land that actually helped to justify individual property ownership. If you have individual property ownership, individual owners maximize the productive use of their property at least in theory. They use it in beneficial ways to society as a result, at least that is the theory behind private ownership. Nonetheless what I am interested in is the value behind common land. The land where the interests of the public are held. Although they are not unowned commons public parks, beaches and other large public spaces can function as common land. One of the most valuable things about commons is that no one has the right to exclude.

Water is something we need every day. The access to water and the way property law allocated it was essential to determining how we developed. How we privatize water rights sometimes we call water course surface water; they are really rivers and streams things that can be used for transportation. America in law divided property rights in two basic ways. the first one is called riparian rights. In those cases, we can observe that there is a natural use of water and consequently riparian owners[234] have riparian rights protected by those state that recognize those rights. The second category of use within riparian rights are artificial uses so this might be irrigation, propelling machinery and other non-domestic uses and each

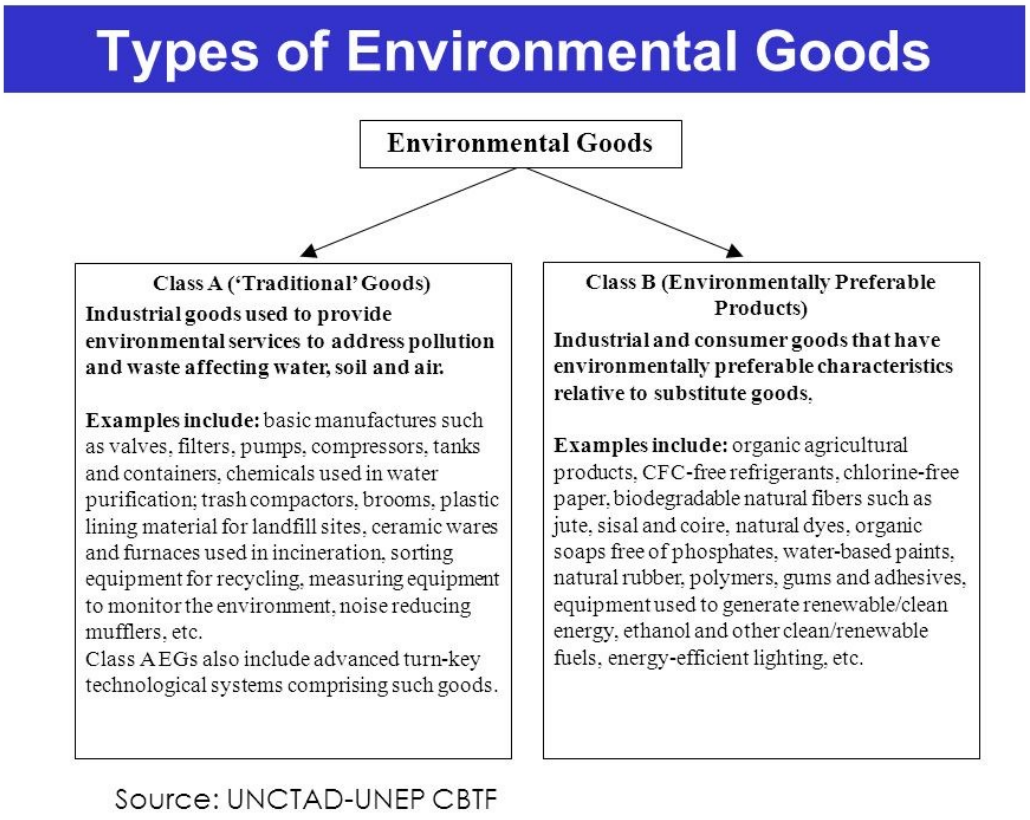
[233] Ibidem, 234.

[234] Riparian owners are those who have property rights next to a river or a stream or a water course and they have certain rights.

riparian owner can use water as long as that use is reasonable. On American allocation of water rights in water courses is the appropriation rule. This rule is typical of western land because the climate is drier and irrigation, for example, is a necessity for most human settlements. Indeed, the goal is to protect the water as a precious resource. In both cases, neither of them encourages conservation of resources specifically water and neither has a particularly good way of responding to droughts. In a prior appropriation regime, you can actually have an incentive to keep using the water you initially you had an initial entitlement to keep at least showing that you are using it by spraying in an area that might not need irrigation because you do not the ability to not use it. Similarly, the riparian allocation of water ownership might give you access to a river simply by having a very small stretch of land along that river.

Conservation and restrictions deal with landscapes. They deal with nature, wildlife, environmentally sensitive lands. Preservation restrictions differ from those in that they would typically cover historic buildings or structures that are occupied by people. Typically, these restrictions are held by a non-profit organization usually with some expertise in holding easements. So, a historic preservation organization at the state or local level or maybe a land trust might be the kinds of entities that hold preservation and conservation restrictions. Let's deepen in the terminology. why are we using the term restrictions? Some people use the term conservation and preservation easements. Actually, even the federal government uses that term in incentives. Although even scholars can't decide whether these are covenants or easements and state legislatures have had trouble with that too. The content of these restrictions: they might prohibit construction on environmentally sensitive areas, they might prohibit demolition or changes

to exteriors of historic buildings or even ancillary structures that might be on an historic site. This restriction might prohibit subdivision, either under certain circumstances or absolutely. They might prohibit certain uses that constrain or threaten conservation and preservation values. They might actually require the property owner to engage in affirmative maintenance. More technical provisions and restrictions include requiring the property owners to ensure the property and to indemnify the restriction holder. Finally, there might be mandates for public access or at minimum access by the organization holding the restriction for regular inspections. Usually, these obligations endure perpetually.



Source: UNCTAD-UNEP CBTF

2.4 Comparative analysis on commons

It is not possible to define and classify public property without mentioning common goods. In Italian jurisprudence, the dichotomy between common goods and public property is still a controversial topic. The controversy arises from the condition of use already mentioned above. Public goods, in general, are classified according to the condition of use. If this is true, all those goods that have as their addressee the population and therefore have a common use, have to be considered as common goods. The issue arises within the need to create a regulation and management recognized by law that concerns a series of goods that have as their destination the community and have public power. However, the role of the state and its function is not yet well defined, at least legislatively speaking, because there is no category that can identify these goods. There are some important personalities who have tried to describe which are common goods and how should they be regulated. Actually, I will quote two definitions that I found more accurate and valid. According to Ostrom[235]: "un bene comune è 'una risorsa condivisa da un gruppo di persone e soggetta a dilemmi ossia interrogativi, controversie, dubbi, dispute sociali."[236]

The second definition is given by Stefano Rodotà[237]: "i beni comuni sono 'le cose che esprimono utilità funzionali all'esercizio dei diritti fondamentali nonché al libero sviluppo della persona" e che, per questo, "devono essere tutelati e salvaguardati dall'ordinamento giuridico, anche a

[235] Elinor Claire Ostrom was an American political economist. In 2009, she was awarded the Nobel Memorial Prize in Economic Sciences for her "analysis of economic governance, especially the commons", which she shared with Oliver E. Williamson.
[236] S. Marotta, *La via italiana ai beni comuni*, Aedon, Fascicolo 1, gennaio-marzo, 2013.
[237] Stefano Rodotà was an Italian lawmaker and politician.

beneficio delle generazioni future'."[238] These two personalities have been played a significant role around this debate. In addition to, the debate has an exquisite international taste. According to Hardin[239], if an asset does not belong to anyone, there is a significant possibility that it could be overused. Anyone can take benefit from the use of that asset. But, the entire cost necessary to protect and manage it will relapse on the community.[240] Of course the entire theory is strictly connected to the politic and economy. Both disciplines play an important role about the management of goods which can be used by the entire community and at the same time the asset does not belong to anyone. However, it seems the manager of the asset remains the state. An enormous number of goods nowadays belong to this category. Following the definition given by Ostrom and taking account of the theory formulated by Hardin, the America political economist proposed political propositions. Evidently the political and common way to manage goods revealed itself insufficient or at least, obsoleted. Ostrom affirms that nor the state nor the market have been successful.

"In particolare è stata vista come il supporto di carattere scientifico a forme di economia alternative tra quella di Stato o collettivistica o quella di mercato basata sull'iniziativa privata, […] è stata considerata come la dimostrazione scientifica della praticabilità di forme di proprietà alternative alla proprietà privata, individuale e pubblica."[241]

("In particular, it has been seen as providing scientific support for alternative forms of economics between state or collectivist economics or market economics based on private initiative, [...] it has been seen as demonstrating scientifically the viability of alternative forms of ownership to private, individual and public property.[242]")

The theory promoted by Ostrom was so strong that influenced also other personalities such as Rodotà. He was the one who worked in order to achieve a re-formulation of the management of public property in the Italian territory.

[238] S. Marotta, *La via italiana ai beni comuni*, Aedon, Fascicolo 1, gennaio-marzo, 2013.
[239] Author of a popular and influential essay "The tragedy of commons"
[240] A. Lalli, *I beni pubblici. Imperativi del mercato e diritti della collettività,* Jovene editore, 262, 2015.
[241] Ivi,263.
[242] Mia proposta di traduzione.

According on the use or purpose of public goods, the entire Commissione Rodotà[243] drafted new category of public property and a new model of belonging. A new category proposed was, in fact, the category of commons. They differentiate from other categories by the fact that they do not belong to the public administration or privates, they belong to anyone.[244] What, then, are the goods that would be part of this category?

"[…] i fiumi, i torrenti, i laghi e le altre acque; l'aria, i parchi, le foreste e le zone boschive; le zone montane di alta quota, i ghiacciai e le nevi perenni; i tratti di costa dichiarati riserva ambientale; la fauna selvatica e la flora tutelata; le altre zone paesaggistiche tutelate. Vi rientrerebbero anche i beni archeologici, culturali e ambientali."[245]

("[...] rivers, streams, lakes and other waters; air, parks, forests and wooded areas; high-altitude mountain areas, glaciers and perennial snows; stretches of coastline declared an environmental reserve; protected wildlife and flora; and other protected landscape areas. Archaeological, cultural and environmental properties would also be included.")[246]

All those goods that are "pur essendo indissolubilmente connessi a esigenze profonde della persona umana (vitali e culturali), sono in una situazione di scarsità e di vulnerabilità."[247] (while inextricably connected to deep needs of the human person (vital and cultural), are in a situation of scarcity and vulnerability)[248] They are subject to the destructive action of world economic policies or, in any case, are goods at risk due to the abuse that is made of them. The issue also arises from the awareness that these goods are available to all and so is their use. abuse or misuse of these goods could lead to a road of no return. This law proposal would represent a protection of these goods, aimed at preserving the use of these goods. The commission considered the function of these goods to be of such great importance. Exactly for this reason, the Rodotà commission, recognizing the value of the goods and

[243] The name of the movement headed by Rodotà.
[244] In italiano l'espressione giuridica corretta sarebbe: a titolarità diffusa. (Angelo Lalli)
[245] A. Lalli, *I beni pubblici. Imperativi del mercato e diritti della collettività,* Jovene editore, 266, 2015.
[246] Mia proposta di traduzione.
[247] Ibidem.
[248] Mia proposta di traduzione.

expressing the will to protect them as much as possible for future generations, has proposed guarantees even from the legislative point of view, such as indemnity protection and inhibitory protection. It is opportune then to say, that and other categories of goods like those properly public, that is belonging to the state, proposed the elimination of the distinction between patrimony and demanio. Finally, come individuate others three categories: "beni ad appartenenza pubblica necessaria; beni pubblici sociali; beni fruttiferi."[249] However, the one proposed by Rodotà was not actually applied, at least until 2011. until then, the classic scheme was taken in reference to the management of public goods. "il tema dei beni comuni era argomento di carattere squisitamente dottrinario o, al più, *de iure condendo*, secondo ad esempio, la prospettiva suggerita dalla commissione Rodotà." [250]
The year 2011 was significantly important. From that moment on, the issue begins to concern Italian lawmakers as well, following sentences published by the *Corte di Cassazione a Sezioni Unite*.

The interest regarding the possible categorization of certain goods already defined as public whose use has been disproportionate has certainly increased, not only for the reason explained above, but also for the numerous privatizations of these goods. it is a social phenomenon that has been growing since the 90's, which provides for the privatization of goods already considered public. this has been possible in addition to a strong reminder of the untransferable status of these goods, also because of the evident difficulty of the role of the state in protecting the needs of the community and satisfying its requirements. The attention to this bill, and more generally, to the redefinition of a new category regarding a sub-set of public goods, is fundamental for me, to bring attention to how certain goods considered

[249] Ivi, 267.
[250] Ivi, 268.

public and therefore available to all still need a body, whatever it may be, that regulates their use and protects their preservation. In spite of its use by the community, the economy and the mechanisms it produces have a strong impact on the management of goods such as water, which is considered necessary for the vital condition of the human being. therefore, what weight does the economy have and what role does it play in the management of public goods?

Usually air, land and water are considered environmental goods. Generally, economists use the word *land* to represent natural resources.[251] Although, these types of goods expect another treatment as property. "Scholars have long recognized that the nature, extent, and allocation of property rights can significantly affect the rate of resource depletion and degradation. In the 4th century B.C.E., Aristotle wrote, 'that which is common to the greatest number has the least care bestowed on it'."[252] Common property (res communes) refers to collective ownership situations, in which the owners cannot exclude each other, but can exclude outsiders. Public or state property is a special form of common property supposedly owned by citizens, but typically controlled by elected officials.[253] Finally, 'no property' or 'open access'[254] means no one has the right to transfer or to use or exclude because no one is an owner.

A linguistic issue has been observed. Usually, the conflation of 'common' with 'open access' is understandable because of non-property resources are often described as *common pool resources*. What distinguishes open access resources from common property is the unlimited size of the

[251] D. H. Cole, *Property Law and Economics*, 227, -, 2010.
[252] Ibidem, 225, -, 2010.
[253] Ibidem, 229.
[254] Res nullius.

group capable of accessing and using the resources. In order for property to be 'common' (res communes) rather than open access (res nullius) there must be at least two groups one of which collectively controls the resource and excludes the other from access and control[255]. 'Common' is sometimes also confused with 'state' property. The state could be viewed as a group of owners. "When a group of self-governing villagers controls access to fishery, for example, that is considered 'common' ownership. But when non-users, far removed from the village, control access and use that is state or public ownership."[256] However, in some ways this might seem like a good thing. But there are many negative consequences too.

[255] D. H. Cole, *Property Law and Economics*, 230, 2010.
[256] Ibidem, 230-231.

Conclusion

I would like to summarize like this: starting from the analysis of the Civil Law legal system we can affirm that the expression *beni pubblici* is referring to a significant area of law called public law. They are categorised and according on that classification, they are regulated by government, which is the major entity entitled to protect and rule these goods. On the other hand, in Common Law system, the public law is almost no existent. Thus, the government does not have the same power and tools to administrate these goods. As a matter of fact, every kind of relationship between a juridical entity and a thing/good/asset is considered as a private law matter. The expression public goods are used to express a group of private goods which function is public.

I would conclude saying that, public goods are in both systems goods which function is public and this is the reason why they need to be protected and ruled. According on the law of public goods in civil law, it is a wider concept rather common law. In civil law, public goods reach out several services which do not have correspondence in common law. In common law there is not a law which regulate these goods, there are though regimes which take care of these services which function is public and they try to guarantee the enjoyment from the community. The element that truly make a distinction is the regimes and institutions that take care of those goods.

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“False friends e diritto comparato: il caso dei beni pubblici/public goods”.

Il diritto è una disciplina molto complessa. Il diritto comparato è una branca di studio del diritto e come suggerisce l’aggettivo ‘comparato’, lo strumento di analisi è la comparazione. Il diritto comparato si è affermato nel diciannovesimo secolo, in seguito alla formazione delle nazioni. La centralizzazione dei poteri ha favorito la nascita di norme che regolassero i rapporti all’interno delle nazioni e tra le nazioni. Nasceva allora la curiosità e lo studio dei vari i modelli giuridici. Studiare quali fossero le somiglianze e le differenze tra i vari modelli giuridici adottati dalle nazioni era auspicabile per una maggiore comunicazione fra le nazioni. Uno strumento che allo stesso tempo definirei di supporto e di ostacolo alla comparazione è stata proprio la lingua. La lingua naturale di un Paese è utilizzata in modo speciale da alcune discipline che, per loro natura, necessitano di un linguaggio più tecnico e specifico. Il diritto è una di quelle discipline. Affinché la comparazione sia di successo, è necessario conoscere una lingua che possa permettere la comunicazione tra giuristi di paesi diversi che confrontano i propri modelli giuridici/norme/istituti. Ad oggi, la lingua che favorisce questa comunicazione è sicuramente l’inglese. L’inglese è considerata lingua veicolare. Tuttavia, la conoscenza della lingua non è di certo sufficiente. Basti pensare, all’unione europea come istituto all’interno del quale circolano norme e/o documenti che devono essere compresi da tutti i membri partecipanti e quindi scritti in inglese, ma che devono essere poi tradotti nelle specifiche lingue naturali dei membri partecipanti per metterle in atto e/o discuterne all’interno del proprio Paese. La traduzione in questa disciplina non è un semplice processo di traduzione di un termine da una

lingua di partenza ad una lingua di destinazione. Il processo di traduzione preso in considerazione presenta delle difficoltà sia di natura legale che di natura linguistica. Dal punto di vista legale, il linguaggio utilizzato è un linguaggio tecnico che è sottoposto all'interpretazione di giuristi. Questo significa che ci sono già due processi di mediazione coinvolti: quello interlinguistico e quello intralinguistico. L'interpretazione di un testo giuridico nella propria lingua naturale è già di per sé un lavoro di mediazione che subisce poi un ulteriore processo di mediazione tra la lingua naturale e la lingua veicolare. Dal punto di vista linguistico è molto più complesso. Talvolta, nel processo di mediazione di testi altamente specialistici, le discrepanze sono di diversa natura. Ad esempio, vi possono essere ambiguità nel tradurre concetti. Alcune parole nascondono un'idea che non viene contemplata nel termine equivalente della lingua di destinazione. Ecco un esempio riportato dal professor Sacco: "se un francese dice 'tourner ses épaules' per dire 'voltare la propria persona', un italiano può tradurre 'voltare le spalle', perché la lingua italiana ammette questa specifica sineddoche. Ma si può fare lo stesso per tutte le sineddochi ammesse dalla lingua francese?" Paradossalmente, nel caso preso in esame non è la terminologia in sé a suscitare problematiche linguistiche, ma il valore semantico a cui fa riferimento nella lingua di destinazione non è l'equivalente nella lingua naturale di partenza. Il problema legato alla terminologia infatti è ad oggi facilmente risolvibile. Vi sono software che permettono la memorizzazione di molti termini specifici che accelerano il processo di traduzione. L'ostacolo ad una corretta traduzione è saper scegliere la strategia traduttiva migliore che possa cosi tradurre al meglio il valore extralinguistico di un termine in un contesto altamente specifico. Proprio per questo, una seconda ambiguità è legata al differente valore semantico tra il significato ordinario e quello legale. Ecco il processo di

mediazione intralinguistica di cui parlavo. Vi sono parole che presentano una pluralità di significati, come ad esempio la parola 'equity' in inglese. Nel mio caso specifico andrò ad analizzare un fenomeno di natura linguistica conosciuto come false friends. Tuttavia, è necessario fare due precisazioni: oggetto della mia analisi è quella del "false friends beni pubblici public goods". Dal puto di vista strettamente linguistico, il false friends esiste poiché nella lingua inglese il termine *bene* viene tradotto con il termine *property.* Da non confondere quindi con l'equivalente in italiano *proprietà*. Oltre ad esservi quindi una discrepanza linguistica evidente, è necessario avere una conoscenza dei sistemi giuridici di riferimento e di un bagaglio culturale legale che permettano di comprendere questo tranello linguistico. Io ho approfondito il caso dei beni pubblici/public goods prendendo in riferimento il sistema Civil Law italiano e quello di Common Law negli Stati Uniti d'America.

Partendo dal sistema giuridico italiano di Civil Law, vi sono dei concetti da introdurre. Innanzitutto, nel sistema di riferimento si fa una prima e fondamentale distinzione tra *cose* e *beni* di diritto. Il concetto di beni è particolare. Per beni si intende "qualunque cosa possa formare oggetto di diritti". È l'articolo 810 del codice civile a definirlo tale. Non tutto quello che esiste in natura può essere considerato come bene ma solo quelle 'cose' che possono formare oggetto di diritto. Per essere qualificato come 'bene' è opportuno che sia suscettibile di appropriazione e di utilizzo, deve possedere, cioè, un valore. Se volessimo essere ancora più precisi, un bene acquisisce valore quando esiste in quantità limitata ed è suscettibile di appropriazione. Non sono beni le cose che si trovano in natura in quantità illimitate come potrebbe essere l'aria o, non appropriabili, come le stelle o il sole, mentre è sicuramente un bene l'energia elettrica prodotta grazie ai pannelli solari.

Abbiamo definito ‘bene’ solo dal punto di vista economico, ma da punto di vista giuridico il concetto di " bene " è più vasto: sono beni non solo le cose che hanno un valore, ma anche i diritti perché anche questi hanno valore e sono commerciabili (o, meglio, negoziabili). Ricordiamo infatti, la distinzione di beni in: beni corporali, beni immateriali, beni materiali e beni mobili. I beni sono strettamente legati anche ad altri due concetti davvero complessi: quello di proprietà e di titolarità. Questi ultimi due concetti hanno un peso importante anche nel sistema di common law. Comparando questi due modelli giuridici è interessante come il regime di proprietà sia inteso diversamente. La proprietà che in Civil law può essere privata o pubblica dove per privata si intende titolare del bene un individuo privato e per pubblico si intende un ente pubblico o lo stato. In common law, lo stato o l’ente pubblico titolare del bene è giuridicamente considerato un individuo privato. La grande distinzione, che credo si debba sottolineare, non è nel mancato equivalente di concetto di bene pubblico piuttosto nell’idea di pubblico. In common law, a differenza del Civil law, la principale distinzione non è tra diritto pubblico e privato ma tra diritto privato e diritto penale. In questo senso, gli enti pubblici o lo stato, titolari di beni, svolgono semplicemente la funzione di gestori di questi beni per tutelare l’uso di questi ultimi e garantirne l’accesso alla comunità. Giuridicamente però non hanno un regime ad hoc. In common law è opportuno citare la Public Trust Doctrine. È un principio al quale si fa riferimento per l’uso pubblico di alcune risorse indipendentemente dalla proprietà privata. I casi riguardanti l’accesso alle spiagge, ricordiamo ad esempio il caso Illinois central Railroad Company v. Illinois, in cui la Corte Suprema ha ribadito che ogni Stato nella sua qualità di sovrano detiene titolo permanente a tutte le terre sommerse all'interno dei suoi confini e detiene queste terre nella fiducia del pubblico, sono casi interessanti perché evidenziano il ruolo dello stato come ‘gestore’

di risorse il cui obiettivo è garantire l'uso della risorsa al pubblico. Se volessimo estendere il paragone, in Civil law e nello specifico, nel sistema italiano, la spiaggia viene categorizzata come demanio. Fanno parte del demanio pubblico tutti quei beni inalienabili e imprescrittibili che appartengono ad uno stato. La spiaggia privata a cui solitamente siamo abituati in Italia, di uno stabilimento balneare è dal punto di vista legale, una 'concessione' che lo stato fa ad un privato. Viene concessa la gestione di uno spazio il cui accesso rimane garantito al pubblico. L'amministrazione dell'accesso alle spiagge è una questione controversa e delicata. Ho comparativamente portato un'analisi tra l'Italia e la sua visione di amministrare le spiagge come ho detto con la cosiddetta concessione amministrativa, e poi ho inserito casi pronunciati dalla corte suprema n diversi paesi di common law, quali Inghilterra compreso i Wales, gli stati uniti a Australia. Tutti e tre questi paesi nascono dalla stessa famiglia di ordine giuridico, però è interessante notare come alcuni aspetti si siano evoluti, come proprio quello dell'accesso alle spiagge intese come bene pubblico. La ricerca che ho condotto sull'Inghilterra e Wales consiste in un progetto che prevede la costruzione di una strada attorno alle spiagge che può essere usato per scopi ricreativi. Accanto questa nozione, vengono però introdotte delle regole affinché i proprietari di questi territori sui quali dovrebbe costruire uno spazio adibito a scopi ricreativi, abbiano la possibilità di escludere terzi dal loro territorio anche se l'utilizzo di questo spazio pubblici è più volte ribadito essere per scopi ricreativi. In questo momento, il progetto è in fase di sviluppo e le regole che amministrano l'accesso a questo spazio pubblico sono in fase di sviluppo, ma consultabile sul sito governativo d'Inghilterra. Parallelamente mi sono occupata anche di approfondire la questione della gestione dell'accesso alle spiagge in America. Abbiamo visto essere più complicato perché ogni stato ha la

possibilità di appellarsi alla dottrina del Trust per l'utilizzo di spazi pubblici. Diversi sono i casi della corte suprema che ho riportato. Tra le diverse sentenze emesse dalla corte suprema riguardo alla gestione delle spiagge, ho potuto consultare un vero e proprio manuale riguardante l'accesso delle spiagge in new jersey. Nel manuale viene spiegato il principio della Trust Doctrine, della sua origine storica, una linea temporale che descrive l'evoluzione di questo principio e i casi più impattanti dal punto di vista legale dello Stato. E infine, l'Australia, sul sito nazionale, vengono riportati i codici attraverso i quali fare riferimento e le regole da seguire nel caso si voglia accedere ad una spiaggia. Vi è anche qui una vera e propria guida (che ho riportato all'interno della tesi) che spiega dettagliatamente i diritti e doveri sia che tu sia un proprietario che tu sia colui che sfrutta la risorsa pubblica.

Questo approfondimento relativo all'accesso delle spiagge è uno degli esempi più emblematici per cercare di comprendere come i governi o le amministrazioni pubbliche o gli apparati pubblici affrontino l'aspetto relativo al 'pubblico'. La mia ricerca cerca attraverso esempi comparati di descrivere delle azioni di carattere politico, sociale e legale che sono state intraprese da parte degli apparati pubblici. Seppur simili, la gestione dell'accesso alle coste sono amministrate in modo differente addirittura tra paesi che appartengono alla stessa famiglia giuridica. In Italia, la 'concessione amministrativa' è chiaramente qualcosa di straordinario se si pensa al modello di ownership di stampo britannico. Proseguo la mia analisi, quindi, con un ulteriore proposta 'politica' di amministrazione di risorse il cui uso dovrebbe essere pubblico.

È proprio il dibattito intorno ai beni comuni/commons. Questa proposta di una nuova categorizzazione di beni di cui idealmente il

proprietario è la collettività. La questione di una nuova tassonomia che riguarda i beni comuni nasce in seguito alla necessità di allocare i beni pubblici anche da un punto di vista non solo legale ma anche economico. Uno degli svantaggi dei beni pubblici è quello del free rider. Questo lato "negativo" economico dei beni pubblici è da molto discusso. Le teorie economiche che hanno cercato di proporre delle soluzioni son diverse la più famosa è sicuramente quella del teorema di Coase. Il teorema in questione propone, dal punto di vista economico, una soluzione affinché coloro che sfruttino i servizi e i beni pubblici, siano anche poi coloro che partecipano ai costi del loro mantenimento. A volte capita che, ci siano persone che non partecipano ai costi della somministrazione di questi servizi ma che comunque ne traggono beneficio. Questo a lungo andare ovviamente porta ad una scarsità di quelle risorse. Da molto gli economisti stanno cercando di proporre teorie che possano ridurre la minimo questo problema. Tuttavia, anche per quanto riguarda il teorema di Coase, molti studiosi si sono lamentati della sua inapplicabilità alla società. Lui stesso ha riconosciuto in seguito di non aver saputo creare un teorema che potesse essere appropriato alla realtà.

Quelle risorse che inevitabilmente appartengono a tutti, di cui qualcuno però si deve occupare per evitare lo sfruttamento di queste e garantire a tutti la possibilità di utilizzarle. In Italia ad esempio, la commissione Rodotà ha proposto uno schema di legge delega per la modifica delle norme del codice civile in materia di beni pubblici. La Commissione prendeva atto innanzitutto dei cambiamenti tecnologici ed economici verificatisi dal 1942, che hanno reso particolarmente obsoleta la parte del Codice Civile relativa ai beni pubblici. Alcune importanti tipologie di beni sono assenti, un'assenza oggi non più giustificabile. In primo luogo i

beni immateriali, altre tipologie di beni pubblici sono profondamente cambiate negli anni: come le c.d. “reti”, sempre più variabili, articolate e complesse. Inoltre, le risorse naturali, come le acque, l’aria respirabile, le foreste, i ghiacciai, la fauna e la flora tutelata, che stanno attraversando una drammatica fase di progressiva scarsità, oggi devono poter fare riferimento su di una più forte protezione di lungo periodo da parte dell’ordinamento giuridico. A tale proposito è interessante il saggio di G. Hardin “The tragedy of commons”. Egli descrive un modello che costituisce una "metafora" della pressione data dalla crescita incontrollata della popolazione umana sulle risorse terrestri, presentandolo quale "tragedia della libertà in una proprietà comune". La posizione di Hardin è, in sintesi, che gli utilizzatori di una risorsa comune sono intrappolati in un dilemma tra interesse individuale e utilità collettiva, che è sostenibile solo in situazioni caratterizzate da scarsità di popolazione. Dal dilemma, secondo Hardin, non è possibile uscire con soluzioni tecniche che si risolverebbero in espedienti in grado solo di spostare il problema in avanti nel tempo. L'ultima parola, secondo Hardin, spetta all'intervento di un'autorità esterna, di norma lo stato, che imponga la "*coercizione*" come sistema per evitare la "tragedia": si tratta di una soluzione statalista e contro il libero mercato, secondo cui, nell'elaborazione di soluzioni politiche e legislative, la salvaguardia dell'interesse e del bene della collettività viene prima della tutela della libertà individuale dei diritti individuali, tra cui il diritto di proprietà. La prospettiva economica e quella legale, inevitabilmente, si intersecano. Il dibattito, ad oggi, è ancora aperto e controverso.

Concluderei la mia analisi quindi sostenendo che il diritto dei beni pubblici del nostro sistema è molto più ampio di quello anglo-americano. I beni pubblici, nella loro suddivisione in patrimonio, demanio indisponibile

e disponibile sono tutelati e regolati dal codice civile. D'altro canto, nel diritto anglo-americano per beni pubblici si intende l'insieme di servizi il cui uso è a disposizione della collettività. Il termine giuridico inglese property, corrispettivo di beni, in realtà traduce solo il nostro concetto di patrimonio. Per property si intende una larga varietà di istituti che nel nostro diritto non si sono sviluppati. Pertanto, si potrebbe concordare su un'effettiva corrispondenza nell'intendere i beni pubblici di entrambi i sistemi come risorse il cui uso deve essere garantito al pubblico. L'amministrazione, la tutela e i principi che garantiscono questi beni differiscono. Inoltre, la mia analisi voleva evidenziare come i governi di diverse nazioni, quindi in modo comparato, ragionassero per prendere provvedimenti riguardo l'amministrazione e la gestione di beni naturali/beni pubblici. La tassonomia che ho riportato e le loro implicazioni sono servite come punti di riferimento per poter creare una sorta di metro di paragone per un problema che riguarda diverse nazioni non importa la famiglia giuridica di appartenenza. O meglio, nonostante queste nazioni appartengano a famiglie giuridiche diverse, la gestione di beni pubblici e la loro allocazione è comunque un dibattito molto forte e delicato.