

Introduction

The Anthropocene has produced a serious threat to the survival of civilization on our planet. Thousands of scientists from almost every discipline have proved that the ecological footprint of humans on Earth is currently at the record level of almost 1.5, which means that each year we consume 50 percent more resources than the planet's capacity to regenerate them. Employing a metaphor that is particularly easy for the common neoliberal mentality to understand, from August to December every year, humankind lives off the capital and not on its returns. It thus contracts a debt to future generations of humans and to current non-human inhabitants of the Earth that it will never be able to repay.

It would be senseless to allocate responsibility to *all* humans. Today, the global North has an ecological impact close to 5.0. Some segments—including the most technologically advanced one, Silicon Valley—are now close to 6.0. This means that were everybody on the planet to live like those inhabiting Menlo Park, Cupertino, or Palo Alto we would need six Earths to sustain this standard of living. Thus, the problem is not just the ecological impact of 1.5: it is also a dramatic ecological imbalance, with the global South suffering, today as in the past, from the predatory and extractive attitude of the global North. The chain of consequences, such as eco-refugees, famine, drought, and death are only going to worsen in the future because corporate propaganda hides the truth from the general conversation. The ecological footprint being out of control (that should be the first concern of everybody) is all but an unknown concept even among the educated elite. Climate change could change everything, because it might reshape the economic, political, and social objectives of Western societies.

The first step towards understanding this fundamental phase requires a precise identification of responsibilities.

Western politicians, economists, and policymakers bear the lion's share of responsibility in this state of affairs, when they keep pointing at growth, development, and "business as usual" as a way out of the dramatic crisis that exploded ten or so years ago and is sadly the structural reality of our time. However, the responsibility for such a generalized state of eco-illiteracy and lack of genuine effective efforts to

tackle it is not the monopoly of powerful policymakers. As pointed out elsewhere,¹ in the book that constitutes the theoretical basis for the present more practical work, it is largely shared by mainstream scientists, technologists, media operators, and pundits ... as well as by lawyers.

Lawyers today throughout the West operate in a sort of intellectual vacuum based on an artificial form of reasoning that blinds them to any real understanding of their own responsibilities. Through their daily activities, they incrementally construct an ideological and political cage, grounded in a mythology of notions such as legality or the rule of law, that ultimately guarantees their own marginalization and impotence in tackling and contributing to the solution of our ecological predicaments.

By creating and reproducing their professional knowledge without questioning its political and ecological foundations (and in their insouciant respect for professional canons whose history they ignore), lawyers participate in accelerating the final disaster of the Anthropocene. Even worse, they make it impossible for law to be used to steer humankind in the right direction or even just to apply the brakes to avoid the crash. In other words, the law, as it has been conceived since the development of the modern sovereign State, has been serving a purpose that today is just senseless and indeed lethal: the transformation of commons into capital, of use value into exchange value, of communal ties and obligations into individual rights and the freedom to accumulate.

We do not wish to deny that the great transformation of modernity has yielded, together with much suffering, a great deal of benefits to many. The accumulation of surplus capital made possible the necessary division of labor that allowed some to engage in activities of public utility such as science. Science made possible technological development, which produced, among other things, tremendous medical progress and improvements in the quality and duration of life for many. In the centuries that, at different paces, enabled the great transformation to visit most of the planet, the commons that originally were abundant have become incrementally scarce. Common pool resources, managed for centuries with a philosophy of care and reproduction by local indigenous communities, have been assaulted by capitalist extraction grounded in notions of individual property rights and State sovereignty. Communal institutions such as guilds, extended families, and age-group networks of solidarity, have been progressively substituted with an individual-centered system of

¹ F Capra and U Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Berrett-Koehler 2015).

production that suits the strong and powerful individual, leaving behind and alone the needy and the weak.

In inverse proportion to the decline of the commons (the category that includes common pool resources, networks of collective social organization, and the social norms created for taking care of both resources and groups), capital has dramatically increased in quantity and concentration. In little more than a quarter of a century, a world of commons abundance and capital scarcity has been transformed into one of capital abundance (though very badly distributed) and commons scarcity. While all natural ecological indicators today blink in red, almost all relationships have been commoditized, and self-centered possessive individualism has reached its apogee. From abundance of commons and scarcity of capital, we are now in the world of abundance of capital and scarcity of commons. Clearly, the last quarter of a millennium, at a dramatically accelerating pace, is responsible for the current crisis of the Anthropocene. As economic historian Carlo Maria Cipolla has put it better than anyone else,² it is as if the keys of the secret safe box in which the Earth had hidden its capital accumulated over millions of years was suddenly discovered by a few generations of humans. These modern humans have then used part of this wealth to create a religion of extraction celebrating the reckless squander of such hidden treasure as *progress* or *growth*. Thus, all the institutions of sharing, care, and group solidarity have been despised as pre-modern, obscurantist, and ultimately undesirable. The only desirable and efficient institutions are those of possessive individualism as developed in Europe during early modernity and exported throughout the world at gunpoint. Such institutions have been refined ever since by lawyers serving the imperatives of capital in a process of commoditization that the current technological possibilities have extended to the most intimate aspects of our life, perhaps transforming even consumers into commodities.

It would be well beyond the modest ambitions of this book to engage in a legal sociology or even a sustained critique of such dramatic and always accelerating transformations. What we wish to do here is to discuss critically some of the most fundamental legal institutions of private law in the broader perspective offered by a full consciousness of such transformations. Accordingly, property, contracts, torts, and legal personhood—which are the core of private law—will be introduced

² Carlo Maria Cipolla, *Uomini, tecniche, economie* (Feltrinelli 1966); D Birdsall and C M Cipolla, *The Technology of Man: A Visual History* (Wildwood House Limited 1979).

within an ecological approach from their development as basic institutions of capitalist extraction to their possible unfolding as generative institutions of ecological private law.

It should be obvious, once we have understood as human societies the catastrophic nature of the extractive Anthropocene, to deploy the most powerful political tools to address this existential issue as our priority. In the traditional legal approach, such tools to determine social behavior compatible with the needs of survival would be those of public law, through which political sovereignty is directly exercised. Because of the global nature of the issues involved, one would expect that sovereign States would use international law to bind each other to determine the behavior of their citizens. Experience shows, however, how such expectations would be poorly placed. The only occasional instances in which the political discourse deals with the tragedy of the Anthropocene is when some international summit is convened (such as in the case of Kyoto or of COP 21 in Paris). The hope is that governments through public law, the ultimate exercise of their sovereignty, would implement some international law agreement to be entered into in the interest of survival. Unfortunately, this vision is just wishful thinking. Interventions from the top down, even when actually motivated by public interest, are already very difficult to implement because of powerful patterns of resistance, due to the ordinary failures of the hierarchy. Unfortunately, things are even worse in the current global scenario. Sovereignty today has shifted from the States to the transnational corporations that control, outside of any democratic check, a tremendous amount of political power determined by the concentration of capital. As largely acknowledged in the literature, this shift of power became all but structural in the globalization era and has actually determined a major transformation in the overall “legal order” (or disorder). Governments do not pursue the public interest because of the way in which the process of representative democracy works. Organized private interests determine the political process that produces public law and this explains why the fundamental issues are not addressed by public and international law. In the era of globalization, organized private interests have a global pace (large car manufacturers, financial institutions, global chains of food production and distribution, etc.) and their power is much stronger than that of Governments. One should also consider that, because of the tension between globalization and the territoriality of the State legal order, even the clear-cut distinction between the domains of private law and public law is a largely simplified and naïve vision. Not only has global economic power shifted from sovereigns to private concentrations, but it is also impossible today to distinguish a private from a public sector due

to the recurring mergers between the two. The issue was famously evoked by US President Dwight Eisenhower in his 1961 farewell address when he denounced the “military industrial complex.” Today the pervasiveness of this phenomenon, highly corruptive of “democracy,” is clear to anyone who wants to view it. Think about the convergence of interests between the private and the public in the management and control of intelligence or in the development of mega-projects in the domains of energy, transportation, and technology.

This scenario shows how unrealistic it is to rely on public law or on ordinary processes of representative democracy to determine the kind of radical change of direction that is needed for the survival of civilization in the Anthropocene. The law is extremely difficult to implement from the top down, even when genuinely meant to do so for the common interest. When captured by powerful vested interests, public law (whose ordinary form is that of statutes) is much more part of the problem than of the solution. Sure, today private law shares many of the problems we have discussed thus far. Statutes, *i.e.* enactments produced by political authority, are becoming an increasingly important part of its structure.³ True, in the European continental tradition, Civil Codes can be seen as relatively insulated from the direct capture of the political process, often being a genuine product of legal scholarship. Indeed, Civil Codes, because of their highly technical claim, are usually drafted by committees composed of leading jurists whose work is then formally enacted by the political authority. From this perspective, their function and role is close to that of case law in the common law tradition, *i.e.* Civil Codes are more the product of legal professionalism than the political process. Nevertheless, with increasing frequency and intensity, many political enactments also intervene in the sphere of private law relationships. Think about contract law involving regulated industries such as banking, insurance, telecommunications, transportation, etc. Think about producers’ liability in tort law, privacy issues, zoning and environmental regulations in property law: all of this shows not only the difficulty of keeping private and public law separate (and ultimately the ideological nature of the separation) but also the number of occasions in which organized interests can penetrate the system of private relationships. In all the domains of traditional private law, organized vested interests are able to determine both the mandatory rules and the default rules of the

³ See Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press 1982).

game, *i.e.* those that govern peer-to-peer relationships unless there is agreement to change them.

In spite of the convergence of private law and public law into a system in which the rules of the game are determined by the State (almost invariably influenced by special interests), a relatively significant part of the private law system displays characteristics that make it potentially more resistant to influence. To begin with, private law rules are largely the product of private autonomy, *i.e.* they are produced far from the political process. Individuals negotiate their own transactions and have the power to create private institutions serving their collective purposes. Such private institutions can serve the purpose of collectively doing business or of pursuing other sorts of non-profitable or charitable purposes.

Private solutions created according to the logics of the commons, solidarity, and cooperation are generally more attentive to their ecological impact. We will illuminate in this book how individuals are creating a new ecological private law, with a bottom-up approach, enhancing their personal reasons for taking care of nature and future generations. We assume an important distinction between this ecological private law, produced from below, and the complex set of private rules that compose the traditional legal framework of the market.

Such institutional arrangements can play a significant role in determining the evolution of human activity in a direction more compatible with survival. Private organizations can socialize people into a different kind of ecological awareness and can set themselves up as forms of “generative” rather than extractive law. True, private autonomy is restricted by State authority in a variety of ways and for a variety of rationales; it is, nevertheless, a relevant source of law and in liberal constitutionalism it is often protected as property against government intervention. Secondly, private law—even when codified or otherwise incorporated in statutory form—is very much a matter of interpretation. Contract, property, and tort law evolved over history as the end products of the work of a handful of intellectual leaders whose general theories have been incrementally applied and developed by courts of law in the process of solving private disputes.⁴ The modernist revolution has determined the transformation of private law as a solid framework aimed at alchemizing use value into exchange value as the outcome of the theories of a handful of jurists such as Grotius, Domat, Pufendorf,

⁴ See John Philip Dawson, *The Oracles of the Law* (Greenwood Press 1978).

Blackstone, or Savigny, who, following philosophers like Descartes, Hobbes, Bacon, or Locke, have offered their skills to the great transformation described by Polanyi.⁵ While the materials used by the jurists remained almost the same, their interpretations attributed to these old texts had an entirely new meaning, thereby changing the default rules of the game. Because such a process has already happened once in history, it might well happen again: this time, perhaps, allowing the transformation of the excessive capital that we have accumulated in the last two and a half centuries into revamped sustainable commons.

The proposition that law is mostly a process of interpretation is now quite accepted. However, few in jurisprudence are ready to acknowledge that such a nature defeats all the tenets of positivism. To be sure, the dominant vision of the legal order is that of a system of principles and rules that pre-exist human behavior and that lawyers are able to describe as an objective entity existing outside them. A layman may preventively go to the lawyer to make inquiries about what the law “is” at a given moment in order to know how the legal system affects his prospective behavior. She might visit the lawyer once she has been sued in order to determine if the law is on her side or that of the plaintiff. In both the cases, the layman expects the lawyer to describe some sort of an objective set of rules capable of neatly separating what is *legal* from what is *illegal*. However, no lawyer worth his salt posits the answer preventively to the client. Counsels know that the outcome of any prospective litigation is determined in reality by the way the adjudicator interprets the law. This is essentially the reason why the legal system cannot be understood mechanically. Actually, the legal process of adjudication is more similar to the probabilistic process of emergence described by quantum theory in the domain of the very small (invariably determined by the tools deployed for observation) than to the mechanistic Cartesian ideal of a legal order. In fact, according to this latter perspective, the legal order is part of the domain of the objective, of the *res extensa* that the subject (*res cogitans*) can describe and disassemble in its component parts like any other “furniture of the world.” As demonstrated elsewhere,⁶ the positivistic approach in law is perhaps the most significant leftover of the great transformation of modernity. It is moreover a very deep, initiated secret of Western lawyers as a guild. Clearly, the large historical role of interpretation as an intellectual activity shows that lawyers inevitably participate in the making of law by producing interpretation

⁵ See Karl Polanyi, *The Great Transformation* (Rinehart & Company 1944).

⁶ F Capra and U Mattei, *The Ecology of Law*, cit.

aimed at persuading others of the righteous position of their client. The legal system is full of instances in which interpretation has radically changed the meaning of anything that is supposed to be binding authority. This has been true on countless occasions in the past and it will be true forever.⁷

Most importantly, the interpretive nature of law, jealously maintained within the guild of professional lawyers as some kind of a monopoly, shows that jurists constantly and unavoidably engage in the usurpation of political authority. Once again, it is positivism in its different forms that hides this truth, the consequences of which are however desirable in our perspective. The phenomenology of law is such that interpretation is simply unavoidable in a dialectic between what is established and what is in the making. Jurists give meaning to words formalized in statutory authority and classify social conflicts in order to help in their orderly management ... but this is only the tip of the iceberg. Social conflicts generate the law in a constant challenge of the status quo through resistance and illegality.⁸ Sure, the law is interpretation; but this interpretation belongs to the people, the ultimate users and makers of the legal system.⁹ The law can claim authority only as long as it is obeyed rather than resisted by the people. In this perspective, what today can be deemed illegal might become tomorrow's new legal order as long as the people's interpretation becomes dominant. Think about Rosa Parks's act of *illegal* resistance in keeping her seat on the bus, or about the scores of times in which property law becomes modified by recognition of possession as an act of hostility against the status quo. All of this shows that through conflict people are the protagonists and the ultimate interpreters of the legal order, which is thus the genuine product of unmediated political action. The lawyers do maintain an important role in ultimately providing the proper form to such private production of law, which is the genuine meaning of the term "private law." Such a meaning for *private law* as "the law of the private," *i.e.* the people's law, has actually been all but lost through modernity because of the overwhelming power that the sovereign State has been able to muster and of its consequent claim to control the whole legal order. However, the profound difference of its horizontal nature from the vertical structure of the State's

⁷ Benjamin Nathan Cardozo, *The Nature of the Judicial Process* (Yale University Press 1960).

⁸ E Peñalver and S Katyal, *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership* (Yale University Press 2010).

⁹ Laura Nader, *The Life of the Law: Anthropological Projects* (University of California Press 2002).

public law has never been lost but has survived precisely through a diffused interpretation often dissonant with the centralized will of the sovereign. True, private law, as the law of the people, is at constant risk of becoming the rule of the stronger, and for a significant period of time the modern State has gained legitimacy and prestige by mediating conflicts in the public interest, thus avoiding the law of the jungle. Of course, this has been true only in a very limited period (from the early twentieth century through the 1970s) and in a relatively small number of contexts (mostly in Western “developed” democracies). In most places and for most of the time, the State has been a faithful ally of the strong in oppressing the weak.¹⁰

As already discussed, in the current phase of capitalist development, the State has lost power to new global sovereign entities, the transnational corporations, which show a remarkable capacity to determine their processes. Once again, as in the days of the enclosures, the sovereign State is weak with the strong and strong with the weak, as witnessed by, among other things, the appalling level of cruelty toward immigrants and the poor. As a consequence of this condition, reminiscent of the eighteenth and nineteenth centuries, not only has the State lost legitimacy and should be resisted, but also neoliberal private law displays increasingly extractive features. Indeed, the stronger actors determine not only the political process but also, because they can afford the best lawyers and can invest unlimited amounts of money in litigation, adjudication.

In this grim scenario, it becomes especially important to determine the process of interpretation by injecting into the system *ecological awareness*. An ecologically aware interpretation of private law could incrementally steer human behavior in the right direction. Change of the requisite magnitude can come only from the bottom up, with an increased diffused cultural awareness of the dangers of our civilization. Ultimately, it is private law that, because of its “performative” nature, signals to the people what is right and what is wrong in their daily encounters. Its generative interpretation can thus determine generative social behavior.

An important reason to engage in a sustained critique of the current system of private law is to generate resistance. So many of the current neoliberal practices are unconscionable and people accept them in resignation only because they are formally “legal.” The development of a robust critique empowers the people to resist in the mode of Rosa Parks

¹⁰ U Mattei and L Nader, *Plunder: When the Rule of Law is Illegal* (Blackwell 2008).

(or other everyday heroes like Aaron Swartz) and to fight for a more acceptable social order. Critique, however, cannot be effective if it is only a negative exercise. It needs to be accompanied by a reconstructive vision: a plausible and better alternative to the status quo. This is what we will try to accomplish in this book, by discussing the foundation of a generative system of private law, based on concepts of commons, as opposed to the current extractive one based on capitalist institutions.

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