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Labour Law UTOPIAS

*Post-Growth &
Post-Productive
Work Approaches*

OXFORD

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Post-Growth and Post-Productive Work Approaches

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NICOLAS BUENO, BERYL TER HAAR, AND
NUNA ZEKIĆ

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Labour Law and the Utopia of the Commons

Paolo Tomassetti*

I. The State, the Market, and Beyond

Western capitalism has historically relied on the division between the state and the market.¹ In both civil and common law jurisdictions, this division has been fuelled by a separation between public and private law, with property rights being articulated accordingly.² Simon Deakin argues that Western law itself ‘is premised on the separation of the spheres of the public and the private which is also an essential feature of a capitalist economic order’.³ Such dichotomy, however, has proven to be unsustainable. Not only does the fracture of social life between public and private domains not fully account for the actual manifestation of human experience and, therefore, cannot adequately appreciate the real determinants of freedom.⁴ But it also contributes to the current societal and environmental crisis as, echoing Elinor Ostrom, ‘neither the state nor the market is uniformly successful in enabling individuals to sustain long-term, productive use of natural resource systems’.⁵

In parallel to the eclipse of the so-called welfare state and the colonization of the public by the private,⁶ the ‘tragedy of the commons’⁷ materialized as a

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¹ Wolfgang Streeck, *How Will Capitalism End? Essays on a Failing System* (Verso 2016).

² Hila Shamir, ‘The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State’ [2014] *Theoretical Inquiries in Law* 1; Alain Supiot, ‘The Public–Private Relation in the Context of Today’s Rfeudalization’ [2013] *International Journal of Constitutional Law* 129; Alan Freeman and Elizabeth Mensch, ‘The Public-Private Distinction in American Law and Life’ [1987] *Buffalo Law Review* 237.

³ Simon Deakin, ‘The Law of the Anthropocene’ in Samantha Besson and Samuel Jubé (eds), *Concenter les civilisations: mélanges en l’honneur d’Alain Supiot* (Seuil 2020) 114.

⁴ Karl Klare, ‘The Public/Private Distinction in Labor Law’ [1982] *University of Pennsylvania Law Review* 1358.

⁵ Elinor Ostrom, *Governing the Commons. The Evolution of Institution for Collective Action* (CUP 1990) 1.

⁶ Shamir, ‘The Public/Private Distinction’ (n 2) 9.

⁷ Garrett Hardin, ‘The Tragedy of the Commons’ [1968] *Science* 1243.

metaphor for a contemporary ‘social question’, which rising inequalities, labour disempowerment, and ecological destruction have made severely manifest. What is essential to understanding tragedy as a metaphor, though, is not the mere occurrence of inequalitarian market outcomes as the erosion of the ‘common good’ took place. It is the *longue durée* sacralization of limitless growth as the solution to all societal problems—even the problems created by the growth itself.⁸ Unsurprisingly, the irrationality of infinite growth on a finite planet was even inherent in John Locke’s romanticized idea of private property. Locke argued that ‘the same rule of propriety—viz., that every man should have as much as he could make use of, would hold still in the world, without straitening anybody, since there is land enough in the world to suffice double the inhabitants.’⁹ This Lockean proviso ‘reminds us that property entitlements are not absolute and that they must be subject to overriding concerns of public interest.’¹⁰ An interest that, unfortunately, both the state and the market largely failed to protect.

The utopia of the commons provides a fascinating set of arguments to look beyond the state-market dichotomy and the multiple crises attached to it. It envisages any desirable society where the state and the market cleavage, and their institutional equivalents—state sovereignty and private property—are traced back to synthesis. Advocated by degrowth and post-growth scholars as an alternative to the *status quo*, collaborative commons are successful examples of ‘real utopias’¹¹ that transcend the public-private divide and give value to collective action as a synthesis between the two spheres. The commons as a ‘real utopia’ reflect a variety of social practices of activists and communities that organize themselves for the protection and reproduction of social and natural resources while satisfying their fundamental needs outside of market exchange. From subsistence farming, the establishment of renewable energy communities, the re-municipalization of water, the self-management of cultural and urban spaces, to the co-housing experiences, and the free software and makers’ movement, collaborative commons involve collective action that establishes

⁸ Dennis Meadow and others, *Limits to Growth. The 30-Year Update* (Earthscan 2005).

⁹ John Locke, *Two Treatises of Government* (Awnsham Churchill 1689) 120. Modern political thought is premised with similar naïve assumptions about abundance of land and natural resources; Pierre Charbonnier, *Abondance et liberté. Une histoire environnementale des idées politiques* (La Découverte 2021).

¹⁰ Tonia Novitz, ‘Locke’s Property Rights: Pensions and Trade Unions’ [2012] *International Union Rights* 6–7.

¹¹ Erik Wright, *Envisioning Real Utopias* (Verso 2010).

juridical spaces, institutions, and norms of polycentric governance of complex socioeconomic and ecological systems.¹²

After contextualizing the utopia of the commons and presenting collaborative commons as sociolegal institutions, this chapter contrasts their characteristics with the main common features of labour law and industrial relations frames of reference. Three broad claims are made and discussed in the following sections, drawing on legal and sociolegal literature on the commons. Firstly, classical labour law justifications and industrial relations frames of reference, based on the pluralistic assumption of a conflict of interest between capital and labour, are unfit to frame the idea of work in collaborative commons. Secondly, the ideal-typical function of the commons, which sees the corporation as a commons, is theoretically useful for many purposes. However, it lacks analytical capacity when it comes to assessing the structure of the employment relationship in the capitalistic corporation, which remains unchanged in contrast to the traditional shareholder conception of the firm. Thirdly, and most importantly, it is argued that although there is little scope for classical labour law to land in the non-place of the ‘common good’, the labour movement can learn a lot from the idea of work in collaborative commons. The commons, in fact, offer the possibility to rethink and question some of the basic assumptions of labour law and industrial relations institutions, to reflect on the role that these institutions can play to close the existing gap between the kind of society we have and the kind of society that current and future generations of workers might deserve.

II. Contextualizing the Utopia of the Commons

As a constitutive element of capitalism, the legal division between public and private domains assumes that the society and the market are two separate entities that the state—ideally, the so-called welfare state—should regulate to make them converge. In a welfare state regime, such convergence is achieved through the redistribution of wealth and power from the market to society. Redistribution is a key component of the idea of justice in a capitalist welfare state, to ensure that ‘none should fall below a decent standard of life, and that all should receive certain protections against accident and misfortune—for

¹² Elinor Ostrom, ‘Beyond Markets and States: Polycentric Governance of Complex Economic Systems’ [2010] *American Economic Review* 644.

example, unemployment compensation and medical care.¹³ Yet redistribution is an ambivalent concept in capitalism.

Designed to keep social conflict under control by guaranteeing income stability through economic growth and distributive justice,¹⁴ the welfare state institutions proved unable to achieve fair equality of opportunity in capitalist societies. Even in the liberal tradition of legal and political philosophy, there is consensus that the reason lies in the scale of background inequalities and concentration in the ownership of property.¹⁵ Instead of addressing the root causes of the uneven distribution of wealth and power, welfare state regimes embraced the ideology of growth and productivism as foundational aspects of their socioeconomic model.¹⁶ On the one hand, the rise of living standards and consumption possibilities in Western countries and newly industrialized economies has been traded-off as a form of social conflict mitigation, to sedate distributional conflicts over scarce resources. On the other hand, any inquiry about whether increased productivity or more efficient production is a good thing came to be stigmatized: to the extent that growth creates wealth and redistribution possibilities, 'it is, *per se*, a good thing.'¹⁷ The goals of the market, though regularly presented as those of society, have progressively detached from them. And the market dimension of value has been increasingly decoupled from non-economic values, overlooking the human potential to create social (and natural) benefits beyond producing material goods and services.¹⁸

The erosion of the ecological limits to growth is a consequence of such an unnatural divide between the market and society. Allan Schnaiberg's theory of the 'Treadmill of Production' is illuminating in this respect. Schnaiberg argues that the more resources for economic growth are extracted, the more environmental degradation worsens, but uncontrolled depletion of limited resources also makes further social and economic development difficult, and distributive justice

¹³ John Rawls, *A Theory of Justice* (Harvard UP 1999) xv.

¹⁴ Tuuli Hirvilammi and others, 'Social Policy in a Climate Emergency Context: Towards an Ecosocial Research Agenda' [2023] *Journal of Social Policy* 1. Compare Béla Galgóczi and Philippe Pochet, 'Introduction. Welfare States Confronted by the Challenges of Climate Change: A Short Review of the Issues and Possible Impacts' [2022] *Transfer* 307, 309.

¹⁵ John Rawls, *Justice as Fairness: A Restatement* (Harvard UP 2001) 137–38.

¹⁶ Elise Dermine and Daniel Dumont, 'A Renewed Critical Perspective on Social Law: Disentangling Its Ambivalent Relationship with Productivism' [2022] *International Journal of Comparative Labour Law and Industrial Relations* 237, which define productivism as 'the ideology based on the belief that continually increasing production in a society is both possible and desirable, and that economic growth should be the central objective of all human organization' 239.

¹⁷ John Galbraith, *The New Industrial State* (Princeton UP 2007) 425.

¹⁸ Nicolas Bueno, 'From the Right to Work to Freedom from Work. Introduction to the Human Economy' [2017] *International Journal of Comparative Labour Law and Industrial Relations* 463.

impossible.¹⁹ As a result, the nexus between the State and the economic power has been subverted, with the former no longer being able to sustain or protect the relatively broad distribution of wealth and power and therefore being no more effective at achieving social justice and sustainability.²⁰ Rather than ruling the economy, governments are controlled more and more by market forces while becoming increasingly exposed to the influence of those who contribute to and benefit the most from the spiral of growth.²¹ Outside of any constitutional limit or judicial review, the polarization between the market and society extended to the point that, in most cases, the social utility of private property no longer coincides with its social function.

The intellectual and societal movement for the commons originates as a historical alternative to the fiction that the state and the market are mutually exclusive and exhaustive of humans' political possibilities.²² The normative proposal of the commons questions the state-market polarity in favour of a collectivistic and participative reconfiguration of the relations between the two poles—one that is democratic, inclusive, and more effective at responding to current societal and environmental issues. As Raworth nicely puts it, the commons are 'shareable resources of nature or society that people choose to use and govern through self-organising, instead of relying on the state or market for doing so'.²³ The commons in this context become any non-place that is equidistant from the private and the public, involving direct civic participation and collective action as the new *pouvoir constituant*.²⁴

The idea of the commons includes a variety of social practices and institutions. A major distinction is made between commons as resources or resource systems (named *common-pool resources*) and commons as a property-rights regime (named *common property*).²⁵ Also, experiences of commons vary

¹⁹ Allan Schnaiberg, *The Environment: from Surplus to Scarcity* (OUP 1980). Schnaiberg's theory resonates with contemporary debates about degrowth and post-growth; see Tim Jackson, *Prosperity Without Growth: Foundations for the Economy of Tomorrow* (Routledge 2017).

²⁰ Ugo Mattei, 'The Rise and Fall of Law and Economics: An Essay for Judge Guido Calabresi' [2005] Maryland Law Review 220, 242, arguing that 'not only has the law been freed from the lethal hug of the state, but also the idea that the law is produced by market forces is now generally accepted'.

²¹ Saki Bailey and Ugo Mattei, 'Social Movements as Constituent Power: The Italian Struggle for the Commons' [2013] Indiana Journal of Global Legal Studies 965, 974.

²² Silvia Federici, *Re-Enchanting the World: Feminism and the Politics of the Commons* (PM Press 2018) 103.

²³ Kate Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st-Century Economist* (Random House 2017) 82.

²⁴ Bailey and Mattei 'Social Movements' (n 21) 968; Fritjof Capra and Ugo Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Berrett-Koehler Publishers 2015); Ugo Mattei and Alessandra Quarta, *The Turning Point in Private Law. Ecology, Technology and the Commons* (Edward Elgar 2019).

²⁵ Charlotte Hess and Elinor Ostrom (eds), *Understanding Knowledge as a Commons: From Theory to Practice* (The MIT Press 2007).

in time and space. Although the traditional articulation of commons theory recalls ancient forms of collective ownership in rural communities, the concept has evolved to include all types of goods, resources, and collaborative work activities that aim to foster solidarity, social justice, and sustainability.²⁶ Examples of collaborative commons in real life refer to local communities in both advanced and developing economies resisting the expropriation of rural, urban, and cultural areas for market purposes, as well as to groups of self-organized workers undertaking the production of goods and services for the sake of sustainability.²⁷

The utopian character of the commons lies in their radical critique of the existing socioeconomic model and its institutional infrastructure. Any critique of the public-private divide, in fact, involves a rejection, or at least a critical reconsideration, of the legal foundations of capitalism and the concurrent political and economic ideology of limitless growth. Yet, in contrast to classical utopian visions, there is no systemic programme to reform the overall organization of society. Although some aspects of the commons theory point in this direction, there is no comprehensive or general 'economic plan' implied in the normative idea of the commons, nor coordinative and redistributive roles attributed to central public authorities, nor private property nationalized and subjected to state planning. These characteristics distinguish the commons from communism, which 'consigned power to the state'.²⁸ The commons, instead, are not dependent on a supporting state. On the contrary, their legitimation is 'directly related to the crisis of the state form, which the failure of realized socialism and the internationalization of capital has made dramatically evident'.²⁹

III. The Commons as Sociolegal Institutions

Besides differing from the socialist vision of a state-centric command economy, the commons also stand opposed to property.³⁰ Their reality manifests itself in

²⁶ Margherita Pieraccini, 'Taking Stock of Italian Commons: Un-common Grounds?' in Ting Xu and Alison Clarke (eds), *Legal Strategies for the Development and Protection of Communal Property* (OUP 2018) 38.

²⁷ Stefania Barca and Felipe Milanez, 'Labouring the Commons: Amazonia's "Extractive Reserves" and the Legacy of Chico Mendes' and Gustavo García-López, 'Commoning Labour, Labouring the Commons: Centring the Commons in Environmental Labour Studies' in Nora Räthzel, Dimitris Stevis, and David Uzzell (eds), *The Palgrave Handbook of Environmental Labour Studies* (Palgrave Macmillan 2021) 319 and 389, resp.

²⁸ Federici, *Re-Enchanting the World* (n 22) 95–96.

²⁹ *ibid* 167.

³⁰ Stefano Rodotà, *Il terribile diritto. Studi sulla proprietà privata e i beni comuni* (Il Mulino 2013).

a complex of characteristics that parallels those of collective forms of ownership: 'the priority of the group and the subordination of individuals and their ends to the group; the priority of objective ends, of the economic nature, destination and use of things, over subjective ends; the priority within the group of subjective situations of duty over those of power or right typical of the traditional *iura in re*'.³¹ They are 'networks of relations, responsibilities, rights, and duties within organised groups' that seek to promote sustainable development of local communities and the reproduction of their material and immaterial resources.³² These networks are so intermingled that any attempt to isolate the subjective dimension of the person from the group or the ecosystem in which she lives and within the limits of which she realizes herself socially is fruitless. Further characteristics of the commons, in fact, include their *contextual* and *relational* nature.³³ They cannot be divorced from the cultural, social, or environmental context in which they exist; they are an integral part of complex human-ecological systems. The demand for the commons is not transcendental but relational: it is the object of the struggle of communities attempting to defend them and structures of authority seeking to control them.³⁴

The contextual and contingent character of the commons requires shifting the conceptualization of law from the positivistic and legalistic approach to pluralistic and anti-formalist ways of intending legal rationality and subjectivity. The movement for the commons has grown and developed in response to the crisis of the conceptual and institutional foundations of modern law: property and sovereignty; and the correlated state-centric legal categories grounded on positive law.³⁵ Instead, what emerges from the analysis of the commons as sociolegal institutions is precisely an idea of legal rationality intended as *living law*,³⁶ as an expression of autonomous and participatory processes of self-regulation and resistance by communities, local institutions, small firms, workers, and consumers.³⁷

The commons' legal rationality is implicitly dismissive of the institutional foundations of capitalism, including positivism as a philosophical and legal

³¹ Paolo Grossi, *An Alternative to Private Property: Collective Property in the Juridical Consciousness of the Nineteenth Century* (University of Chicago Press 1981) 23–24.

³² *ibid* 155.

³³ Ugo Mattei, *The State, the Market, and some Preliminary Question about the Commons—IUC Research Commons* (International University College of Turin 2011) 1.

³⁴ Capra and Mattei, *The Ecology of Law* (n 24) 149–67.

³⁵ Paolo Grossi, *A History of European Law* (Wiley Blackwell 2010) 68–74.

³⁶ Eugen Ehrlich, *Fundamental Principles of Sociology of Law* ([1913]; Routledge 2001).

³⁷ Construed in this way, the movement for the commons parallels the characteristics of what Harry Arthurs has defined as 'the law of economic subordination and resistance'. See Harry Arthurs, 'Labor Law as the Law of Economic Subordination and Resistance: a Thought Experiment' [2013] *Comparative Labor Law & Policy Journal* 585.

doctrine. Critical scholars note that, in reproducing the radical dichotomy between private and public law, legal positivism contributes to the promotion and protection of the capitalistic logic of limitless growth and its inegalitarian outcomes.³⁸ On the contrary, the law that gains prominence in institutional analyses of the commons goes far beyond the law of the state. Collaborative commons comprise rules at different levels of decision-making. They are dynamic systems promoting legal learning and self-regulation.³⁹ These are normative patterns emerging from the ‘laboratory of the real-life experience’, to provide decentralized responses to forms of injustice, for the social reproduction of local communities and the sustainable use of natural resources over time and space.⁴⁰

In this reading, Mattei and Quarta suggest rethinking Western law categories and regulation in light of the commons’ non-property nature, as opposed to an extractive legal setting based on the supremacy of property rights meant to transform the commons into capital.⁴¹ While this process of extraction was reasonable when the commons were abundant and capital scarce, Mattei and Quarta argue that the relation between the two factors is now reversed; thus, novel political and legal institutions are necessary to unfold the creative and transformative power of the commons. Instead of mandating new theoretical accounts of law, this might mean recognizing legal subjectivity to the commons and their grassroots normativity. This implies that private law should no longer be interpreted as the normative framework for competition, selfishness, and individualism. Private law should be construed as the juridical dimension to enforce the fundamental principles of dignity, freedom, and equality in society by empowering intermediate communities or specific networks of solidarity to direct action, participatory democracy, and self-regulation. Echoing Anna Grear, such networks are likely to be ‘inherently responsive to lived realities—intrinsically more able, perhaps, to produce new, practical, organic and adaptive, self-governance responses emerging in non-state and commons-based initiatives—in turn, reconstituting agency in far more complex forms.’⁴²

³⁸ Boaventura De Sousa Santos, *Towards a New Legal Common Sense: Law, Globalization and Modernity* (Sage 1990) 40.

³⁹ Margherita Pieraccini, ‘A Politicized, Legal Pluralist Analysis of the Commons’ Resilience: The Case of the Regole d’Ampezzo’ [2013] *Ecology and Society* 1, 3.

⁴⁰ Capra and Mattei, *The Ecology of Law* (n 24) 160.

⁴¹ Mattei and Quarta, *The Turning Point* (n 24).

⁴² Anna Grear, ‘Towards “Climate Justice”? A Critical Reflection on Legal Subjectivity and Climate Injustice: Warning Signals, Patterned Hierarchies, Directions for Future Law and Policy’ [2014] *Journal of Human Rights and the Environment* 103, 132.

IV. Work in the Commons: From Subordination to Solidarity

For centuries, human labour was a way to transform natural resources into products and services to trade in the market.⁴³ Modern states justified the transformation of commons into capital as serving societal purposes. With the advent of industrial capitalism, labour law and industrial relations institutions became essential features for the sustainable development of this market mechanism.⁴⁴ However, the socially progressive goals of labour law, with their different articulations of means and objectives,⁴⁵ have only partially internalized the negative effects of such a market mechanism,⁴⁶ thus inadvertently contributing to the ‘tragedy of the commons’.

In the field of labour law, it is true that ‘none of the polarities expressed in general private law—subject and object, person and thing, status and contract, public and private—really make sense.’⁴⁷ But on closer inspection, both labour law and industrial relations frames of reference tend to reproduce the inconsistency of those cleavages when they embrace in their epistemic statute the normative function of redistribution of power and resources from capital to labour, and the consequential ideology of limitless and unpurposive growth.⁴⁸ While wage labour benefited from the share of welfare and economic resources redistributed from industrial growth, the social function of the business enterprise remained unquestioned in orthodox labour law scholarship, along with the invisible externalities of increasing productivity and consumption on social and environmental commons. The same goes for the field of industrial relations.

Another fundamental assumption of classical labour law and industrial relations epistemologies, which reflects the core feature of wage labour, contrasts with the essence of work in the commons: the existence of a conflict of interest between the employer and the worker.⁴⁹ Collaborative commons

⁴³ Alain Supiot, ‘*Homo faber*: continuità e rotture’ in Axel Honneth, Richard Sennett, and Alain Supiot, *Perché lavoro? Narrative e diritti per lavoratrici e lavoratori del XXI secolo* (Fondazione Giangiacomo Feltrinelli 2020) 21.

⁴⁴ Simon Deakin, ‘The Contribution of Labour Law to Economic and Human Development’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 156.

⁴⁵ Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016).

⁴⁶ Deakin, ‘The Law of the Anthropocene’ (n 3); Simon Deakin, ‘Labour Law and the “Capitalocene”: Law, Work and Nature in the Ecological *Long Durée*’ (2023) *International Journal of Comparative Labour Law and Industrial Relations* 281.

⁴⁷ Deakin, ‘The Law of the Anthropocene’ (n 3) 121.

⁴⁸ For wider discussion on this aspect, see Dermine and Dumont, ‘A Renewed Critical Perspective’ (n 16). See also Elise Dermine, ‘Towards a Sustainable Social Law: What Role for Legal Scholars?’ (2023) *International Journal of Comparative Labour Law and Industrial Relations* 315.

⁴⁹ Otto Kahn-Freund, *Labour and the Law* (3rd edn, Stevens 1983) 26–28.

pose challenges to this pluralistic idea of labour law in both its individual and collective dimensions. Conflicts of interest underpinning the employment contract in wage labour fade away in work activities based on collaborative commons.⁵⁰ The same is true for the trade unions' logic of collective action in building solidarity to coordinate individual interests towards broader societal goals. Although positive developments are happening,⁵¹ it is still common to find indifference among confederal unions towards forms of active citizenship promoted by individuals and organized groups in global cities, suburbs, and rural areas. This reveals the difficulty trade unions find when operating in contexts where the traditional forms of conflict between capital and labour yield to social and ecological reproductive activities based on cooperation and solidarity. In such activities, cooperation and solidarity are not goals to pursue; they are the assumed basis of social and work relationships.

This is evidenced by the nature of work in the commons. Literature concerned with collaborative commons hardly accounts for the specific jobs and tasks performed by the commoners. Some common elements can, nonetheless, be detected indirectly and show their irreducibility to classical labour law narratives. Further to the technical skills needed to perform commons-related activities, communing entails a set of soft skills, as well as relational and behavioural competencies. It involves different models of labour division outside of subordination, in which human time is freed up for proselytizing, organizing, and caring activities. Capra and Mattei, for example, note that the fundamental organizational principles of communing are 'caring, duty, reciprocity, and participation. It is about spending a lot of time together to care for something recognised as a common with high attention and patience.'⁵² In the same vein, Federici observes that communing is 'the willingness to spend much time in the work of cooperation, discussing, negotiating, and learning to deal with conflicts and disagreement.'⁵³ To some extent, the universal services provided by the commoners 'are similar to household work, never noticed when the work is being done. Only when no one is there to do the dishes, you notice its value.'⁵⁴

⁵⁰ Unsurprisingly, many forms of reproductive work have been marginalized by labour law rationality. See Ania Zbyszewska, 'Regulating Work with People and "Nature" in Mind: Feminist Reflections' (2018) *Comparative Labor Law & Policy Journal* 9.

⁵¹ Besides the many examples in Räthzel, Stevis, and Uzzell, *Environmental Labour Studies* (n 27); see Ian MacDonald (ed), *Unions and the City. Negotiating Urban Change* (ILR Press 2017).

⁵² Capra and Mattei, *The Ecology of Law* (n 24) 153–54.

⁵³ Federici, *Re-Enchanting the World* (n 22) 94.

⁵⁴ Mattei, *The State, the Market* (n 33) 3.

In the commons, labour is relational, associative, and solidarity-based. It is consistent with forms of non-market work in which social relations and values prevail over material interests.⁵⁵ Unlike a capitalistic division of labour, which occurs when the establishment of the employment relationship is formalized through a contract, the impulse that drives the parties in collective action aimed at protecting a common good is not based on conflicting economic interests; it is based on reciprocity, solidarity, and sociability. While the employment contract based on the exchange between wage and subordination presupposes a conflict of interest between employer and employee, activists involved in collaborative commons do not stand face to face but side by side. The working relationship in collaborative commons is horizontal. It relies on the existence of a common purpose of the commoners: the care of the commons. Such care activity involves a cooperation between parties who act in solidarity, as a band of parallel forces converging towards a common objective.

Even the more inclusive justifications of labour law, such as the legal construction of personal work relations, cannot entirely capture the essence of work in collaborative commons.⁵⁶ It comes with no surprise that Freedland and Kountouris exclude from their conceptualization some forms of socially valuable activities, such as care work, waste recycling, subsistence agriculture, and other activities comparable to work in collaborative commons.⁵⁷ Although the commoners engage personally in the performance of work activity, establishing relations with other persons, the type of social relation involved in the commons focuses on the *common good*. Work in collaborative commons is not performed to fulfil the personal interest of the worker or the employer. It is performed to serve the socially and environmentally progressive ends of care, preservation, and reproduction of a common good.

Cooperatives are instructive in further explaining the distance between wage labour and the reality of work in collaborative commons. The International Labour Organization (ILO) recommendation n. 193 defines the cooperative as 'an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise'.⁵⁸ Cooperatives might be one

⁵⁵ Noa Zatz, 'Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationship' [2008] *Vanderbilt Law Review* 857.

⁵⁶ Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011) 351–52, 347–49, 354–56.

⁵⁷ This is noted by Supriya Routh, 'The Need to Become Fashionable' in Brian Langille (ed), *The Capability Approach to Labour Law* (OUP 2019) 113. On this issue, Routh cites Judy Fudge, 'Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction' [2014] *Feminist Legal Studies* 1, 12–16.

⁵⁸ ILO Recommendation on the Promotion of Cooperatives, 2002 (R.193), point 2.

of the institutional channels to give legal recognition to the commons, even if not all of the commons should necessarily be subsumed under the cooperative model. Collaborative commons, for example, can be organized and legally recognized through an association, a foundation, or even without any formal juridical status.⁵⁹

Undoubtedly, both cooperatives and the commons emphasize social values and solidarity over economic interests. They both employ democratic forms of managing their activities, transcending the public-private divide.⁶⁰ However, while cooperatives are owned, the non-property nature of the commons remains an important feature that distinguishes the two models. This difference is accentuated when cooperatives focus on purposes and interests that are not coincident with the care and sustainability of the common good. When such institutional differences occur, the economic interests of the cooperative worker become relevant. Although the solidaristic dimension of the relationship may still be higher compared to work in capitalist corporations, it is not always the case that 'the employment in a cooperative blurs the division between the employer and the employee, de-constructing the main core of labour law scope.'⁶¹ Instead, the existence of an economic interest of the worker, distinct from that of the cooperative as a legal person, shows that mutuality does not always imply the absence of conflict of interest in labour relationships.⁶² This is evidenced by the fact that cooperative workers get a salary in exchange for their work and that trade unions in cooperatives continue to exist in many countries, even though their functions and purposes are pursued according to strategies that are not necessarily confrontational.

In short, if labour law and industrial relations institutions work to promote *organic solidarity*, social ties and work relationship in collaborative commons are based on *mechanical solidarity*.⁶³ In this context, the confrontational background of any property-based division of labour retrocedes, and solidarity rediscovers its function as the constitutive element of co-existence between the person, the community, and the common good that is to be protected.⁶⁴

⁵⁹ Saki Bailey and Maria Edgarda Marcucci, 'Legalizing the Occupation: The Teatro Valle as a Cultural Commons' [2013] *The South Atlantic Quarterly* 396.

⁶⁰ For recent sociological and industrial relations research on cooperatives, Katherine Chen and Victor Tan Chen (eds), *Organizational Imaginaries: Tempering Capitalism and Tending to Communities through Cooperatives and Collectivist Democracy* (Emerald Publishing Limited 2021).

⁶¹ Miriam Kullmann and Andrea Iossa, 'Subordination in Solidarity? The Labour Law of Workers' Cooperatives' [2020] *Global Workplace Law & Policy*.

⁶² Marco Biagi, *Cooperative e rapporti di lavoro* (Franco Angeli 1983) 288, 301.

⁶³ Émile Durkheim, *De la division du travail social: étude sur l'organisation des sociétés supérieures* (Félix Alcan 1893).

⁶⁴ Rodotà, *Il terribile Diritto* (n 30) 498.

This way, labour (like natural resources) ceases to be a mere component of the market and regains its social and collective dimension of promoting the caring and sustainable development of those material and immaterial goods needed for the progress of humanity and the reproduction of social and natural ecosystems.

V. Beyond Utopias: The Ideal-Typical Function of the Commons

Academic interest in the commons has recently expanded from counter-hegemonic narratives to far less radical positions. While heterodox scholars articulate the idea of the commons in critical terms, even advocating it as a form of social unrest, the latter tend to construe the commons as an ideal type, emphasizing the transformative power that such an institution drives on traditional sociolegal categories. These categories include the classical articulation of property rights into separated public and private realms, as well as the conceptualization of the enterprise as the epitome of private property and shareholder primacy.

Drawing on the ideal-typical function of the commons, for example, Deakin sees the corporation 'as a collectively managed resource or "commons" which is subject to a number of multiple, overlapping and potentially conflicting property-type claims on the part of the different constituencies or stakeholders that provide value to the firm.'⁶⁵ He argues that viewing the corporation as a common is the first step towards a 'better understanding of the role that the corporate form can play in ensuring wider economic and social sustainability'.⁶⁶ Indeed, the overall sustainability of the corporation 'depends on ensuring proportionality of benefits and costs with respect to the inputs made to corporate resources, and on the participation of the different stakeholder groups in the formulation of the rules governing the management and use of those resources'.⁶⁷

Deakin's conception of the corporation as commons parallels the main normative assumptions of the stakeholder theory, as well as the familiar narratives of the pluralist theory of industrial relations that sees the firm as a system of interests. Consider Ross' idea of the firm, for example. Ross looked

⁶⁵ Simon Deakin, 'The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise' [2012] *Queen's Law Journal* 339, 376.

⁶⁶ *ibid* 381.

⁶⁷ *ibid* 381.

at the corporation as a plural reality consisting of divergent but intermingled groups of interests, including those of consumers, suppliers, and organized workers.⁶⁸ In such a corporation, the management goal is to secure justice for all and unconditional maxima for none by balancing different interests with the aim to achieve 'the general interest of society'.⁶⁹ In this reading, management is not seen as the personification of capital interests opposed to those of salaried workers and other stakeholders, but as a rational agent of a higher collective interest, that is, what Deakin refers to as sustainability. Robert Dahl made a similar claim in his classical study of 1961.⁷⁰ Dahl depicted social organizations, including corporations, as pluralist communities with groups of competing interests that continually shift alliances and keep each other from monopolizing power. In a following study, he explicitly questioned the idea that shareholders should have priority in executive decision-making: 'Why should people who own shares be given the privilege of citizenship in the government of the firm when citizenship is denied to other people who also make vital contribution to the firm? The people I have in mind are, of course, employees and customers, without whom the firm could not exist, and the general public.'⁷¹

In line with Ross and Dahl's pluralist theory of the firm, scholars from the so-called 'Oxford school of industrial relations' emphasized the plurality of interests constituting the corporate structure. Fox, for example, looked at the enterprise as a 'stakeholder coalition', a 'democratic state in miniature' consisting of conflicting interest groups.⁷² Similarly, Flanders argued that 'the business enterprise does not have a unitary structure of authority; in some degree it is always a pluralistic society composed of groups with divergent interests and values. Whether management appreciates this or not, it is invariably confronted with the problem of reconciling the impersonal aims of the enterprise with the personal aims of its many constituent groups.'⁷³ Like democratic participation in collaborative commons, industrial relations' pluralism assumes that the coordination and balancing of interests are achieved through a transaction, negotiation, and other mechanisms for conflict resolution. Although

⁶⁸ NS Ross, 'Organised Labour and Management: the UK' in Edward Maurice Hugh-Jones (ed), *Human Relations and Management* (North-Holland 1958) 101, 104.

⁶⁹ *ibid* 114.

⁷⁰ Robert Dahl, *Who Governs? Democracy and Power in an American City* (Yale UP 1961).

⁷¹ Robert Dahl, *After the Revolution? Authority in the Good Society* (Yale UP 1970) 102.

⁷² Alan Fox, *A Sociology of Work in Industry* (Collier-Macmillan 1971) 58.

⁷³ Allan Flanders, *Managements and Unions* (Faber and Faber 1970) 150.

there is no inherent common purpose in traditional capitalist firms, it is assumed that its constituent groups are dependent on each other to achieve their objectives.⁷⁴

Two fundamental elements, though, distinguish the commons' system of governance from the pluralist idea of stakeholders' participation and negotiation with management in a business corporation. Firstly, shared governance in collaborative commons is connatural to the commons itself. Participation of the commoners is a truly democratic process, which extends to core decisions related, for example, to access and use of a common-pool resource. Secondly, such decisions are taken in a condition of substantial equality among the commons' constituents. This is a condition that, in principle, ensures fairness of the decision-making process and justice of the related outcomes. Even in the most participatory, horizontal, and democratized corporate structures, these two elements make the ideal-typical conception of the corporation as a commons hardly capable of achieving the egalitarian outcomes that the commons as a real utopia convey. John Rawls' idea of justice as fairness helps further clarify this.

Rawls derives principles for a just society from the agreement to a fair procedure: justice is the outcome of a decision-making process accepted as fair. According to Rawls, 'the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social co-operation The justice of a social scheme depends essentially on how fundamental rights and duties are assigned and on the economic opportunities and social conditions in the various sectors of society.'⁷⁵ While justice is the outcome of fairness, the reverse is also true. The assessment of fairness in social relations requires consensus around an idea of justice based on shared values and fundamental principles of coexistence. These are the principles that 'free and rational persons concerned to further their own interests would accept in an *initial position of equality* as defining the fundamental terms of their association.'⁷⁶ It is only in a context where the justice of the prevailing definitions of 'fundamental rights and duties' can be taken for granted, as agreed by free and rational agents in a condition of substantial equality, that meaningful discussion on fairness is possible. Otherwise, the idea of fairness is arbitrary and subject to manipulation.⁷⁷

⁷⁴ *ibid.*

⁷⁵ Rawls, *A Theory of Justice* (n 13) 6, 7.

⁷⁶ *ibid* 10 (emphasis added).

⁷⁷ Richard Hyman and Ian Brough, *Social Values and Industrial Relations* (Basil Blackwell 1975) 9.

The reality of work in capitalism is that the root causes of inequality within and beyond employment cannot be adequately addressed. It is not only unquestioned but even reflected in legal rationality that employers have the right to use labour (and natural resources) for less than its actual cost and for purposes that are not necessarily coincident with those of society, as much as workers (and natural resources) have the equivalent right not to be exploited excessively.⁷⁸ In this connection, the managerial attitude to consider labour as a cost to minimize mirrors the worker's and union's tendency to overlook non-materialistic values within and outside productive work.⁷⁹ This has the further consequence that, in principle, the voice of organized labour cannot extend the limit of workers' protection corresponding to the need to curb the worst implications of labour (and environmental) subordination to capital.⁸⁰ In conclusion, even in the inspiring view of corporations as commons, workers and their representatives can seek to expand democracy in firms and, perhaps, dampen the consequences of adverse managerial decisions. Nonetheless, they remain relatively powerless to alter the fundamental reality of management control over the strategy and direction of the enterprise, as well as the negative externalities of the division of labour in society.⁸¹ Regardless of whether countervailing forces such as trade unions might be effectual in their role of stakeholders,⁸² organized labour has no right to contrast the deepest sources of unsustainability.⁸³

VI. Discussion and Conclusions

In this chapter, the commons have been considered real utopias and in their ideal-typical dimension. Consideration has been given to the extent to which mainstream and more progressive labour law justifications fit with the commons. Not surprisingly, one of the conclusions is that labour law scholarship is ill-fitted to frame the reality and the utopia of the commons. This is unsurprising as familiar categories of labour law refer to work relationships that—to a large extent—are incompatible with human activities in collaborative

⁷⁸ Richard Hyman, *Industrial Relations: A Marxist Introduction* (Macmillan 1975) 86.

⁷⁹ *ibid* 87.

⁸⁰ *ibid*.

⁸¹ Karl Klare, 'The Labor-Management Cooperation Debate: A Workplace Democracy Perspective' [1988] *Harvard Civil Rights-Civil Liberties Law Review* 39, 71.

⁸² Robert Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (Hearts International Library 1915); C Wright Mills, *The Power Elite* (OUP 1956).

⁸³ Hyman, *Industrial Relations* (n 78) 86, 87.

commons. The same goes for the dominant and pluralistic frame of reference in industrial relations.

Even though there is little scope for classical labour law to land in the non-place of the commons, some areas of such discipline can still be useful to protect and empower people involved in collaborative commons. Occupational health and safety is one of these areas, along with social security law, welfare provisions, and distribution norms that allow the commoners to actively participate in the life and reproduction of the common good. To the extent that the capability approach is functional to justify labour law beyond the assumption of inequality of bargaining power⁸⁴ and to disconnect income from the exchange value in the labour market,⁸⁵ this might contribute to rationalizing some aspects of the idea of work in collaborative commons. The expansion of human freedom to choose meaningful jobs within and beyond employment is certainly an area in which the capability approach might become relevant in the discourse about the commons. For example, active and passive labour market policies might contribute to support transitions from productive work to collaborative commons and vice versa. Indirect contributions from labour law could also stem from working time reductions in energy-intensive and polluting industries in order to free and empower people to engage in collaborative commons, political activism, and other social reproductive work.⁸⁶ Sabbatical leave, for example, would point in this direction.⁸⁷

As with any utopia, the utopia of the commons is useful when it remains an ideal. When humans try to turn utopias into reality, they often fail miserably since real life is not the dimension of their existence. When applied to the utopia of the commons, for example, the fundamental principle of labour law—that is, *labour is not a commodity*—should not just imply that the worker is a subject worthy of protection—protection of his dignity, naked in the face of market and state strongholds, but rather, the worker should be protected as a person who actively participates in solidarity with the other commoners and with the life of the commons itself. However, in real life, solidarity can easily be manipulated for unethical purposes. It can be debased if solidarity efforts and commitments are not equally shared. The possibility that all successful institutions are also coercive, and the burden of coercion tends to fall unequally

⁸⁴ For a recent debate on the capability approach to labour law, see Brian Langille (ed), *The Capability Approach to Labour Law* (OUP 2019).

⁸⁵ Dermine and Dumont, 'A Renewed Critical' (n 16) 262, 265.

⁸⁶ Zbyszewska, 'Regulating Work' (n 50).

⁸⁷ Katherine Stone, 'Unions and On-demand Work in the United States' in Julia López (ed), *Collective Bargaining and Collective Action. Labour Agency and Governance in the 21st Century?* (Hart Publishing 2019).

on those who are less powerful, has been neglected in commons theory.⁸⁸ Likewise, the literature on new forms of collaborative commons documents internal problems of slack, opportunism, and other forms of non-cooperative behaviour. These problems result in a deterioration of the common good that is to be protected, in internal rent-seeking by commoners who have practical leverage over others, or in decreasing productivity of some of its members, who nevertheless demand their equal share in the outputs.⁸⁹

In short, as long as the idealized resilience of the commons is vulnerable to the *iron law of oligarchy*,⁹⁰ classical labour law and industrial relations institutions regain importance to revive solidarity, regulating distributional conflicts and the asymmetry of power implicit in any type of organization. Putting this argument in Kahn-Freund's terms, it is 'sheer Utopia to postulate a common interest in the substance of labour relations. To dig up the roots of this Utopia of a "pre-established harmony" of management and labour would be a fascinating task for a sociologist: he would probably discover laissez-faire doctrines as well as a very crude type of Marxism and most certainly those (more or less bogus) ideological constructions which were used by Mussolini to bolster up the "*stato corporativo*", and he would also observe how the Utopia can degenerate into the sham romanticism of the feudalistic trappings used by Hitler for his labour laws.'⁹¹

Compared to utopias, ideal types can better reflect the imperfectness of real life, albeit this often happens at the cost of oversimplifying it. And an oversimplification of reality might involve disrespect for nature and human values. In this reading, the idea of corporations as commons should be taken as it is: a theoretical framework to analyse the legal structure of a business enterprise better than the shareholder primacy model does. But the temptation to expand the qualification of a commons to every good or service should be limited. Otherwise, the concept loses its specificity; if everything is a commons, nothing is a commons. Viewing the corporation as a commons, thus, would not necessarily help to deliver benefits for all its stakeholders and society as a whole. Instead, the 'tragedy of the commons' is still likely to materialize as long as the voices of employees, unions, and other stakeholders are excluded from or are unequally heard in core decisions concerned with property rights

⁸⁸ Compare Arun Agrawal, 'Sustainable Governance of Common-Pool Resources: Context, Methods and Politics' [2003] *Annual Review of Anthropology* 243, 257; Pieraccini, 'A Politicized, Legal Pluralist' (n 39).

⁸⁹ Amnon Lehari, 'Re-romanticizing Commons and Community in Israeli Discourse: Social, Economic, and Political Motives' [2018] *Theoretical Inquiries in Law* 671, 699.

⁹⁰ Michels, *Political Parties* (n 82).

⁹¹ Kahn-Freund, *Labour and the Law* (n 49) 28.

and the correlated economic freedom to choose *how*, *how much*, *where*, and above all *why* and *for whom* social and natural resources are used (for some, exploited) to produce value.

Regardless of the contribution of labour law and industrial relations institutions, the movement for commons will likely continue to expand and regain space for the sustainability of socioecological systems. Thousands of activists around the world have organized themselves in defence of the commons for current and future generations. Opposite to the unpurposive transformation of commons into capital, there is a flourishing progressive movement beyond the public-private fracture that retraces the early forms of solidarity and collective action that unions had promoted at the onset of industrial capitalism. These new forms of solidarity and collective action bring together humans that, irrespective of their status, share the purpose of defying 'the market-fundamentalism while also retaining the market space within the much broader socio-ecological one'.⁹²

It is in this context that collaborative commons are emerging to lead a renewed, perhaps more effective, and therefore far more convincing twenty-first-century response to the parallel process of commodification of labour and nature. This is a response that originates out of formal legal institutions to confront superordinate public and private power. It flows from 'local struggles', from 'indigenous, implicit, and informal lawmaking', and from 'movements which have not become juridified but which actually draw their strength and sustenance from grass-roots involvement'.⁹³ Organized labour cannot ignore this. The *living law* of collective bargaining is an essential feature of the enduring idea of labour law.⁹⁴ Yet collective bargaining's contribution to achieving social justice and transformation in a post-industrial society has increasingly eroded. Despite a large part of labour being intrinsically mutualistic, cooperative, and relational, traditional segments of the market seek to expand the margins of competitiveness outside the boundaries of the market itself, multiplying the mechanisms of value extraction far beyond the paid working time. In times and places of post-industrial capitalism, where the scene of primitive accumulation revives, the capitalist illusion of an infinite growth on a finite planet is driving a process whose only end can be the destruction of the material conditions it needs to operate.⁹⁵

⁹² Supriya Routh, 'Embedding Work in Nature: The Anthropocene and Legal Imagination of Work as Human Activity' [2018] *Comparative Labor Law and Policy Journal* 29, 31.

⁹³ Harry Arthurs, 'Labour Law without the State?' [1996] *The University of Toronto Law Journal* 1, 45; Routh, 'Embedding Work in Nature' (n 92) 45.

⁹⁴ Ruth Dukes, *The Labour Constitution. The Enduring Idea of Labour Law* (OUP 2017).

⁹⁵ Deakin, 'Labour Law and the "Capitalocene"' (n 46) 290.

While nation-states seem powerless in front of this contemporary ‘social question’,⁹⁶ the language of public and private persists, both in legal discourse and in social life. Its enduring viability and power lie in its manipulability.⁹⁷ It can easily be turned inside out precisely because it has no logical content except for veiling the contradictions inherent in current economic and political institutions.⁹⁸ If legal rationality is still unable to reflect new forms of democratic self-governance and the full capacity of humans to experience freedom confronting existing patterns of domination,⁹⁹ collective action for the commons is, in conclusion, a reasonable utopia to creatively imagine a new model of sustainable coexistence between humans and nature; a model in which the fictitious polarities of the industrial social contract can definitely be deconstructed and traced back to synthesis. This could have important implications for democracy and progress, if it is true that freedom lies not in the option to choose between white and black but in the capability of humans to emancipate themselves from any prescribed choice.

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⁹⁶ Simon Deakin refers to the climate crisis in terms of modern ‘social question’ *ibid.*

⁹⁷ Alan Freeman and Elizabeth Mensch, ‘The Public-Private Distinction in American Law and Life’ [1987] *Buffalo Law Review* 237, 248.

⁹⁸ Capra and Mattei, *The Ecology of Law* (n 24) 151.

⁹⁹ Klare, ‘The Public/Private Distinction’ (n 4) 1358.

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