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# Constitutional and post-constitutional problems: Reconsidering the issues of public interest, agonistic pluralism and private property in planning

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## Abstract

In the field of planning theory the discussion often seems to assume that all problems – for example, ethical or political ones – pertain to a single level or dimension. In fact, different and clearly separate "levels", which raise problems of different kinds, can be distinguished. A "multi-level" approach therefore seems necessary. The underlying idea is that it is essential to distinguish more sharply between two analytical levels: the constitutional and post-constitutional levels. These levels are here understood mainly as analytical levels; that is, as standpoints that anyone can – at any time and even only hypothetically – assume to posit certain problems at the appropriate level and treat them by acknowledging the argumentative requirements suited to that level. This article uses such a multi-level approach to address three fundamental and currently much debated problems of planning theory and practice: the issue of "agonistic pluralism"; the issue of "public interest"; the question of "private ownership (of land)". The contribution of this article falls within the neoinstitutionalist approaches to planning. The belief is that these approaches are shedding new light on planning problems and that research in this direction should be expanded. In this regard, this article attempts to make a contribution to this research perspective especially in analytical and methodological terms.

## Keywords

agonism, institutions, private property, public interest, veil of ignorance

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## Introduction: a multi-level approach as a methodological contribution to the neo-institutional strand in planning theory

The contribution of this article falls within the neo-institutionalist approaches to planning (e.g. Buitelaar, 2007; Cars et al., 2002; Gualini, 2001; Healey, 1997; Salet, 2017, 2018; Verma, 2007; Webster and Lai, 2003). The belief is that these approaches are shedding new light on planning problems and that research in this direction should be expanded. In this regard, the article attempts to make a contribution to this research perspective especially in analytical and methodological terms. The main idea is that if planning theorists change how they look at things, planning problems may appear different and can be addressed differently.

The starting point of the article is the observation that in the field of planning theory the discussion often seems to assume that all problems, for example ethical or political ones, pertain to a single level or dimension. In fact, different and clearly separate "levels", which raise problems of different kinds, can be distinguished. A "multi-level" approach therefore seems necessary. An intrinsically multi-level approach can for instance be useful to conduct critical reassessment of some central issues of planning theory (as suggested in Moroni, 2018a). This article uses such an approach to address three fundamental and currently much debated problems of planning theory and practice: the issue of "agonistic pluralism"; the issue of "public interest"; the question of "private ownership". The contention is that a clearer distinction drawn among different levels or layers can set order on the debates concerning these three problems by resolving contradictions that are often only apparent, and by possibly identifying deeper-lying ones. Although the three issues are different, they all relate to the crucial question of what the state's legitimate role is or can be today.

More precisely, the underlying idea is that it is essential to distinguish more sharply between two analytical levels, taking seriously the core aspects of the theories of John Rawls (1971, 1993, 2001) and James Buchanan (1987, 2005): the *constitutional* and *post-constitutional* levels. These levels are here understood mainly as analytical levels; that is, as standpoints that anyone can, at any time and even only hypothetically, assume to posit certain problems at the appropriate level and treat them by acknowledging the argumentative requirements suited to that level. Each level therefore represents the appropriate point of view from which certain kinds of issues are addressed (Rawls, 1971: 195–201). In the case of a "constitutional democracy" they correspond to real-world situations; that is, to real deliberative stages. The idea of constitutional democracy has clearly both a descriptive relevance and a normative one (Allan, 2001; Holmes, 1995; Kis, 2003; Murphy, 2007; Rawls, 1971; Riker, 1988; Schneier, 2006).[1]

## Basic concepts: two analytical levels

Let us consider in detail the two analytical levels mentioned above.

First, therefore, we have the constitutional level; that is, the level at which we can imagine a group of constitutional delegates conceiving and writing a constitution. In contractarian perspectives, like the Rawlsian or Buchananian ones, constitutions are

understood to embody the social contract's definition of the basic framework (Gaus, 1996: 205). Here the main problem is the choice of *background constraints* to the political choice *within constraints* (Van Den Hauwe, 2005: 224). The constitution therefore both *empowers* governments and *limits* them. This is a crucial level too often taken for granted but which warrants much closer attention and analysis (Ratnapala, 2006). Second, we have the post-constitutional level; that is, the level of the political and social activities that come about within the accepted constitutional constraints. This level can be further divided into at least three different sub-levels: the legislative level, i.e. the one at which centrally and locally elected decision-makers introduce laws and regulations; the administrative level, i.e. the one at which public officials apply laws and regulations; that of civil society, i.e. the level at which developers, ordinary citizens, etc., act freely, but in compliance with the law in force.

The schema clearly moves from the most abstract and general situations and issues to the most specific and concrete ones (Moroni, 2018a). At the first level, the constitutional one, the ethical requirement is to operate behind a thick *veil of ignorance*, to use John Rawls's (1971) expression; the same idea is propounded by James Buchanan, who prefers the term *veil of uncertainty* (Brennan and Buchanan, 2000). The "veil" conceals, or, better, is conceived in order to conceal, the concrete and contingent characteristics of the various real individuals (their particular and contingent interests, their status and social position, and so on), and certain characteristic and peculiarities of the social and economic reality in which they live. The thickness of the veil of ignorance relatively to the concrete characteristics of the social and economic reality progressively decreases on passing from the constitutional level to the post-constitutional ones. In other words, limitations on knowledge regarding the characteristics of society and the economy can be progressively relaxed. The veil of ignorance is obviously a metaphor: however, it is evident that anyone can imagine themselves in the situation figuratively exemplified by that idea.

Clearly, constitutional choices must be made with a particularly long-timespan in mind. In other words, the basic constitutional rules for the social order are explicitly chosen as permanent or quasi-permanent "parameters" within which social action and interaction are to take place over a "whole sequence of periods" (Buchanan and Congleton, 2003: 8). A certain idea of stability is intrinsically embedded in the idea itself of a constitutional framework (Vanberg and Buchanan, 1989). Instead, at the post-constitutional level, choices can be taken in a shorter time-frame.

It is important to emphasise the "stage-wise" nature of the approach outlined above; that is, it is an approach which suggests thinking sequentially from the basic structure of society to the development and subsequent implementation of increasingly focused principles, laws and policies (Rawls, 1993: 259–262). In other words, this approach rejects the idea that it is possible to establish a *single* decision-making or deliberative principle that applies in wholly undifferentiated manner to *any* level. Principles and criteria suited to the various situations should instead be identified step by step in an appropriate sequence (Rawls, 1993: 258).

This is not at all to suggest a linear and mechanical top-down process, but rather to emphasise the differences between levels and their inter-connections in primarily analytical terms. As said, in the case of a constitutional democracy, the matter assumes a

more concrete significance in regard to real institutional stages. Indeed, one may say that a multi-level theoretical approach (like the one suggested by Rawls, 1971 and Buchanan, 1987, but also, for example, by Barnett, 1998; Gaus, 1996; Vanberg, 2001) enables more appropriate account to be given *also* of how a desirable constitutional democracy works.

Failure to grasp this multi-level view has induced many planning theorists to believe mistakenly that the two Rawlsian principles of justice, i.e. the equal liberty principle and the difference principle, apply *as such* to post-constitutional stages and, indeed, to any planning decision at local level (e.g. Krumholz, 1982, 1994; Krumholz et al., 1975; Krumholz et al., 1978). By contrast, according to Rawls they are, first and foremost, principles of just constitutions. As he writes: "The basic structure of society is the first subject of justice"; on this view, "there is no attempt to formulate first principles that apply equally to all subjects" (Rawls, 1993: 257–258). Therefore, Rawlsian principles of justice do not, and cannot, directly concern everyday planning decisions (Campbell, 2006; Moroni, 2018a).

Before concluding this section, two specifications are necessary. The first is that the reader might gain the impression that the constitutional level coincides with strictly *ethical* issues, and the post-constitutional one with strictly *political* issues. But this impression would be mistaken, because, as shown in what follows, each level has an ethical and political dimension; put simply, at the two levels, these dimensions are of different kinds. One could say, to use an expression suggested by Thomas Porter (2009), that a multi-level approach entails a *division of moral labour*, as well as a *division of political labour*.

The second specification is that this article adopts an approach that is *à la Rawls* but not substantially *Rawlsian*. In other words, there are some analytical and methodological aspects of Rawls' approach – and, as said, of Buchanan and others – that are of interest here, not those of normative ethics in the strict sense.

## Discussion: three problems

As said, the suggested multi-layered approach may prove useful for critical reappraisal of some typical problems of planning theory and practice. Here I consider three issues that seem to me particularly relevant to current debates and practices. In the three subsections that follow I shall seek to show how these issues can be usefully recast by specifying their significance and relevance at the constitutional level, and their significance and relevance at the post-constitutional level (when pertinent, also this second level will be treated in terms of sub-levels). Since my purpose is obviously not to conduct exhaustive discussion of three problems of such magnitude, I shall deal only with aspects significant in the predominantly analytical and methodological framework adopted here.

### *First issue: agonism and conflict*

The themes of collaborative dialogue and consensus building have repeatedly arisen in the planning theory and practice of the past few decades. Recently, the so-called *agonistic approach* has challenged this point of view, invoking the return of the "political" as the ineradicable dimension of antagonism that exists in human society. In this case, the principal author of reference is indubitably Chantal Mouffe (1993, 2005, 2013). Mouffe's

theory has been amply considered and debated in the recent planning literature (Amin, 2002; Bäcklund and Mäntysalo, 2010; Bond, 2011; Collins, 2010; Fougère and Bond, 2016; Grange, 2014; Hillier, 2000, 2003; Horowitz, 2013; Lysgård and Cruickshank, 2013; McClymont, 2011; McGuirk, 2001; Newman, 2011; Oosterlynck and Swyngedouw, 2010; Pløger, 2004; Ramsey, 2008; Roskamm, 2015; Yamamoto, 2017).

The key question on which to reflect is this: at what level should we recognize that human interaction consists of ineradicable and irreconcilable conflict?

If we locate it at the *constitutional* level, this inevitably entails adoption of a form of ethical relativism, of total nihilism (Crowder, 2008; Trainor, 2008). If this is the case, there is nothing more to be said. We need only strive in every way possible to assert our idiosyncrasies and passions, without any framework of shared guarantees being accepted and justified.

If instead the idea is that, given a constitutional framework that all find agreeable, (i) more space should be given to *post-constitutional* passionate political confrontation,[2] (ii) recognizing the collective, non-atomistic dimension of this confrontation,[3] and (iii) without deluding ourselves that rational consensus is the goal pursued by everyone,[4] this is more readily acceptable. It is only necessary to avoid the excessive idealization of the constructiveness and rationality of political discourse into which some communicative and collaborative approaches in planning theory and practice have sometimes lapsed (though not all of them: Innes and Booher, 2015).

In short, democratic-communicative approaches can undoubtedly accommodate a more agonistic perspective at the post-constitutional level, but not at "higher" ones. Mouffe herself ends up by implicitly accepting a kindred perspective. In other words, she seems to "take a step back" from her premises, thereby creating a certain incoherence in her overall theoretical framework. See for instance Mouffe (2005): "Consensus is needed on the institutions constitutive of democracy and on the 'ethico-political' values informing the political associations – liberty and equality for all" (p. 31). Although Mouffe (2005: 31, 2013: 8) emphasises that democratic values cannot be defended in an absolute way, but only as constitutive of a certain form of life, and that there will always be discussion on how these ideals and values can be implemented, the foregoing recognition seems crucial. In this regard, see also Mouffe (2005): "A democratic society requires the allegiance of its citizens to a set of shared ethico-political principles, usually spelled out in a constitution and embodied in a legal framework" (p. 122).

In short, the fundamental question for democracy is

> "distinguishing between the categories of 'antagonism' (relations between enemies) and 'agonism' (relations between adversaries) and envisaging a sort of 'conflictual consensus' providing a common symbolic space among opponents who are considered as 'legitimate enemies' […]. Adversaries do fight – even fiercely – but according to a shared set of rules, and their positions, despite being ultimately irreconcilable, are accepted as legitimate perspectives" (Mouffe, 2005: 52).

Their "right to defend those ideas is not to be questioned" (Mouffe, 2013: 7).

Consider also the following observation by Mouffe (2005): "I do not believe that a democratic pluralist politics should consider as legitimate all the demands formulated in a given society" (p. 120). She continues:

> "The pluralism that I advocate requires discriminating between demands which are to be accepted as part of the agonistic debate and those which are to be excluded. A democratic society cannot treat those who put its basic institutions into question as legitimate adversaries" (Mouffe, 2005: 120).

Not only does a *common constitutional framework* seem necessary, but also *legal pluralism* seems to be excluded in Mouffe's perspective. As she expressly writes: "Legal pluralism cannot become the norm without endangering the permanence of the democratic political association […]. Some forms of legal pluralism have no doubt existed […], but such a system is incompatible with the exercise of democratic citizenship" (Mouffe, 2005: 122).

As said, these assertions create incoherence in Mouffe's argument. Her *pars destruens*, used to criticise theories such as those of Habermas and Rawls, is based on radically relativist premises. In this case it is impossible to explain how antagonism can transform into agonism. Given that antagonists do not share any common cultural or symbolic background until they accept some ethical-political principles (changing from enemies to adversaries) how can they accept these principles? (Erman, 2009: 10). Mouffe's *pars construens* departs from her radical premises to accommodate a more Habermasian but also Rawlsian position, thus supporting the idea that antagonism can be transformed into agonism but at the price of some inconsistency. As Eva Erman (2009: 6) notes in this regard, criticisms can be levelled against Mouffe's agonistic approach for relying on many of the ideas embraced by the more traditional constitutional democratic theory that she wants to gainsay.[5]

Regardless of the extent to which Mouffe's theoretical arguments are coherent, the crucial point is that consensus and unanimity are issues more typically constitutional than post-constitutional. More precisely, the constitutional level is the domain of forms of *meta-consensus* (Dryzek and Niemeyer, 2006). Meta-consensus is not a fixed consensus; rather, it is a particular kind of consensus at a particular level and subject to slow changes. It is therefore necessary to distinguish between the question of voluntariness of *agreement on basic rules*, i.e. at the constitutional stage, and the voluntariness of *agreements within basic rules*, i.e. at the post-constitutional stages (Vanberg, 2001: 34).

## *Second issue: public interest*

The question of public interest has been long debated in political science and planning theory (to cite only some recent contributions in the planning theory field, see Alexander, 2002; Campbell and Marshall, 2002; Chettiparamb, 2015; Lennon, 2017; Mattila, 2016; Tait, 2016). The above schema makes it possible to untangle some difficulties, and to frame the question in a manner more consistent with the various contexts in which it may arise.[6]

If we ask what it means to decide or act in the public interest, we must first specify in regard to what level we are asking the question. If, for example, it is the constitutional level, we may say that, for a constituent, deciding in the public interest means adopting that basic *constitutional* framework which (i) improves in the long term (ii) the chances of unknown individuals (iii) of pursuing their equally unknown and continuously

changing purposes (iv) in a complex and continuously evolving social environment (Moroni, 2018c; see also Cordato, 2007). Observe how at this level institutional choices cannot hinge on interpersonal utility comparison. Moreover, there is something intrinsically non-teleological at this level, because institutional settings cannot be chosen in terms of specific outcomes (Brennan and Buchanan, 2000: 10–18). Any idea of allocative efficiency is therefore ruled out *a priori* here (North, 1990: 80–82).

At the constitutional level, the public interest is not the real interest of *any one specific person* but the potential interest of *anyone at all in the long run* (as suggested in Moroni, 2018c). In assessing whether something is in the public interest, the point is therefore determining whether it is in the interest of *potentially everybody*, but clearly not *literally everybody* (Taylor, 1994: 97). The public interest is something that is in the interest of each individual regardless of his or her membership of any specific sectional interest group: it is the interest of any individual *taken at random*, so to speak (Taylor, 1994: 95). For instance, there may be no single infrastructure in a county to whose building cost it would be strictly in everyone's interest to contribute directly; but it may still be in everyone's interest to contribute to the costs of an institutional framework in which certain infrastructures will be provided (Barry, 1990: 197). In this sense the public interest is something that concerns an *indefinite number of non-assignable individuals* (Barry, 1990: 192). Note how an idea of the public interest of this kind becomes almost a matter of course if we want to take also future generations into account (Moroni, 2018c). This idea of the public interest is "ends-independent" in the sense that it does not depend on single given ends, but aims at promoting a situation where everyone can adaptively pursue the various ends he/she perceives from time to time as most valuable (Cordato, 2007). In short: "society as a whole has no ends or ordering of ends in the way that associations and individuals do" (Rawls, 1993: 276).

The same criterion of public interest holds *at the post-constitutional legislative level*, but it is subject to the constitutional constraints already accepted, and to the availability of more information on actual living conditions. Here again to say that "Law x is in the public interest" means that the law is commendable because it was passed with a spirit of impartiality (Flathman, 1966: 58). In other words, anyone who advances an argument in favour of particular rules

> "must invoke criteria that take on elements of general or public interest. An argument may claim that this or that rule is indeed in the 'general' interest […], and that such a rule is supported, not from altruism, but from the necessary coincidence between the individual and general interest" (Buchanan and Congleton, 2003: 9).

Note that, on this view, the *fact* that the real interests of individuals and social groups are *effectively* different at some post-constitutional point in time therefore does not matter (Moroni, 2018c); or better, it does not constitute a counter-argument to the idea that public institutions *must* act in the public interest (as often asserted in planning theory[7]).

If instead the post-constitutional administrative level is concerned, one may say that for a public official – a planner, for instance – to act in the public interest means (i) *complying with (legitimate) laws* and trying to accomplish their public purposes, and (ii) acting with honesty, responsibility and accountability *in accordance with the*

*position held*. In an article devoted to redefining the meaning of the public interest in different contexts, Stephen King et al. (2010: 961) observe that the public official's duty comprises the following main components: fiduciary duties to constitutional principles; actions that are congruent with the values of a constitutional democracy; the practice of impartial and non arbitrary administrative leadership and decision making. From this perspective, corruption, which is unfortunately widespread in the field of land-use planning (Chiodelli and Moroni, 2015; Chiodelli et al., 2018), becomes an intrinsic violation of the duties of a public official in a constitutional democracy, even independently of the still grievous fact that corruption has various harmful consequences (Ceva and Ferretti, 2017).

If it is instead the civil society level, and taking entrepreneurs as an example, one may say that they act in the public interest if they respect the rules and pay their taxes. The famous remark by Milton Friedman (1982: 112), often mistakenly considered simplistic and provocative, here assumes an unequivocal meaning:

> "there is one and only one social responsibility of business: to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud".

Not distinguishing clearly among the various levels has created confusion: for instance, when the pursuit of profit – at the civil society level – is considered *in itself* to be contrary to the public interest (for a critique of this assumption, see Acton, 1993 and Kirzner, 2000); or when it is claimed that entrepreneurs should assume obligations of solidarity in a broader sense (for a critique of this view see Clark and Lee, 2011; Turner, 2001).

Let us briefly examine this latter point. Recently, there has been a growing consensus that businesses should not focus solely on profit but also consider the broader achievement of "social goals". In this sense, public and private need no longer stand on opposite sides, but collaborate on creating a more mutually supportive society and foster joint objectives. There are three pitfalls in this outlook, however (Turner, 2001). In the first place, it is not possible for individual businesses to forecast the social effects that will arise from their activities, nor are they entitled to occupy themselves directly with them. Secondly, the more we strive to salvage the market with generic warnings about the broader responsibilities, the more we distance ourselves from the basic duty of pinpointing the just and correct set of basic rules to guarantee a just setting. Thirdly, the more public subjects attempt to involve the business world in a joint effort to achieve noble aims, the less power they will wield in terms of imposing restrictions and limits on the business world. It is exactly for reasons like these that we need a sharp "division of moral labour" among different institutional and social levels.

In conclusion, a specification is necessary. It will have been noted that as the discussion has proceeded, the focus has shifted from *principles for institutions* (i.e. principles which concern the basic structures of society) to *principles for individuals* (i.e. principles which regard agents in particular roles or situations) (Rawls, 1971: 108). This is possible and unavoidable if and only if – as supposed here for purely analytical purposes – the basic institutional framework is already deemed legitimate. Conversely and obviously,

individuals are not bound to unjust institutions; in particular, they do not have an obligation, in the perspective here assumed, to arbitrary and autocratic forms of government (Rawls, 1971: 112).[8]

## *Third issue: private property*

The issue of ownership, of land in particular, is at the core of planning problems (see e.g. Alexander, 2007; Baer, 1997; Corkindale, 1999; Davy, 2012; Jacobs and Paulsen, 2009; Krueckeberg, 1995; Lai, 2016; Luithlen, 1997; Porter, 2014; Siegan, 1997; Slaev, 2014, 2015; Sorensen, 2018). However, many of the discussions and debates on the matter do not seem to distinguish among its various levels. It is particularly crucial to distinguish sharply between two issues: first, the constitutional right of each individual to hold private property; second, the post-constitutional property title of someone to something. There are five key differences between these two items; we can distinguish them according to their (i) rank, (ii) domain, (iii) nature, (iv) alienability (v) variability. (Here I resume considerations put forward in Moroni, 2018b).[9]

The first important difference concerns the *rank*. The right to hold private property is a *first-order right* to become an owner of something. In this sense, the right to hold private property is usually recognized in liberal-democratic constitutions. By contrast, the property title to something (e.g. the property title to a particular plot of land or building) is a substantive *property title* to a particular item. This title will be legitimate if it has been obtained through legitimate (that is, informed and voluntary) processes and exchanges with others. This is a *second-order right*. Strictly speaking, this title is not a title to a thing in itself, but to a certain formal relationship with the others, who must refrain from directly doing something with/to this thing. When one buys a piece of land, for instance, "one acquires not some physical object but rather control over a benefit stream arising from that setting and circumstance that runs into the future" (Bromley, 2004: 27). Observe that property titles also allocate particular responsibility within society. "The person who controls the property is responsible for the consequences of his or her actions regarding such property *because* they were the one exercising such control" (Shaffer, 2009: 177).

The second difference pertains to the *dominion*; that is, "who" possesses what right or title. The right to hold private property is, if we decide to recognize it, a right that pertains to all individuals in equal form and to an equal extent: it is, therefore, a *universal right*. By contrast, ownership as title pertains to some specific individuals, who possess it to an extent that all the others are excluded: this is clearly a *singular title* (e.g. the property title of E to plot Z). Whereas in the former case it is obvious that *anyone* possesses the right in question, in the latter case the titles must be formally registered for it to be clear *who* possesses them. The compulsory registration of property titles was first proposed in England during the reign of Henry VIII, but it is only since the beginning of the twentieth century that comprehensive compulsory registration has become the rule, both in England and other countries like the United States (Holderness, 1985: 339–340).

The third crucial difference concerns the *nature* of the right or title. The right to hold private property is clearly *abstract*: it regards not a particular item, but all possible items; not a particular plot of land, but all potentially available plots of lands. The

property title on a specific object is instead *concrete*: it regards a specific thing and only that thing (e.g. plot W).

The fourth difference concerns *alienability* or *inalienability*. The right to property as a basic right is inalienable: it cannot be renounced or transferred. As David Ellerman (2010: 571) underscores: "Inalienable rights are rights that may not be alienated *even with consent*". By contrast, the property title to something (e.g. land H, building J, car K) is intrinsically disposable. Exchange is possible when certain titles are alienable (Holderness, 1985).

The last, fifth, difference concerns *variability* or *invariability*. The right to hold private property remains invariant: one cannot become "more a holder" than others of this basic right. Specific property titles, instead, may vary, and in fact they do so: one may become the owner of more items (e.g. plots of land) or of fewer items.

The frequent overlap between property as an abstract basic right and property as a concrete title to something has generated misunderstandings in planning theory and in many other fields (Moroni, 2018b).

The suggested distinction makes it clear for instance how the right to hold private property may be considered by some (for instance, classical liberals) as a fundamental, basic right, of the same level as others like the right to free association, the right to free speech, and so on. In this sense, individuals have the right to hold private property because they are human beings: they are entitled to advance certain claims by virtue of their common humanity. Note that in the Universal Declaration of Human Rights of 1948 the right to property was formulated in these terms: "Everyone has the right *to own property*". By contrast, property titles are historically determined: not all individuals, but only some of them, possess property titles as a result of contingent events, exchanges, processes.

The distinction also makes clear how classical liberals can argue that most of the criticisms of a system that recognizes private land ownership, for example the idea that it benefits the owners *at the expense of the others*, are due to a confusion between the right to hold private property and specific property titles. Once this distinction is clearly drawn, it is evident that it is the right to hold private property that classic liberals and others have usually defended as one of the fundamental individual rights. The fact that such a right exists, for instance the right to private ownership of land, is considered by them of crucial importance for all citizens; as evidenced by the misery of the many when it did not exist, for example in the feudal period when only the king had this right (McClaughry, 1976); or when it was cancelled, for example in Soviet Russia during the early twentieth century (Pipes, 2000).

According to classical liberal authors like Ludwig von Mises (1927) and Friedrich von Hayek (1982) defending the right to hold private property is therefore not in favour of the effective owners of specific properties over a particular stretch of time, but in favour of all. The conviction has grown, Hayek observes, that a socio-economic system which provides for the right to hold private property is in the service of particular interests. But the justification for that system does not depend on who is the owner of something at a particular time. The justification depends on the benefit that this system brings to all:

> "It serves as much the interest of those who at the moment own no property as that of those who do, since the development of the whole order of actions on which modern civilization depends was made possible only by the institution of property" (Hayek, 1982: vol. I, p. 121).

What we have to judge in this case (i.e. at the constitutional level) is the long-term desirability of a particular institutional arrangement, not individual property titles.

Indeed, it is quite another matter to defend or question certain specific property titles; for instance, specific titles to certain plots of land. In this case the matter is different, and certain property titles may be disputed because, for instance, a certain transaction has not been completely voluntary (e.g. A has been forced in some way by B to accept a certain transaction) or not completely transparent (e.g. C misinterpreted the exchange situation due to the fraud expressly committed by D); or because whoever has acquired certain property titles has as a consequence obtained a position of unjustified and unjustifiable monopoly (e.g. E has become the owner to all accesses to the sea in region X).

In short, defending the right to hold private property (for example, opposing the unacceptable fact that, in some developing countries, women are excluded from the category of potential owners of land) is different from defending specific titles to specific plots of land (Moroni, 2018b). The two problems are at different levels: constitutional the former, post-constitutional the latter (compare with Vanberg, 2001: 21–27). Let it be clear: in neither of the two cases, according to classic liberalism as well, are there absolute rights or titles (i) because the right to hold private property must be co-possible with other individual rights; and (ii) because all single property titles must be held and used without generating reciprocal harms.

The point here, however, is not whether or not the arguments of classical liberals like Hayek or Mises are completely convincing. Of interest instead is that the discussion in favour or against the *right to own private property*, and the discussion in favour or against *specific property titles*, are (and should be) conducted at different analytical levels. This fact is not always clear even to certain defenders of private property.[10] For instance, many (not *classical liberal* but) *libertarian* thinkers often seem to consider only specific property titles as the focus of their theories of justice, thus giving primary value to a secondary element and without developing any reasoning in favour of a higher-order formal individual right to be an owner. One might even argue in this regard that certain libertarian positions are illiberal (Freeman, 2001). The celebrated *entitlement theory of justice* of Robert Nozick (1974) deals for instance almost solely with this latter aspect, i.e. property titles. By contrast, in Nozick certain individual rights, including the right to own private property, are simply assumed *a priori* with no argument or specific justification in their regard (Campbell, 1988: 45; Höffe, 1987; Kukathas and Pettit, 1990: 87; Nagel, 1975; Pettit, 1980: 94–96; Ryan, 1982; Scheffler, 1976).

Note also that, once the constitutional level is distinguished from the post-constitutional one, it is evident that the possible inclusion of the right to hold private property in the constitution does not in itself have any allocative effect (as instead is often presumed: see e.g. Underkuffler, 2003). The constitution does not allocate or assign particular titles to things to particular individuals. Actually, by itself, it does not determine any particular property titles distribution.

Moreover, the distinction suggested may also be useful in remedying a certain confusion generated, also in the field of planning theory, by the debate that followed the celebrated works of Elinor Ostrom (1990). We can in particular note that the right to hold private property is – if we decide to accept it – a strictly individual (constitutional) right; but property titles are not necessarily connected with a single individual (Moroni, 2018b). Indeed, there are various forms of collective or semi-collective private property arrangements: homeowners' associations, cohousing complexes, residential cooperatives, common pool resources, etc. (Moroni, 2014). These various forms of "collective property" do not constitute a *different* kind of property, an *alternative* to public or private property (as generally considered: Berkes et al., 1989; Feeny et al., 1990; Geisler and Daneker, 2000; Wade, 1987). This seems true only if we consider a private property title as the property of a single item that is always owned by a single individual for his or her sole use. But it is certainly not so: private titles can take many different forms, including several kinds of collective private property (Lottieri, 2010). In short: the issue is not to contrast "private property titles" with "common property titles", as usually happens, but to distinguish, *within private property*, the case of "individual property titles" from that of "collective (or group) property titles" (Moroni, 2014).

It is clear that when Ostrom (1990) speaks of commons she is referring to "collective private property titles", because in the situations that she considers a certain group has exclusive prerogatives for the use of something. The examples that Ostrom (1990) uses to illustrate of a common in her best-known book are in actual fact situations of collective private ownership. In other words, in Ostrom's examples, exclusion is pervasive (Block, 2011). In all cases, the private owners – whoever they are and whatever mutual regulations they establish – can by definition exclude others from access to, or use of such property. In particular, Ostrom indicates the existence of clear and well-defined boundaries of the goods in question as one of the necessary conditions for commons to function. Ostrom (1990) writes:

> "Defining the boundaries of the CPR [common-pool resource] and specifying those authorized to use it can be thought of as a first step in organizing for collective action. So long as the boundaries of the resources and/or the specification of individuals who can use the resource remain uncertain, no one knows what is being managed or for whom. Without defining the boundaries of the CPR and closing it to 'outsiders', local appropriators face the risk that any benefits they produce by their efforts will be reaped by others who have not contributed to those efforts" (p. 91).

In short, "some set of appropriators must be able to exclude others from access and appropriators rights" (Ostrom, 1990: 91). Otherwise, those who are co-owners of the commons may not be adequately rewarded for their commitment to their management and maintenance (Ostrom, 1990: 91). (The same point is stressed in Anderies et al., 2004; Ostrom, 1995, 2012).

Note that also the common contention that property is not "natural" but "social"[11] assumes a different meaning at the two levels mentioned above, i.e. the constitutional and the post-constitutional ones (Moroni, 2018b). Arguing that the right to hold private property is not natural may mean that it is impossible to derive its value directly from *descriptive* premises on human nature *as such* (MacDonald, 1984; Waldron, 1984); or it may mean that the institution of private property arose as an idea in the long course of

history (for an evolutionary account of the emergence of the idea of the right to property see for example Hayek, 1988). Instead, property titles, to specific plots of land for instance, cannot be called "natural" simply because they are, by definition, strictly dependent on contingent socio-economic processes and exchanges.

## Conclusions

The debate in the field of planning theory covers and often confuses different analytical levels. This also happens because the term "planning" is often used indiscriminately to denote things which are very different; Aaron Wildavsky's (1973) critical admonition is still valid in this regard (see recently also Alexander, 2015). A more composite approach to the various issues may yield more appropriate developments of planning theory and more effective guidelines for practice. The recent interest in institutions and institutional design in the field of planning theory and human geography have opportunely opened avenues in this direction. The central thesis of this article has been that it is necessary to continue along this path, adopting an intrinsically multi-level institutional perspective.[12] It has been argued that it is important, even for neo-institutional approaches, not to speak of "institutions" as a single undifferentiated entity but instead to recognize that there are institutions of very different kinds operating at different stages.

This article has sought to apply a multi-level approach to three crucial issues in the theory and practice of planning: agonism and conflict; the public interest; and private property. Of course, within the limited space of an article, it has not been possible to deal exhaustively with these three issues, nor to reach definitive conclusions about them. But this has not been the article's purpose; which has instead been to show that certain questions can be critically re-framed by using the multi-layered approach suggested.

In the case of the debate on *agonism*, the article has sought to demonstrate that Mouffe's theory at the constitutional level is not particularly different from that of authors like Habermas or Rawls; the main difference being apparent at post-constitutional levels. This makes Mouffe's approach much less disruptive than it is often considered to be, also in planning theory, and makes it merely useful for avoiding excessive idealizations in terms of consensus building at post-constitutional levels.

In the case of the *public interest*, the article has sought to show that this is not a unitary issue, but assumes a different meaning and role at the different levels at which it arises. This does not imply that the concept of public interest is meaningless, as has sometimes been too hastily and reductively suggested, even in planning theory; rather, it implies that it is differently embodied at different levels.

Emphasised in the case of *private property* has been the fundamental difference between the constitutional right of each individual to hold private property – if we decide to recognize it – and the post-constitutional property title (i.e. property holding, entitlement) of someone to X. Whence derives the central difference between (i) justifying the right to hold private property at the constitutional level; that is, providing an answer to the question: "Why should anyone own anything"?, and (ii) justifying specific titles on single items at post-constitutional levels; that is, providing an answer to this question: "Why should certain individuals own certain specific things?" (Moroni, 2018b). Taking

these differences seriously makes it possible to recast the debate on private property not only for those who advocate it but also for those who criticize it.

The suggested approach may also be useful for grasping new linkages among the various concepts. I provide just one example, which I think suggests that it is worthwhile continuing reflection and debate in this direction. The ideas of "public interest" and "individual rights" are often held to be contradictory; however, this happens because it is not always clear what level is being referred to. At the constitutional level, for example, the two concepts can be merged rather than opposed: the constitutional recognition of certain rights *can* be, for example, deemed in the public interest (Freeden, 1991: 97; Kymlicka, 1990: 206).

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## Notes

1. On the difference between a "constitutional democracy" and a "procedural democracy", see Rawls (2001: 145–148). As the multi-level approach adopted will make clear, there is a *tension* but not necessarily a *contradiction* here between the idea of "constitution" and the idea of "democracy" (Habermas, 2001).
2. "My claim is that it is impossible to understand democratic politics without acknowledging 'passions' as the driving force in the political field" (Mouffe, 2013: 6).
3. "The political is from the outset concerned with collective forms of identification" (Mouffe, 2013: 4).
4. "Too much emphasis on consensus, together with aversion towards confrontations, leads to apathy and to a disaffection with political participation" (Mouffe, 2013: 7).
5. In the case of *pars construens*, Mouffe is obliged to remain very vague about the constitutional level (Erman, 2009: 6) in order to somewhat conceal the essential inconsistency of her argument: Mouffe (2005: 31, 2013: 7) speaks very generically of "liberty and equality for all" as important ingredients of a constitutional text, but without any specification at all.
6. I assume here that totally cynical, sceptical views of the public interest can be rejected (Croley, 2008).
7. As Simmie (1974: 125) writes: "There is no such thing as THE public interest. Rather there are a number of different and competing interests". See also Gans (1973): "In a pluralistic society, it is difficult to identify communal goals because they generally turn out to be shared by […] only a part of the population" (p. 10).
8. Note that this is perfectly in line with the multi-layered approach taken here. For instance, if institutions are just according to some principles for institutions, then the planner as a public official must simply follow certain ethical principles for individuals; in this case the appropriate standpoint is the administrative level. But, if the institutions are unjust, the planner can more actively think and act to promote change and institutional reform; in this case the appropriate view to adopt is a "superior" one.
9. I mainly follow Ferrajoli (2001), though reaching different conclusions.
10. In defending as necessary the right to property as defined by Locke, Rowley (2006) writes: "This natural right to property is not an inalienable right […] If we define an inalienable right as a right that cannot be lost in any way, then such a right would incorporate both a disability and an immunity: the possessor of the right would not be able to dispose of it voluntarily.

… Property clearly does not fall into this category of a right, as it can be given away or exchanged voluntarily" (p. 55).

11. See for instance Needham (2006: 32) in the planning literature: "Rights are not 'natural' but are socially created". Compare with Freyfogle (2007: 10): "Property is inherently a social institution".
12. Albeit from a partially different perspective, it may be of interest to recall here the methodologically similar attempts to distinguish more clearly between "governance" and "metagovernance": see Torfing and Sørensen (2008). See also the difference between "normative principles" and "metanormative principles" in Rasmussen and Den Uyl (2005).

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