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The Legal Form of Climate Change Litigation: An Inquiry into the Transformative Potential and Limits of Private Law

Abstract: This article analyzes the impact of climate change litigation on the form of private law, contributing to our understanding of the transformative potential and limits of private law. I argue that climate change litigation breaks the homology between the commodity form and the legal form, to surprisingly antisystemic effect. Developing this argument, I make three distinct contributions. First, I demonstrate that the legal form of climate change litigation is incompatible with the rationale of capital accumulation. Second, I update the commodity form theory of law elaborated by Pašukanis to conceptualize the transformations of European private law systems that have been unfolding for some decades, which I tentatively label "private law for the age of monopoly capitalism" (PLAMC). Third, I contend that climate change litigation departs from the rationale of PLAMC and that in these cases the legal form does not replicate the commodity form. This rare dissociation creates antisystemic potential.

Keywords: climate change litigation, law and political economy, private law, tort law, commodity form theory of law, monopoly capitalism, world-system

I. Introduction

After the release of the last report of the Intergovernmental Panel on Climate Change (IPCC 2023), the urgent necessity of cutting emissions to keep the planet livable cannot be denied (UNDP 2022). Within the broad context of mobilizations against climate change, a phenomenon that is rapidly gaining momentum is that of so-called climate change litigation. One of the many innovative aspects of these disputes is that the claims and judgments are based on traditional tort law systems, combined with many other sources, such as environmental law (both national and supranational) and fundamental rights (de Vilchez Moragues 2022, 185). The litigation assessed in this article is primarily based on tort law in civil law traditions. This litigation largely departs from the usual primary purpose of tort law: compensating a victim for a wrongful damage they have suffered (Bourassin 2014, 2–3; Viney 2019, 9; Wagner 2019). As will be argued in Part III, climate change litigation strains the main elements and conception of tort law: first, traditional categories such as fault, causation, and remedies need to be stretched to be applicable in this context, and, second, it

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involves a wide political dimension that transcends the relationship between the tortfeasor and the victim. Even though scholarly literature has addressed the multifarious issues that climate change litigation raises, there has until now been little attention to the impact of this phenomenon on the form of private law. This is a major gap in the literature, as the analysis of the legal form provides a crucial tool to understand the potential of climate change litigation and how to assess it in relation to the broader context of private law. This article aspires to fill this gap and, in so doing, to provide a contribution to the understanding of the transformative potential and limits of private law.

In this article I argue that, because of its distinctive features, climate change litigation has antisystemic potential: more precisely, I advance that it is antisystemic in its form because it contradicts the rationale of capital accumulation. Such litigation is focused not on a different allocation of risk and of resources, but on a mandate to transform the way business is carried out, on the basis of an aim external to the rationale of capital accumulation. This finding is surprising and needs to be inquired into: indeed, it is usually impossible to use private law in an antisystemic way (Baars 2019; Wood 2016) because the legal form, even in the age of monopoly capitalism, reproduces the commodity form. I contend that this outcome is possible because climate change litigation breaks the homology between the commodity form and the legal form. Developing this argument, I make three distinct contributions. First, I demonstrate that the legal form of climate change litigation is not compatible with the rationale of capital accumulation. Second, in order to assess how and why this finding is original in relation to private law, I widen the focus to private law in general and analyze what usually prevents private law from having antisystemic potential. This examination is necessary in order to understand, against this background, the originality of climate change litigation and how, in these specific cases, tort law mobilization is peculiar. I argue that the commodity form theory of law, as elaborated by Pašukanis, is a powerful theory to explain the stability of the private law system. However, the transformations of the global capitalist systems, and in particular monopolization, seem to undermine some of the pillars on which this theory is built, necessitating an update. To update the theory, I develop a theoretical framework to conceptualize and understand the transformations of European private law systems that have been unfolding for some decades, which I tentatively label as private law for the age of monopoly capitalism (PLAMC). I will then demonstrate how the underlying rationale of the commodity form theory of law is still operating even in this context. Finally, assessing climate change litigation against this theoretical framework, I contend that it departs from the rationale of PLAMC and that in climate change cases the legal form does not replicate the commodity form: this rare dissociation enables its antisystemic potential.

Climate change litigation is a flourishing field. In recent years, the number of climate change lawsuits has burgeoned worldwide (Setzer and Higham 2022), and it is clear that it will increase further. First, because of the still-unsatisfactory actions undertaken by legislators and governments, as the disappointing outcomes of COP27 and COP28 (27th and 28th Conferences of the Parties) show only too well. Second, because of the growing juridification of the issues related to climate change, which should foster further litigation pursuing climate justice (Tigre et al. 2023). It has been shown that global climate change disproportionately affects those who have least contributed to the problem and have fewer resources to face it (Gonzalez and Mutua 2022, 173; Chancel, Bothe, and Voituriez 2023), but the current legal framework at the international level fails to address the root causes of climate change and the related social, racial (Gonzalez 2020; Kotzé, Du Toit, and French 2021; Villavicencio Calzadilla 2021), and gender (Morrow 2021) injustices. Third, because the resounding victories in landmark cases incentivize other actors to follow the same path and to widen the subjects on behalf of which actions are brought. Rights of nature (Schimmöller 2020; Tănăsescu 2022; Petel 2024), of Indigenous groups (Tigre 2022), and of future generations (Harris 2022; Bertram 2023; Donger 2022) are three examples in kind. Because of the great influence of comparative law, successful litigation in one jurisdiction is likely to be followed

in others. Finally, litigation against banks and financial institutions is growing (Setzer and Higham 2022, 38; Solana 2020; Setzer et al. 2021), dragging into the fray the credit system, whose contribution to fossil capital is quintessential (Rainforest Action Network et al. 2023).

Two kinds of litigation are at the core of the analysis carried out in this article. First, litigation where NGOs sue transnational corporations because the conduct of the whole corporate group does not respect international standards concerning the level of emissions of greenhouse gases (GHGs). Second, litigation against states because they do not fulfill their international obligations and duties concerning the adoption of policies to reduce emissions within the agreed limits. When plaintiffs are successful, the judgment usually orders the holding company or the state to reach a specific outcome in order to comply with the established limits on emissions to mitigate climate change.

The expression "climate change litigation" is broad, and its boundaries are inevitably blurred, as are those of any rapidly developing category. In the following analysis I will admittedly use the expression arbitrarily, to refer to litigation of the kind mentioned above and further examined in Part II. The inconveniences occasioned by this limited definition of the term are compensated for by the easing of innumerable passages of the article where a concise reference to those cases proves effective. The following analysis is based on some of the most recent and relevant cases and does not pretend to encompass all litigation that is related to climate change. This choice is consistent with the purpose of the article, which aims not to develop a general analysis of climate change litigation, but to assess whether and why specific cases can have antisystemic potential. Although not numerous, the cases I analyze are, at least within the group of successful cases in Europe, among the most significant ones. They have catalyzed the attention of scholarship and, most important, they serve as a model for further litigation. It will be up to an eventual reader who might want to apply this analytical framework to other cases and contexts to evaluate whether it is appropriate, pertinent, or useless.

This article deals mostly with European case law. As climate change is a global phenomenon, which has been produced in a colonial, postcolonial, and imperialist setting of international relations that necessitates adequate attention to the dimension of environmental justice (Gonzalez 2020; Natarajan 2021; Purdy 2018; Chancel, Bothe, and Voituriez 2023), the analysis risks being flawed by Eurocentrism. Three reasons justify the choice to focus on these cases instead of broadening the perspective.

First, even though there are new and promising initiatives on climate justice and litigation in the global South (Tigre et al. 2023; Setzer and Higham 2023, 14; Setzer and Benjamin 2020; Peel and Lin 2019), climate litigation has, at least until now, been mainly centered in the global North. This is also because transnational corporations that bear the main responsibilities for climate change and its destructive effects are usually incorporated in the North (the same is self-evident concerning litigation against states) and this has obvious effects on the jurisdiction of litigation involving their activities.

Second, even for damages that occurred in the South, redress is often sought in courts in the North (Bradshaw 2020), which are seen as jurisdictions where claims might be more likely to prove successful and enforceable (van Loon 2018). From a less complacent perspective, it might be argued that this implies that global North actors and courts are in fact exercising control over litigation aiming to establish global North states' responsibilities and liabilities and thus expropriating the voices of states and communities of the global South in the jurisdictional process that concerns transnational corporations and the damages they cause worldwide. Regardless of the preferred interpretation, this tendency further concentrates litigation in the North.

Third, the following theoretical framework on the role of private law and the legal form is particular to Western legal and socioeconomic systems (their influence or imposition and transplant abroad is an issue that is well beyond the scope of this article). It would thus be inappropriate to apply the same categories to other legal contexts and cultures. Even when climate litigation in the global South and that in the global North share common features, they differ because of their context and content (Setzer and Benjamin 2020, 79). Ultimately, it is up to scholars more familiar with those non-Western systems to assess whether this framework may be appropriate and useful for studying the role of private law and climate litigation, as the legacies (and persistence) of colonialism and imperialism have partially crafted those legal systems on the model of the Western ones. For these reasons, the analysis here will not delve into interesting cases pending in the global South,[1] even though they present, prima facie, similarities with case law on which the present argument is built.

To be sure, my argument does not contend that litigation is the best site for tackling climate change or that a satisfactory solution to the problem can come primarily from this realm, as such a solution would require socioeconomic planning at the national and transnational levels (Kampourakis 2023). As alignment with radical movements is necessary for lawyers to foster any transformative power (Abel 1985), the best places to address the issue comprehensively and democratically are sites of political power supported by strong social movements. However, climate change litigation can prove useful, first, in conferring on social movements the symbolic legitimation of the law (Averill 2007, 462; McCann 2006, 29–30). Second, it can help in setting the political agenda (Wonneberger and Vliegenthart 2021), as the IPCC itself has affirmed that climate litigation has an important role to play in "the outcome and ambition of climate governance" (IPCC 2022, 125).

This article will proceed as follows. In Part II, I will assess the main features of climate change litigation and the problems it raises. I contend that, for liability to be found, the elements of tort law need to be interpreted in a loose way and that these hindrances are due to the rationale and aim of tort law itself. In Part III, I show that climate change litigation has antisystemic potential despite its shortcomings in addressing social and racial inequalities. To examine what makes this possible, I develop a twofold analysis: first, I assess what usually determines that private law does not develop autonomously from the socioeconomic system and, then, I identify the peculiarities of climate change litigation that account for its antisystemic potential. The article thus turns to these problems: in Part IV, I argue that the homology between the commodity form and the legal form usually precludes private law from having such potential. As some of the fundamental elements of contemporary European private law do not seem to be coherent with the commodity form theory of law, in Part V I develop a theoretical framework to analyze the transformations of European private law. I advance that they are the legal response to the monopolization of contemporary capitalism and that the commodity form theory of law, if properly updated, is still relevant to understanding how private law remains coherent with the socioeconomic system. In Part VI, against this theoretical framework, I argue that climate change litigation has antisystemic potential because it presents specific features that break the homology between the legal form and the commodity form.

[1] See, for instance, Pari Islanders v. Holcim (application filed in Cantonal Court of Zug, Switzerland, Jan. 2023) (more information at https://callforclimatejustice.org/en/); Ministerio Publico Federal v. Rezende, 1005885-78.2021.4.01.3200, 7a Vara Federal Ambiental e Agrária da SJAM, Brazil, em 16.04.2021, https://jusclima2030.jfrs.jus.br/wp-content/uploads/2021/05/Decisao-ACP-10058857820214013200-1.pdf; Leghari v. Federation of Pakistan, W.P. no. 25501/2015, Order (Lahore High Court, Pakistan, Sept. 4, 2015), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2015/20150404_2015-W.P.-No.-25501201_decision.pdf. In general, see Tigre et al. 2023.

II. The Original Features of Climate Change Litigation

Recently, several lawsuits have targeted states and companies for their failure to fulfill commitments concerning the reduction of GHG emissions. Litigation against states, as well as litigation against companies—in particular litigation against carbon majors outside the US—is growing (Setzer and Hingam 2022). The cases I will assess are mitigation cases, where the courts order an injunction. I have intentionally excluded cases, usually considered part of the same wave, in which the plaintiff claims damages, such as *Luciano Lliuya v. RWE AG.*[2] Indeed, my aim is not to draw a comparative analysis of prominent cases within climate litigation, but to show that in litigation with specific characteristics (which only some cases present) there is a disentanglement between the commodity form and the legal form. In these cases, the claims are brought by NGOs and a wide array of actors that do not primarily seek damages, but rather injunctions to transform the conduct of the defendants, who are either holding companies or states. I have chosen successful cases because the disentanglement between the legal form and the commodity form has been realized in these cases. I do not claim that this can happen exclusively in the cases that I have chosen; my aim is to demonstrate that climate litigation can have this potential and, most prominently, why it can have this potential in relation to the usual role private law plays in society. I leave it to others to assess whether other cases, even in different fields, present the same features and, therefore, the same potential.

A. Climate Litigation Against States

Concerning litigation against states, there are many cases currently pending or already decided in Ireland,[3] Germany,[4] Romania,[5] and Italy,[6] and before the Grand Chamber of the European Court of Human Rights;[7] however, *Urgenda*,[8] *Affaire du Siècle*,[9] and *Klimaatzaak*[10] are the most representative among successful cases. In *Urgenda* the Supreme Court of the Netherlands found that the Dutch state, failing to adopt policies consistent with the Paris Agreement of 2015, breached its duty of care toward its citizens and violated articles 2 and 8 of the European Convention on Human Rights (ECHR). In *Affaire du Siècle*, the Administrative Court of Paris found

[2] Luciano Lliuya v. RWE AG, no. 14/0354Z/R/rv (District Court of Essen, Germany, Dec. 15, 2016) (currently under appeal) (more information at https://climatecasechart.com/non-us-case/lliuya-v-rwe-ag).

[3] Friends of the Irish Environment v. Ireland, appeal no. 205/19 (Supreme Court of Ireland, July 31, 2020), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200731_2017-No.-793-JR_opinion.pdf.

[4] Nos. 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, Order of the First Senate of 24 March 2021 (Federal Constitutional Court, Germany, Mar. 24, 2021), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html.

[5] Declic v. Romanian Government, no. 312/2023 (Cluj Court of Appeal, Romania, 2023) (more information at http://climatecasechart.com/non-us-case/declic-et-al-v-the-romanian-government/).

[6] A Sud v. Italy, no. 3552 (Civil Tribunal of Rome, Italy, Feb. 26, 2024) (more information at https://climatecasechart.com/non-us-case/a-sud-et-al-v-italy).

[7] Agostinho v. Portugal (dec.) [GC], no. 39371/20, 9 April 2024, ECHR, https://hudoc.echr.coe.int/eng?i=002-14303 (more information at http://climatecasechart.com/non-us-case/youth-for-climate-justice-v-austria-et-al/); KlimaSeniorinnen Schweiz v. Switzerland [GC], no. 53600/20, 9 April 2024, ECHR, https://hudoc.echr.coe.int/eng?i=001-233206 (more information at https://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others/).

[8] Urgenda Foundation v. The Netherlands, no. 19/00135 (Supreme Court of the Netherlands, Dec. 20, 2019), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf.

[9] Notre Affaire à Tous v. France, nos. 1904967, 1904968, 1904972, and 1904976/4-1, Paris Administrative Court, First Partial Decision, Feb. 3, 2021, A.J.D.A. 2021, 705; Final Decision, Oct. 14, 2021, Droit administratif 2022(2), 37.

[10] Klimaatzaak v. Belgium, no. 8411 (Court of Appeal of Brussels, Nov. 30, 2023), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20231130_2660_judgment-1.pdf.

that, under international and national laws, the state has a general duty to fight climate change. As France had not adopted policies adequate to meet the objectives that it had itself set in national legislation, the state had caused ecological harm, violating the fundamental rights of citizens. The court therefore ordered the state to comply with its commitments to reduce its GHG emissions. In *Klimaatzaak*, the Brussels Court of Appeal established the liability of the federal state, the Flemish Region, and the Brussels-Capital Region based on national provisions on tort law and articles 2 and 8 of the ECHR, and ordered the defendants to reduce their GHG emissions by 55 percent compared to their 1990 level by 2030.

These three decisions follow this general line of reasoning: climate change damages fundamental rights because it has adverse consequences on people's lives. The state, through the signing of international agreements, as well as treaties on fundamental rights (that complete national constitutional principles), has committed itself to adopting policies to limit warming within certain thresholds. In some cases, these commitments have been the subject of precise national rules (as in *Affaire du Siècle*). These obligations are designed to protect the fundamental rights of citizens and oblige the public authorities to adopt appropriate policies to prevent the infringement of these rights. Failure to adopt appropriate rules or violation of such rules therefore constitutes a breach of the state's duty of care or, in French terms, a *carence fautive*.

The starting point is, thus, that climate change infringes the fundamental rights of citizens (Peel and Osofsky 2018) and, in particular, the rights to health, to a healthy environment, to life, and to private life. The key treaty is the United Nations Framework Convention on Climate Change (UNFCC), emerging from the 1992 UN Conference on Environment and Development, followed by the 2015 Paris Agreement under the UNFCC In the EU space, the common framework is represented by article 37 of the Nice Charter, article 191 of the Treaty on the Functioning of the European Union (TFEU), articles 2 and 8 of the European Convention on Human Rights, and the important judgments of the European Court of Human Rights that have recognized the relationship between a healthy environment and fundamental rights (Cordella v. Italy, nos. 54414/13 and 54264/15, 24 January 2019, ECHR; Renucci 2020). In the absence of states' specific commitments to mitigate climate change that are enforceable by citizens, citizens' fundamental rights are a prerequisite for affirming that states have a duty to adopt policies to combat climate change. However, plaintiffs do not claim a direct violation of fundamental rights, but rather that fundamental rights determine the content of the state's duty of care (Roy 2019, 134). Through the elaboration of the duty of care based on tort law (van der Schyff 2020), citizens and NGOs can enforce provisions of treaties that do not create specific subjective rights for them.

Actions and decisions on the subject are often assimilated and presented as similar due to both their mediatization and the constant comparative references found in the decisions themselves. However, a closer analysis reveals that these disputes present two partially divergent patterns (Fornasari 2022). In some cases (*Affaire du Siècle*), it has been affirmed that the state's liability derives from its failure to comply with the rules it has itself developed to combat climate change. The courts find liability because of the violation of precise targets that the state has imposed on itself, making a discussion of the appropriate limits that public action must respect unnecessary (Hautereau-Boutonnet 2021). In other cases (*Urgenda* and *Klimaatzaak*), failure to comply with the rules that need to be adopted to protect a fundamental right itself entails a tort.

B. *Climate Litigation Against Corporations*

Climate change litigation has also targeted polluting companies, especially carbon majors (for a definition of the concept, see Heede 2014). This litigation is even more ambitious: suing the

holding company, it seeks to challenge the conduct of the whole corporate group and, moreover, to make international agreements on climate change mitigation binding for companies.

Milieudefensie[11] is a landmark case (for different interpretations of the decision see Mayer 2022; Burgers 2022; Paiement 2023). In it, the District Court of The Hague states that climate change hampers Dutch citizens' human rights (I will return in Part III to the exclusion of standing on behalf of citizens from the global South and its implication): the defendant company (Shell) has a duty of care to mitigate climate change and to limit its GHG emissions. This duty of care derives from the application of article 6:162 of *Burgerlijk Wetboek*, the Dutch Civil Code. This article provides that conduct not regarded as "proper" in relation to unwritten law is tortious. After all, fossil fuel companies themselves acknowledge the necessity of limiting emissions (Bach 2019), and these commitments, even though it is still disputed whether they are legally binding (the issue has been raised, for instance, in *Notre Affaire à Tous v. BNP Paribas*[12]), at least reinforce that mitigation must be taken seriously and may be integrated into high-emitting companies' duty of care.

In order to substantiate the duty of care and the level of emission reduction required, the District Court relies heavily on the targets set by the Paris Agreement of 2015 and the case scenarios assessed by the IPCC. The outcome is an injunction to reduce direct and indirect[13] GHG emissions from its global operations by 45 percent by 2030 compared to 2019. Despite the fact that Shell's compliance with these targets does not guarantee that global emissions will diminish, the court affirms that the wrongdoing of other subjects cannot justify the defendant's unlawful conduct. To cut emissions, Shell must do everything possible, irrespective of the impacts that such measures may have on its business.

Although it has been unsuccessful, it is worth mentioning a very similar case before the Judicial Court of Nanterre, *Notre Affaire à Tous v. Total*,[14] in which NGOs and communities sought an injunction against Total to force the whole corporate group to reduce its emissions. Under the French Law on the Duty of Vigilance, big companies[15] are obliged to establish a plan to prevent human rights violations and environmental damage that may occur in the course of their business. Plaintiffs requested an injunction requiring Total to make its conduct consistent with the goal of limiting global warming to 1.5°C. Through this lawsuit, the claimants sought to impose on Total a transformation of its activities, to align them with the goals of the Paris Agreement of 2015, regardless of the potential effects on the corporation's business and profits. However, the court has dismissed the claim on procedural grounds.

In cases against corporations, the lawsuit targets the holding company, contesting the activity of the whole group. This attribution of the actions of the whole group constitutes an important

[11] Milieudefensie v. Royal Dutch Shell, no. C/09/571932 / HA ZA 19-379 (The Hague District Court, May 26, 2021), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf (currently under appeal, but the judgment has been declared provisionally enforceable).

[12] Filed on February 23, 2023, in the Judicial Court of Paris (more information at http://climatecasechart.com/non-us-case/notre-affaire-a-tous-les-amis-de-la-terre-and-oxfam-france-v-bnp-paribas/).

[13] The so-called "scope 3" emissions.

[14] Filed on January 28, 2020, in the Judicial Court of Nanterre (more information at http://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/). On July 6, 2023, the pretrial judge dismissed the lawsuit on procedural grounds. *Notre Affaire à Tous v. Total*, no. 22/03403 (Paris Judicial Tribunal, July 6, 2023), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230706_NA_order-1.pdf. The NGOs have appealed the order.

[15] Meaning any company that employs "at least five thousand employees within the company and its direct and indirect subsidiaries, whose head office is located on French territory, or that has at least ten thousand employees in its service and in its direct or indirect subsidiaries, whose head office is located on French territory or abroad." Art. L. 225-102-4.-I French Commercial Code.

bypassing of the principle of legal personality and is based on previous Dutch case law[16] and, in France, on the Law on the Duty of Vigilance of 2017. This law establishes a duty of vigilance for large companies in order to prevent environmental, social, and human rights risks related to their business. To fulfill their duty, the holding company must establish a vigilance plan for the activities of the whole group and those of the companies with which the group has established business relationships. The holding company is liable for damages that occur because of the violation of this duty.

Additional litigation that relies on the same principles and tries to modify companies' behavior is targeting the credit system. Adopting similar legal arguments, NGOs and citizens attempt to establish that the duty of care requires banks not to invest in or finance fossil activities. More specifically, they argue that banks should limit their financing of and investment in fossil fuel companies in order to reach the target of the Paris Agreement of 2015. The groundbreaking case, *Notre Affaire à Tous v. BNP Paribas*,[17] is a great example in kind. In this litigation, NGOs claim that the bank does not respect its duty of vigilance and that, to do so, it must terminate all investing in and financing of companies that pursue new fossil projects.

These claims make the Paris Agreement of 2015 essentially binding: national courts "link international obligations of conduct with national obligations of result" (Saiger 2020, 40). In this respect, climate change litigation at a national level and the Paris Agreement of 2015 become complementary tools to fight climate change (Wegener 2020). Elaborating a duty of care with regard to the protection of fundamental rights harmed by climate change, climate change litigation makes the state liable for its failure to adopt appropriate policies to limit global warming within the prescribed limits. Furthermore, forcing companies to respect the targets and goals of the Paris Agreement yields its horizontal effect. The protection of fundamental rights imposes a duty of care on both states (Minnerop 2019) and companies: they must act to limit the effects of climate change (Leijten 2019).

C. Climate Litigation and Tort Law: Challenges and Opportunities

The novelty of the issue and its obvious public dimension make it necessary for plaintiffs and courts to stretch traditional tort law categories (Taylor 2018, 83; Loth 2018). These issues have already attracted great scholarly attention; I will sketch them briefly here because they are examples of the cutting-edge territories this litigation goes through. Although national systems have different particularities, from a general perspective climate change litigation presents problems in relation to the main elements of tort, namely, the nature of liability, causation, and damages.

First, courts have to choose whether fault liability or strict liability applies. When targeting states, plaintiffs have to show that the failure to mitigate climate change, likely joined with the violation of international treaties and, possibly, of national rules, constitutes a tort. When targeting polluting firms, plaintiffs have to show that the activity is tortious even if it has received administrative authorization. When targeting financial institutions, claimants need to demonstrate that financing polluting activities makes the financier liable for the outcome of those activities. Although there is now agreement that obtaining administrative authorization for an activity does not prevent a liability claim (Neyret 2017; Hinteregger 2017, 253; Paiement 2023), these issues require innovative

[16] See Bertram 2021, 432; Dooh v. Royal Dutch Shell, ECLI:NL:GHDHA:2021:133 (Court of Appeal of The Hague, Jan. 29, 2001); Oguru and Efanga v. Shell Petroleum, ECLI:NL:GHDHA:2021:132 (Court of Appeal of The Hague, Jan. 29, 2021).

[17] Filed on February 23, 2023, in the Judicial Court of Paris (more information at http://climatecasechart.com/non-us-case/notre-affaire-a-tous-les-amis-de-la-terre-and-oxfam-france-v-bnp-paribas/).

legal tactics to affirm the binding character of climate commitments, their horizontal enforceability, and the widening of the duty of care.

Causation is by no means an easier problem to solve, as traditional theories—such as the but-for test and so-called adequate causation—do not work for climate change claims (Porchy-Simon 2019, 156; Faure and Peeters 2011, 267; Spitzer and Burtscher 2017, 166). The causal link between the companies' activities and global warming is cumulative, because it is the product of the activities of several actors prolonged over time and spread out in space: it is only the sum of these activities that causes the harmful effects.[18] The conduct of each subject is not, on its own, decisive in producing the damage, as the but-for test requires. Causation has to be addressed with judicial creativity, also drawing on the analogies with alternative and cumulative causation that have been developed in case law (Wentz and Franta 2022; Fornasari 2023).

Finally, damages are almost impossible to ascertain and liquidate. On the plaintiff's side, given the principle that the plaintiff needs to be put in the same situation she was in before the tort, it is extremely difficult to assess the monetary value of the damage caused. On the defendant's side, as climate change operates at a global level, it is almost impossible to link damages to the conduct of a specific actor. Moreover, monetary compensation is not at all sufficient to remedy the harm caused and does not fulfill the aim of climate litigation (Taylor 2018). As the damages caused by climate change are the destruction of the planet and of biological systems, which inevitably cause huge damage to health and endanger human life, the most appropriate remedy is a preventive one in the form of an injunction to stop the polluting activity. The conditions and admissibility of injunctive remedies have been the object of much debate.

This brief overview of the issues that climate change raises in relation to tort law gives a measure of the issues at stake. It is important to cast light on the fact that these problems stem from a broader issue, related to the structure of tort law. As explained in Part IV of this article, this field is based on the individualistic structure of ownership and of the commodity form. When dealing with multifactorial events, which can only be understood in their complex and relational dimensions, traditional tort rules and categories are under stress and prove to be inadequate: this is what makes it so difficult for ambitious climate change litigation to succeed, and this is what makes the positive outcomes of the abovementioned cases so challenging from the perspective of the private law form. To assess how the legal form operates in these cases, we now turn our attention to the potential of this litigation.

III. The Antisystemic Potential of Climate Change Litigation

A system of tort law aims to allocate risks and distribute costs and benefits of life in society. In this sense, tort law is always and "inherently political" (Conaghan and Mansell 1999, 3). As a consequence, the reasons that are advanced to explain the differences between national tort laws are often found in the social, procedural, and political underpinnings of the system (Esty and Hautereau-Boutonnet 2022; Magnus 2010). Although most climate litigation is not radical at all (Markell and Ruhl 2012), my contention is that climate change litigation as assessed here presents peculiar characteristics that make it both fundamentally different from traditional tort law litigation and antisystemic (a different issue from whether tort law is progressive or conservative, see Bernstein 2004). Reversing the usual path of argumentation, I will first clarify what this statement does not imply and then I will establish what it means.

[18] See in this respect the decision of the District Court of Essen, Germany, in *Luciano Lliuya v. RWE AG*, no. 14/0354Z/R/rv (Dec. 15, 2016), currently under appeal.

First, I do not advance that these judgments may have a redistributive effect that is, broadly speaking, more favorable to the weaker subjects in a legal relationship, allocating resources in a more egalitarian way; this is not something exceptional and antisystemic (see Part V). This possibility stems from the role of private law in our societies and it should be interpreted as the outcome of the mediation of power relationships and appropriate governance of the system as a whole, against the interests of specific fractions. Capitalism is riven by an endogenous contradiction between the interests of individual capitalists and the interests of the capitalist class as a whole (Marx [1867] 1985; Wallerstein [1983] 2011, 17). The pursuit of individual interests at the expense of others can be detrimental to the system (Wallerstein 2011): private law functions as a clearing tool of opposed interests of fractions of capital (on this concept see Overbeek 2004) to keep the system viable. Tort law is quintessential in performing this function: rules concerning liability for patent infringement or unfair competition are great examples in kind.

Moreover, I do not argue that these climate change decisions constitute the realization of some kind of anticapitalist agenda. After all, the Paris Agreement of 2015, though it now seems extremely ambitious, is what states have agreed to in order to maintain a livable and profitable planet. It is not the content of a specific decision that is directly and per se anticapitalist (although this point needs further elaboration, as I will highlight below).

I do not mean either that these judgments can, on their own, transform the system: it is obvious that one judicial decision cannot do it—although it can change the conduct of a systemic actor—not to mention the fact that the impact of a specific decision must be assessed in its specific social and institutional context it is placed in (its effective enforceability, etc.).

Instead, I contend that it is primarily the form of these judgments that manifests their antisystemic potential. The form and consequences of climate change injunctions conflict with the rationale of the accumulation of capital. As capitalism is characterized by endless accumulation (Marx [1867] 1985; Harvey [1982] 2018, 29; Wallerstein [1983] 2011, 17), the form of a decision that directly challenges this rationale has antisystemic potential. More specifically, climate change litigation entails a command to a company to operate its business in a way that is consistent with the climate goals, despite the logic of valorization of capital and of the market exchange. This is regardless of the activity and the organization of the company itself, and even of the specific administrative authorizations that the company has obtained to engage in that activity (and on the basis of which it has planned its investments).

The climate change injunction does not consider the rules that constitute the framework for the processes of production and realization of value, and requires reaching a specific outcome that is linked to an external constraint. As the Hague District Court states in *Milieudefensie*, "Shell should cut emissions and do everything possible to prevent dangerous climate change," even though this could require it to make "financial sacrifice" (paras. 4.4.53 and 4.4.54), "limit its production" (para. 4.4.39), and "forgo new investment" (para 4.4.39). The same can be said of the order mandating the state to implement specific measures: as long as these measures undermine the functioning of capital accumulation, they mean that the state has to take measures that limit or forbid specific paths of accumulation. Even if the state is free to choose the manner in which it achieves this aim, it is bound to reach it, notwithstanding the economic effects. Some therefore argue that these cases are examples of a "transnational sustainability governance" and of a "counterhegemonic globalization" (Paiement 2021, 843; see also Torre-Schaub 2018, 49).

To draw a comparison, in international investment law the jurisprudence on fair and equitable treatment had reached the extreme effect of shielding corporate interests and profits from the

legislative power of the host state, subjecting the interests of the state and its citizens to the expectations of the investor (Miles 2013). In climate change litigation the balance is more or less reversed. Despite the administrative authorizations and a framework under which the activity could be presumed legal, courts have ordered corporations to exercise corporate activity in a completely different manner, one compatible with climate targets that a fossil fuel company can only respect at the price of stranded assets and the curtailment of accumulation.

In this respect, climate change decisions differ greatly from those that strike a different balance between the interests of professionals and consumers, or between companies with different amounts of power: they do not concern a different allocation of risk and of resources, but forbid business as usual (Paiement 2023) in light of an aim external to the rationale of capital accumulation. The antisystemic character of the form is entangled with the problem that this litigation approaches and, more generally, with the relationship between capitalism and climate change. I am not referring here to the fact that climate change litigation is increasingly considered a risk to capital accumulation and, more specifically, to financial stability (Christophers 2017; Network for Greening the Financial System 2021; Bolton et al. 2020); indeed, this issue could be framed in terms of resources and profit opportunities to green industries (Krogstrup and Oman 2019). Instead, I argue that, given the growing consensus that the current functioning of capitalism is incompatible with a sharp reduction in GHG emissions (Moore 2016; 2011; Foster 2022), the contradiction between the accumulation of capital and the injunction to reduce emissions is stark (Wallerstein 1999). The different scenarios elaborated by the IPCC for the mitigation of climate change (IPCC 2022) show that substantial and radical changes in the way economic activities are carried out are required to keep the planet livable.[19]

This is true not only for the profitable exploitation of the fossil fuel activities, but also for the entire production and circulation processes. Carbon majors have long been aware of the climate-destructive impact of their business and have acted in order to foreclose effective regulation that would have constituted a significant threat to their profitability (Bonneuil, Choquet, and Franta 2021). More broadly, however, this incompatibility between mitigation of climate change and business as usual concerns the functioning of the entire system. As capitalism has a metabolic relation to nature, it is based on an uneven ecological exchange that makes it ecologically unsustainable (Amin 1973, 330; Battistoni 2023). This is true for all systemic cycles of capitalist accumulation, as they have always externalized "the costs of reproducing both human life and nature" (Arrighi 2010, 379). It is not a specific sectoral activity or product (such as tobacco or asbestos) that is forbidden, but a common effect of the accumulation of capital. Writing in the mid-1990s, with great clairvoyance, Eric Hobsbawm (1995, 570) identified the ecological crisis as one of the two major problems for the twenty-first century and affirmed that the future balance between development and sustainability:

> would be incompatible with a world economy based on the unlimited pursuit of profit by economic enterprises dedicated, by definition, to this object and competing with each other in a global free market. From the environmental point of view, if humanity was to have a future, the capitalism of the Crisis Decades could have none.

[19] IPCC assertions concerning the scenarios and strategies for limiting the increase in global temperatures have not always been radical. For instance, the 2018 report (IPCC 2018) lays out several options to limit temperatures' increase at or below a rise of 1.5°C. Many of these strategies are based on carbon capture and storage technology. This analysis was based on technological fixes that purportedly would not substantially transform the economic system. It is important to highlight that techno-solutionism is one of the arguments advanced by high-emitting companies and vested interests that resist any measure that would meaningfully hinder their profits.

To be sure, although climate change litigation is antisystemic, it still presents a biased Eurocentric perspective that fails to account for the interests of the most affected social groups. The narrative according to which the plaintiffs (and the resulting judgments) pursue the general interest can be questioned: it does not account for the different impact that climate change has on the global South (a critique that has also been made of the IPCC climate mitigation scenarios, Hickel and Slameršak 2022). For instance, in *Milieudefensie* (paras. 4.2.3–4.2.5), the court's refusal to take into account interests beyond those of the residents in the Netherlands and the Wadden Sea Region, represented by the NGO ActionAid, denies a voice to those most affected by climate change. The case makes no consideration of people of the global South, such as the communities of the Caribbean Dutch islands (Paiement 2023). A similar argument can be made in relation to French climate litigation—that it does not take into account the specific interests of overseas France.

Moreover, climate change litigation mainly seeks mitigation efforts, while the global South, which has already been hit badly by climate change, needs reparation and adaptation measures, and, notably, compensation for the most affected racialized communities (Gonzalez 2021). The uneven ecological exchange is deeply entangled with uneven economic exchange (Althouse et al. 2023): both the plunder of natural resources that are not replenished (Amin 1973, 131) and the creation of sacrifice zones proceed along racial divides. These cases also suffer from a postcolonial mentality, demonstrated by the choice of the threshold of 2°C instead of 1.5°C, a choice that implies acceptance of the existential threat to people living on small islands at risk of being drowned by sea level rise (Paiement 2020, 142). These considerations recall that the law does not only establish areas of liability, but also organizes irresponsibility (Veitch 2007). These are major shortcomings, because to effectively address climate change it is crucial to radically change global racial structures that have facilitated resource extraction (Gonzalez 2020; Ferdinand 2018), and acknowledge that the attraction of jurisdiction in the global North binds the frame of this litigation. Despite the global character of climate change, litigating before courts in the global North creates a hierarchy of the interests to be taken into account.

Moreover, building on Fanon's work (Fanon [1961] 2002; [1964] 2006), Knox has convincingly argued that crises of accumulation are overcome not only through spatial fixes (Harvey [1982] 2018, 415–445), but also by racial fixes: the racialization of populations facilitates the geographical expansion of capital accumulation and justifies exploitation, dispossession, and land grabbing (Knox 2020; 2016). The many examples of green colonialism prove that addressing the climate issue does not per se involve fighting racial injustices. For instance, green grabbing entails the appropriation of land and resources in the global South for ecological aims (Hamouchene and Sanwell 2023; Fairhead, Leach, and Scoones 2012; Carmody and Taylor 2016), such as to offset carbon emissions (Bryan 2023). Furthermore, even though the fossil fuel industry is responsible for innumerous sacrifice zones (Healy, Stephens, and Malin 2019), similar sacrifice zones are also created through activities necessary for the green transition, such as extraction of raw materials, that disproportionately affect racialized communities (Scott and Smith 2017; Zografos and Robbins 2020; Marin, Dunlap, and Roels 2023; Karam and Shokrgozar 2022). As the law plays a fundamental role in these processes (Knox 2020, 256; 2016; Tzouvala 2020), these topics deserve further research and should inform legal arguments concerning climate change in order to tackle its manifold racial dimensions. Indeed, legal mechanisms have been fundamental for the creation and implementation of the very institutional framework that has enabled the development of racial capitalism, that is, a system in which the processes of profit making and race making are inextricably entangled and operate in a mutually reinforcing way (Gonzalez and Mutua 2022; Robinson [1983] 2021): "together, they form a structured web of racialized extraction that make possible the central goal of racial capitalism—the accumulation of wealth and power" (Gonzalez and Mutua 2022, 128).

Although these critiques are correct, for the purpose of the article—the assessment of antisystemic potential of climate change litigation—three observations are warranted. First, mitigation measures are certainly not enough, especially for countries that are already ravaged by the disastrous effects of climate change and that do not have sufficient financial resources to cope with it. At the same time, mitigation benefits everyone (albeit differently), as the continued increase in temperatures would also severely (further) damage countries in the global South. Second, nothing forbids using these litigation models to foreground the extractive practices of transnational corporations of the global North in the global South; the lawsuit filed against BNP Paribas for its implication in land grabbing and deforestation in the Amazon is an example.[20] Third, and most important, these shortcomings can be considered indecisive for the present analysis, for it is the legal form of climate change litigation that is under scrutiny. This does not imply that other forms of litigation cannot have a more powerful impact against the system, nor that litigation cannot be reshaped to also take into account social, racial, and neocolonial injustices. However, because it contradicts the rationale of capital accumulation, this legal form presents an antisystemic potential despite its deficiencies.

From a theoretical perspective, these shortcomings also remind us that climate change litigation is not the best place to comprehensively address all the social issues climate change raises, and that it can be socially transformative only if coupled with social movements and political action. Moreover, they highlight that although the processes of profit making and race making are inextricably intertwined (Gonzalez and Mutua 2022; Robinson [1983] 2021), the partial hindering of a segment of the process of accumulation does not necessarily address racial injustices, too.

To conclude, a huge difference exists between regulations that realize a different distribution of resources and regulations that directly contrast with the rationale of capital accumulation. This consideration must not be distorted: the simple presence of rules and case law colliding with the rationale of capital accumulation does not make an entire system anticapitalist. It is, however, an anomaly that deserves to be explained, as tort law, despite its manifold expressions, does not usually have antisystemic potential (Abel 1982). This is even more evident when climate change litigation outcomes are reached through traditional tort law and not through specific rules. To shed light on this aspect, I will examine the sources of private law's stability and, then, why and how climate change litigation is not subject to these constraints.

IV. The Boundaries to the Transformative Potential of Private Law Imposed by the Commodity Form Theory of Law

As it is usually impossible to use private law in an antisystemic way (Baars 2019; Wood 2016), we must examine why it might be possible here. This analysis warrants taking into account, dialectically, the reasons that bind private law to the rationale of the socioeconomic system and the reasons that might explain its disentanglement from this system in climate change litigation. To analyze the boundaries of the social transformations that can potentially be achieved through private law, it is fruitful to refer to the so-called commodity form theory of law, elaborated by Pašukanis. Although Pašukanis has not examined it thoroughly, the theory also applies to tort law. I will make the case that the commodity form theory of law is a powerful tool to explain why private law, despite its manifold transformations and developments, does not usually conflict with the rationale of capital accumulation.

[20] Filed on February 23, 2023, in the Judicial Court of Paris (more information at http://climatecasechart.com/non-us-case/notre-affaire-a-tous-les-amis-de-la-terre-and-oxfam-france-v-bnp-paribas/). In this case, NGOs sued BNP Paribas claiming that its investment in and financing of businesses involved in deforestation, land grabbing, and violations of the fundamental rights of Indigenous peoples in Brazil violates the duty of vigilance it owes under the French Law on the Duty of Vigilance of 2017.

In a nutshell, the commodity form theory of law affirms that the legal form is molded on the commodity form: the legal form is the expression of a social relationship, of which capital is the general form (Miaille 1982). Although the law is semiautonomous, and despite the different contents it can have, the legal form corresponds to the rationale of the commodity. As has been affirmed by Koen, "in the exchange economy the legal subject is the alter ego of the commodity owner, and the legal form is the necessary copula of the commodity form" (Koen 2013, 191–92). The legal form, like the commodity form, relies on an abstraction. While the commodity is an abstraction of different labors and has different use values, but is exchanged on the basis of its exchange value, the legal form crafts persons as equal through the fiction of the juridical person and the contract as the product of free will that realizes the exchange of equivalent rights (Marx [1857–1858] 2011, 201–212). This abstraction is also central for the constitution of property and entangles it with racialization (Bhandar 2014). To enable the circulation of the commodity, the system posits that subjects are equal and free, and that their transactions are the product of their will (Pašukanis [1924] 2018). As commodities "cannot go to market and make exchanges of their own account," their owners have to enter into relationships and exchange their goods (Marx [1867] 1985, 112ff). The development of the juridical subject, ownership, and contract is a prerequisite for goods to be exchanged as commodities (ibid. at 115). Exchange is fundamental for the evaluation of goods (Marx [1864–1875] 2008, 1529).

The historical development of exchange confers to goods their character as commodities and fosters the development of money. Money is crucial: the whole system is based on the ability to evaluate any claim using a universal representation of value, as the entanglement between the development of capitalism and of the monetary system clearly demonstrates (Desan 2014; Aglietta 2009; Marx [1867] 1985, 121; de Brunhoff [1973] 2015). In order to grasp the commodity form, one has to start from the exchange relationship between different commodities: their value form appears under the money form (Marx [1867] 1985, 71, 121–130) (for this reason the value theory has been defined as a "macro-monetary theory of the capitalist production": Bellofiore 2018).

As affirmed by Balbus (1977, 216):

> the homology between the legal form and the commodity form guarantees that the legal form, like the commodity form, functions and develops autonomously from the preferences of social actors and that it does not function and develop autonomously from the system in which these social actors participate.

For this reason, and despite the differences (even relevant ones) concerning the substance of the law, private law does not usually have antisystemic potential. For instance, the constitutionalization of freedom of contract in *Lochner v. New York*, 198 U.S. 45 (1905), although extremely significant for contract law (Horwitz 1992, 33–34), did not imply a transformation of the legal form, but only a redefinition of the limits of parties' autonomy concerning the content of contracts. Borrowing the expression from Bourdieu, it can be said that transformations of the system are "inventions sous contrainte structural" (inventions under structural constraint) (Bourdieu [1989–1992] 2012, 169–70, 234). Drawing an analogy with Poulantzas's ([1978] 2013) analysis of the state, in which it is conceived as a battlefield and as a condensation of a power relationship, but with a core that cannot be subverted, I argue that the same can be affirmed of private law: the legal form represents that core that cannot usually be subverted. The discretion of the judge cannot eradicate the link between legal form and commodity form: private law may have redistributive outcomes, but it cannot subvert the rationale of the system.

This homology is best accomplished in the civil codes of the nineteenth century, but it can also be detected in many other systems, at least of Western liberal states: it represents the achievement of the liberal bourgeois structure of private law. It is based on the economic reality of the nineteenth century: the market is generally conceived as competitive, and exchanges are thought to happen at arm's length between rational subjects. From a theoretical point of view, this perspective reaches its most accomplished expression in the French Civil Code: this is not surprising given that, although the world economy of the nineteenth century was mostly shaped by Britain, its politics and ideology were provided mostly by France (Wallerstein 2011; Hobsbawm [1962] 1977, 73–74).

The juridical subject is atomized and is conceived as separate from society, except for juridical ties. His universe of relationships concerns claims against other juridical subjects (ownership, contract, and tort) (Hobsbawm [1962] 1977, 183–193). It is no coincidence that, even from a radically different perspective, these are the three aspects that Calabresi and Melamed (1972) have put at the basis of their cathedral of private law: they are the basic units of a juridical system suited for a capitalist system.

Analyzed, although not in depth, by Pašukanis ([1924] 2018, 187–190), this homology also applies to tort law. Pašukanis mentions the issues of liability and damages when analyzing criminal law and highlights that the basic homology between the legal form and commodity form also applies to this field, as punishment can be considered as the equivalent for the criminal act.

The particularities of tort law's functioning depend on the tradition of the legal system; however, its general function is to allocate risks and costs of specific activities, and in doing so it abides by the commodity form. This is less evident for tort law than for contract law because tort law does not govern the exchange of commodities and therefore the realization of value. However, it aims to ensure that negative externalities are borne by the subject that profits from the conduct producing them. Tort law prevents social behaviors from destroying wealth and impinging on the process of value production and realization. It inhibits conduct that damages other goods and claims, and it guarantees a correspondence between the conduct that grants a profit and the allocation of the risks that stem from it. Tort law is therefore a fundamental instrument to preserve the smooth production and circulation of value from external wrongful conduct. As has been put by Dimick (2021, 124):

> along with criminal law, tort law can be understood as the regulation of involuntary transactions . . . . Because consent is the principal criterion of freedom in liberal-legal thought, the law cannot countenance involuntary transfers or destructions of wealth; the protection of private property remains the bedrock of a system of commodity exchange between free and equal legal subjects.

The individual structure of the tortious claim stems from the same fiction underlying the construction of the juridical subject. This individualization also frames claims in relation to the defendant, as the tortious claim concerns the action of one or more subjects who are liable for the damages that stem from their conduct. Moreover, the plaintiff usually asks for monetary compensation for a specific harm, meaning that the loss is evaluated in terms of exchange value.

An additional element of the commodity form theory of law is the procedural aspect. It entails an individual attribution of rights and dominates the litigation structure, in which standing is granted individually and for the exercise of rights that have the abovementioned form (Pašukanis [1924] 2018, 34; Loiseau 2018, 245). The basic structure of the litigation reproduces and fosters this form. Indeed, the role of parties in the litigation reproduces that constructed by the legal personality: the

juridical person is conceived as an individual that can enforce only its own rights. In short, the structure of substantive law is mirrored in procedural law.

It is important to highlight that the commodity form theory of law is not a sophisticated version of a simple economism, viewing the law as a mirror of economic relationships. On the contrary, it conceives the legal system as semiautonomous (Balbus 1977; Collins 1984, 47–52; Poulantzas 1967, 159, speaking of an "autonomisation spécifique"). Therefore, the content of rules is not predetermined, nor is it the simple object of the will of specific social groups. It is the form of the system that assures that, despite the different content the rules can assume, the system does not contradict the rationale of capital accumulation. In this respect, therefore, the commodity form theory of law is compatible with the deep insights that have argued for the constitutive role of law in relation to the economic system and society (Cotterrell 2002), and its importance in shaping economic relationships and markets (Dagan et al. 2020). The market has always been a legal construct (Desautels-Stein 2012; Hale 1923; Lang 2017; Kampourakis 2023), and the laissez-faire order has also been built through law (Wallerstein 2011, 10, 137; Polanyi [1944] 1957, 3) by governments (Vogel 2018).

This theory, which scholars have also applied to fields such as international law (Miéville 2005; Knox 2016) and criminal law (Epstein 2021), is a consistent explanation for the stability of the legal system in relation to socioeconomic relations. For it does not fall in the simplistic and untenable explanation of a crude intentionalism, nor take the side of a complete indeterminacy (Collins 1984, 40–45) that fails to account for the stability of the legal system (McDougall 2019, 25–30). In this respect, I advance that this framework can be usefully combined with theories that highlight the role of lawyers, their *habitus* (Bourdieu 1986; [1989–1992] 2012; [1982] 2001, 77–87), their behaviors, and how the settings of the "legal scene" determine the boundaries of the law (Xifaras 2017).

To sum up, the commodity form theory of law is powerful in explaining the stability of the legal system. The content of the law is not determined a priori and can vary; there may be laws and decisions that do not favor the most powerful, and law can realize redistribution of resources and therefore rekindle the framework of the struggle between social actors with conflicting interests, but the legal form itself is based on the commodity form and, therefore, cannot be contrary to the rationale of accumulation of capital. It is because of this homology that private law, moving along a spectrum, usually cannot have antisystemic applications.

The premises and basic legal concepts and rules that underpin the commodity form theory of law are those of competitive capitalism and classical private law. There is a dissonance between this framework and many recent laws and decisions at the national, transnational, and international levels; for instance, the presumption of equality between juridical subjects and the conception of the contract as an agreement negotiated at arm's length do not seem to be realistic in the current socioeconomic environment. Thus, it is pertinent to ask whether the commodity form theory of law is still relevant and whether it still imposes boundaries to the transformative potential of private law. Scholars have already remarked that the transformation of the law due to the monopolization of the economic system would have an impact on the homology with the commodity form. With foresight, Balbus (1977) as well as Monique and Roland Weyl (1968, 161) had forecasted that monopolization implied a distancing of the law from the political economy of competitive capitalism; however, that insight remained at the stage of simple intuition, perhaps in part because the private law transformations in relation to political economy had yet to come. Pašukanis ([1924] 2018, 138–39) himself observed that the developments of the capitalist system toward monopolization would have had a huge impact on the legal form. However, he envisaged the issue through the perspective of centralization and planning as an alternative to contract, and did not

consider that private law could become a site contradictorily devoted to both the construction and the hindering of monopolization.

A further factor that may account for the apparent abstraction and rigidity of the commodity form theory of law is that Pašukanis focuses mainly on the first volume of *Capital*, which entails a maximum of abstraction and takes as a presupposition a market with competition (Harvey 2013, 27–29). Focusing more on the insights of volume 2 and especially 3, where the concrete functioning of the economy, the distributional conflicts between different actors, and the distortions and crises of the process of accumulation of capital are analyzed, would be fruitful in updating the analysis of the legal form. Pašukanis started from the hypothesis of nineteenth-century competitive capitalism, as Marx did in volume 1 of *Capital* (Amin 2018, 184). Adapting the commodity form of the law to the realities examined in volume 3 is helpful in assessing whether the legal form also replicates the commodity form in a period of monopolization: I will attempt to do so in the following part.

V. The Transformations of the Commodity Form Theory of Law Due to Monopolization

The fact that the legal form embodies a specific political economy and is appropriate to govern a specific regime of accumulation entails that the legal form, notwithstanding its possible adaptations, becomes inadequate when that specific socioeconomic regime is modified. The development of the world market, mass production and consumption, and concentration and centralization impose the adoption of new and different rules, in the fields of both private and public law. In this context, the transparent homology between legal form and commodity form that characterizes private law is under strain and its tenets seem to be called into question. This theory rests on the basic assumptions of nineteenth-century private law, such as equality between legal persons, negotiation of agreements considered the product of free will, and market competition; given the current structure of private law, where these pillars have been seriously undermined, it might seem that the theory does not hold anymore and that it therefore has no heuristic value in relation to the current stability of private law.

This could lead one to think that the antisystemic potential of climate change litigation is not original. From this perspective, climate change litigation would constitute just another manifestation of the erratic utilization of tort law in a system that is no longer coherent. Against this view, I will first attempt to conceptualize how to interpret the current transformations of private law and then show that the commodity form theory of private law, if properly updated to take these developments into account, is still relevant and imposes its limitations on the transformative potential of private law. I will contend that monopolization is the underlying phenomenon that has made modification of European private law systems necessary, and I will develop a theoretical framework to clearly understand these transformations. On this basis, I will argue that the commodity form theory of law still explains the stability of the legal system. Once this argument is established, it will be possible to return to climate change litigation and demonstrate that it is antisystemic precisely because it disentangles the homology between the commodity form and the legal form. The focus will be mainly on private law, as the present analysis aims to argue that the commodity form theory of law is still a proper framework to assess the potential of tort law. However, the monopolization of the economy has also been constructed through deep transformations of public law. As Pistor has argued: "public and private law are intertwined and jointly constitute the system we call capitalism" and private law relies on public law for its foundation (Pistor 2019, 209). The construction of the neoliberal global legal order is the product of private and public actors and concerns both public and private law (Cutler 2003,

191–206). In general, the role of law is therefore quintessential in the creation and consolidation of the capitalist system (Desautels-Stein et al. 2014; Poulantzas 1967, 160; Engels [1890] 1979).

Public law has been a fundamental element in the transformation of the regime of accumulation and the passage from Fordism to "flexible accumulation" (Harvey 1990, 121–124). This new regime entails further liberalization of trade and investments, globalization of production and exchange, financialization, strong protection of investors and intellectual property rights, weakening of labor, and a transformation of the role of the state to support the profitability of capital (Harvey 2005). Public law has played a central role in the construction of a global market and in the protection of investments. For instance, neoliberal constitutional law structures both the way in which rights are conceived and the organization of the state (Purdy 2014; Nicol 2010). The movement of global constitutionalism has fostered the promotion of the rule of law. International investment law has been crucial in creating a safe environment for investment, especially in the global South, insulating investors from the regulations of host states that could have been detrimental to their profits (Miles 2013).

Administrative law has played a crucial role in the development of multifaceted global administrative law, which entails standardization of regulations and practices (Casini 2022). Public law has been indispensable in the creation of specific spaces of exception, not subject to national regulations (Campling and Colás 2021, 268–270; Slobodian 2023). Furthermore, public law has played a pivotal role in the development of private law institutions like transnational law and arbitration (Pistor 2019, 212) as well as in the development of intellectual property rights (Kapczynski 2015; Sell 2003).

Focusing on private law, European private law has undergone great transformations in recent decades, changing the structure and rationale of private law itself and leading to a pervasive discourse on the crisis of private law (Jamin and Mazeaud 2003; Roppo 2011). These transformations of private law have diverse and even idiosyncratic manifestations, whose peculiarities can only be exacerbated by the disciplinary boundaries typical of Continental legal thought. Instead of being overcome by these specificities, and limiting the analysis to each specific case, I will enlarge the focus and try to detect whether a common underlying process can be identified. The answer is that it can be: in particular, I advance that the underlying and structuring objective of these transformations is that they constitute an attempt to regulate, through private law, the increasingly monopolized contemporary capitalism.

The fast-expanding monopolization of the economy is at the basis of the transformation of private law. From a general point of view, monopolization is an endogenous phenomenon and is the outcome of competition (Harvey 2010, 272). At a more granular scale, however, it appears as the result of different and intertwined phenomena: for instance, the development of financialization (Durand 2014; Lapavitsas 2013), intellectual property, and digital economy (Durand 2020; Rikap 2021; Pagano 2014) plays a crucial role. Moreover, monopolization is deeply entangled with the development of global value chains in different sectors, such as garments (Kumar 2020) and food (Lianos and Katalevsky 2022). This monopolization modifies not only the socioeconomic relations that private law is deemed to regulate, but also the very assumptions that constitute its foundations: the competitive market where transactions should be at arm's length is swept away in manifold sectors. Fast-growing monopolization (Baran and Sweezy 1966; Foster 2014; Selwyn and Leyden 2021),[21] involving the power of a few actors, either colluding or fiercely competing with each other (Cowling and Tomlinson 2005), transforms the assumptions and preconditions at the basis of private law. In the current context, the traditional regulation cannot fulfill its aim, precisely because

[21] This is not meant to say that competition is completely foreclosed, nor that competition between giant corporations is always absent, but that the big corporation is a price maker and not a price taker (Baran and Sweezy 1966, 53–64).

the assumptions that had structured the regulation, such as the presumption of equality between different subjects and of their rationality, which should guarantee the rationality of agreements, do not work anymore. To be sure, monopolization is a phenomenon that not only derives from pure economic developments, but is also legally construed (Vasudevan 2022, 1273; Gonzalez and Mutua 2022, 140; Christophers 2016), as the law has always been structuring and structured (Bourdieu 1986, 13; Cavalieri and Yuille 2022; Tomlins 2018, 523). However, what is at stake here is the reaction of private law and, in particular, contract and tort law, to this phenomenon.

Concentration and oligopolistic tendencies are nothing new in the history of global capitalism (Marx [1864–1875] 2008, 1606–1609). One does not need to accede to Braudel's distinction between "market economy" and "capitalism" to hold that fundamental layers of economic life have been characterized since the beginning by the absence of competition, rent extraction, and monopoly (Braudel 1979, 489–493, 542–546; Banaji 2020). This is also true for the period of Industrial Revolution and of the incipient formation of mass production and consumption (Hobsbawm [1962] 1977). However, the capitalist system could overall be considered competitive, and most economic transactions were at arm's length: this context was the bedrock (economically and ideologically) for nineteenth-century private law regulation. On the contrary, current transformations make the socioeconomic system that private law regulates completely different from competitive capitalism (Amin 2018, 177–179, 193–198).

Monopolization raises manifold issues that affect production and circulation relationships; one of the utmost importance is that of extraction of rent. As clarified by Amin (2018, 28):

> these oligopolies, which have defined contemporary capitalism since the end of the nineteenth century, are positioned to bleed off monopoly rents from the overall mass of surplus-value, guaranteeing them rates of profit higher than those obtained by the segments of capital subordinate to them.

This affirmation can be completed by the following argument advanced by Durand (2020, 210):

> While the exploitation of labor still plays a central role in the formation of a global mass of surplus value, the current specificity lies in the capture mechanisms that allow capitals to feed their profits by drawing on this global mass, while limiting their direct involvement in exploitation and disconnecting themselves from the productive processes.

The extraction of rent distorts the processes of production and realization of value, therefore hampering, if extended too far, the smooth functioning of the system (Harvey 2010, 331). The challenging debate about techno-feudalism witnesses the magnitude of the forces at work and the transformations the system is undergoing, challenging its core (Durand 2020; Dean 2020; Morozov 2022; Rikap 2023). The tension at the very heart of the system and, therefore, also concerning the commodity form, translates into the tension that concerns the legal regulation of this system.

This extraction is primarily realized in the realm of circulation, for instance because leading firms try to obtain unfair conditions and prices; therefore, private law plays a prominent role in opposing this phenomenon. Although the phases of production and realization cannot be separated, because in the circuit of capital they do not happen successively, but simultaneously (Amin 2018), the problems approached by private law are mostly those that concern the circulation process (Edelman [1973] 2000, 103) and, therefore, also the conflicts that arise between capitalists and between capitalists and consumers (Marx [1864–1875] 2008, 1634–1646, to be read in connection with the circuits of capital, Marx [1869–1879] 2008). These distortions happen in relation to the circulation of a product and, at the moment of allocation of profits, between different capitalists.

Therefore, through the lens of private law, the problem of monopoly capitalism mostly concerns the different arrangements that regulate circulation, distribution, consumption, and credit. In these processes relevant distortions occur, given that the most powerful actor may capture unjustified parts of value, distorting competition and, moreover, affecting production and innovation (Vasudevan 2021). The sectors of large-scale organized distribution and finance are two obvious examples in kind: different fractions of capital that, while commonly interested in the maintenance and reproduction of the system, are at the same time moved by contrasting and conflicting interests. Furthermore, because of the disruptions brought forth by the digital economy and the new modes of value capture, traditional competition law fails to counteract monopolization in this sector (Lianos 2022). This highlights an inherently contradictory dynamics of capitalism: on one side, competition is fundamental for the system; on the other, capitalists continually try to tame competition (Wood 2003, 22; Harvey 2014, 131–145). In relation to the division of profits, and to understand the problems raised by these issues and the role that private law can play, it is still relevant what Marx affirmed in volume 2 of *Capital* ([1864–1875] 2008, 1869):

> It follows from the aforesaid that there is no such thing as a "natural" rate of interest. Unlike the general rate of profit, there is on the one hand no general law to determine the limits of the average interest, or average rate of interest as distinct from the continually fluctuating market rates of interest, because it is merely a question of dividing the gross profit between two owners of capital under different title.

The monopolization that the capitalist system has undergone during the twentieth and twenty-first centuries has made private law, and especially contract and tort law, completely outdated in relation to the reality they are supposed to rule. This poses the problem of developing regulation that could foster an appropriate and smooth functioning of the market. A quick look at the current state of contract and tort law is sufficient to cast light on the shortcomings of classical private law. Just to mention an example, it cannot be overstated that the presumption of equality between different subjects, its consequences for the rationality and enforceability of agreements, do not play out as intended, as most contractual terms, and even prices, are no longer negotiated at all. The contract as the product of the free will of two autonomous subjects that negotiate the agreement is a simplification that does not hold anymore.

Concerning tort law, simple damage to property caused by a single tortfeasor that can be repaired through monetary compensation no longer represents the main problem that tort law addresses. Thus, tort law, as a tool of allocating risks and costs through the mechanism of individual liability and compensation, is also undermined. Compensation is often an inadequate measure of the magnitude of the tortious activity, especially when small damages are caused to many subjects and thus compensation does not adequately further deterrence. The contradictions between the individualization process typical of liability and the global character of the phenomena that are observed are manifest. Moreover, given the complex structure and imbrication of monopolies, through corporate veils and the organization of complex value chains, there is a chasm between individual liability and the effective direction of and participation in processes that could cause damages (Bueno and Bright 2020). Furthermore, the development of global processes entails complex and cumulative causation, making it difficult to establish who should bear the liability for harm that many, often located in different places and having acted over the course of decades, have contributed to causing.

Not only does private law involve a microregulation of specific relationships, but the regulation of relationships between private parties has a macroeconomic dimension (Beckers, Eller, and Kjaer 2023) aiming to build and preserve a competitive market. Not just competition law, but also

contract law, especially at the European level, is built on ordoliberal[22] and neoliberal ideologies and the resulting idea of implementing market rationality (Bartl 2015), as competition regulation is part of the architecture aimed at allowing the continued accumulation of capital (Buch-Hansen and Wigger 2011). The multiplication of private law rules at the European level, for which the EU does not have direct authority (they are usually adopted on the basis of article 114 of the TFEU, which concerns the establishment and functioning of the internal market and therefore implies a functionalization of private law: Michaels 2011; Micklitz 2014) also has to be interpreted as a reaction to monopolization.

Confronted with this phase of capitalist development, private law regulation has developed a specific approach to tackle the problems that stem from monopolization. These rules modify the traditional structures of private law. Myriad legislation passed in fields such as consumer law, agrifood business, large-scale organized distribution, antitrust, finance, digital commerce, and so on aims to restore market mechanisms or to mimic the results that a competitive market would have supposedly produced.

To address this issue, European private law has developed many regulations that directly challenge the equality between juridical subjects. For instance, Directive 93/13/CEE on unfair terms in consumer contracts,[23] modified by Directive 2011/83/UE on consumer rights,[24] has created a distinction between consumers and professionals: the rights of the parties and the validity of specific clauses are based on specific characteristics of the contractual parties, renouncing the presumption of equality between different subjects. This differentiation is based on the idea that specific subjects, because of the real structure of the market and the asymmetries of information and power, cannot rationally negotiate an agreement. This approach has also been extended to the relationships between businesses: certain practices deserve to be forbidden because they are based on market failures and not on rational agreements between the parties. Examples of this are Directive 2014/65/EU on markets in financial instruments;[25] Regulation (EU) 600/2014 on markets in financial instruments;[26] Directive 2011/7/EU on combating late payment in commercial transactions;[27] EU Directive 2019/633 on unfair trading practices in business-to-

[22] Ordoliberalism is a sociopolitical, legal, and economic theory, first developed in the context of the Weimar Republic, that has had great influence on the construction of the EU legal institutions and rules. Its core tenet is that, because the competitive market is not natural, the law should have an active role in creating a general framework within which actors can act, and the law should intervene to correct market failures. Private law should have constitutional value so as to insulate free-market competition from states' intervention, especially in relation to social-democratic policies. Ordoliberals promote the idea of a "private law society" built on competition as a constitutional principle: people would be subject to a legal order that would limit the power of the state and possible abuses of power by private subjects in order to guarantee the well-being of society (Malatesta forthcoming).

[23] Council Directive 93/13/CEE of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29.

[24] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, p. 64.

[25] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast), OJ L 173, 12.6.2014, p. 349.

[26] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, OJ L 173, 12.6.2014, p. 84.

[27] Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, OJ L 48, 23.2.2011, p. 1.

business relationships in the agricultural and food supply chain;[28] and EU Directive 2019/771 on certain aspects concerning contracts for the sale of goods.[29]

This phenomenon has also concerned tort law, as demonstrated by Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union[30] and the proposal for a Directive on liability for defective products.[31] Both try to foster private enforcement of public regulation and aim to address situations where many subjects can be damaged by harmful conduct. Concerning the procedural aspect, Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers[32] has generalized class actions for consumers that have been harmed by unlawful practices and provides for the possibility to claim not only damages, but also injunctive remedies.

All these laws aim to regulate socioeconomic relationships characterized by market failures. In doing so, they go beyond the abstraction of equal subjects and of parties' autonomy. On the one hand, they fragment the juridical subject: the asymmetries of information and market power require disrupting the equality of juridical subjects. On the other hand, tort law develops mechanisms, such as collective actions and injunctive remedies, to sanction behaviors that damage many people.

The problem arises because of an imbalance in the relationship between subjects, hampering the normal functioning of the market relationship, which private law rules then try to restore (Zimmermann 2006, 83–85; Schulte-Nölke 2015, 209; Coester 2014). This does not imply that the whole legal system is transformed (Gordon 1984, 88), but that different regulations coexist (Gramsci [1932–1935] 1975, vol. 2, 1321).

However, the broad scope of these regulations challenges the traditional homology between the legal form and the commodity form. For instance, the abovementioned fragmentation of the juridical subject, which is now assessed in relation to the specific market situation that the subject faces, from a functionalist perspective (Fornasari 2019), undermines one of the pillars of the classical legal system. It has been convincingly argued that the inclusion of special groups in the law corresponds to market rationality (Bartl 2020, 236). As "the individual is the historic 'subject' of modernity par excellence" (Wallerstein 2011, 12), it cannot be overstated how troubling these transformations are for the legal order of modernity, which still determines the structure of private law.

As PLAMC approaches monopolization from the perspective of the individual relationship and only as a problem of market power, and not also of concentration and centralization (Vasudevan 2022), the effectiveness and suitability of such regulation can be questioned (Rikap and Durand 2023). This might also explain the apparent contradiction between a period of skyrocketing

[28] Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, OJ L 111, 25.4.2019, p. 59.
[29] Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJ L 136, 22.5.2019, p. 28.
[30] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1.
[31] Proposal for a Directive on liability for defective products of 28 September 2022, COM/2022/495 final.
[32] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020, p. 1.

inequality, which the law helps to create, entrench (Vogel 2021), and invisibilize (Britton-Purdy et al. 2020), and a private law at least discursively devoted to fairness and fundamental rights.

Fostering a complementary rationale of public and private enforcement, these transformations are the result of the regulation of a system where competition has disappeared from large branches of the market and where mechanisms to rebalance legal relationships have to be created in order to avoid excessive rent extraction from corporations with excessive power. If it is appropriate to situate the current transformations in the realm of regulation of monopolization, it should be clear that what is at stake is not the undermining of the dynamics of capital accumulation; no other rationale for the production and realization process is advanced.

Therefore, it is possible—and it happens—that the law has a redistributive effect (Collins 2022; Thompson 1975, 264), allocating resources in a more egalitarian way. There is no doubt that these rules that promote equality are important and have a real impact on the life of the affected parties (Bernstein 2004, 15-20). Moreover, they can even transform contractual practices, setting the stage for more balanced relationships. However, they do not undermine the rationale of the system; it could even be said that they uphold the preservation of that rationale. The law is also a product of the dominated class, but that does not mean that it develops in itself another system, that it represents a neutral tool that can be crafted at will against the rationale of the system (Weyl and Weyl 1968, 101; Gramsci [1932–1934] 1975, vol. 3, 1591). On the contrary, especially for legislation that is intertwined with competition, such as contract, tort, and consumer law, it aims to foster the rationale of the market (Caruso 1997): the way of conceiving the market (and, for instance, the consumer) determines how the law is interpreted and the correlated choices of policy and governance (Herrine 2022). In short, the law does not hamper the process of the accumulation of capital.

Private law tries to correct the distortions that prevent the law of value from operating correctly. Law mediates between contradictory interests of fractions of capital and of classes in order to preserve and foster the proper functioning of the system. However, the transformations that have been highlighted do not disentangle the legal form's homology with the commodity form; on the contrary, they try to react to the fact that in the current system the exchange values and their realization are hampered by the monopolization of the economic system.

As a further element that strengthens the relationship between the current transformations of private law and the economic system, it might be remarked that the development of private law for the age of monopoly capitalism approximately coincides with a transformation of the regime of accumulation and with the passage from Fordism to "flexible accumulation" (Harvey 1990, 121–124). Using regulationist language, it could be said that private law for the age of monopoly capitalism (PLAMC) belongs to the mode of regulation of "flexible accumulation" and that it purports to mitigate some of the distortive effects of monopolization. However, just as for the economy, for private law it can also be argued that it is the regime of accumulation, not the rationale of the system itself, that is transformed (Harvey 1990).

This theoretical framework can better assess the current role and functioning of private law, and enables us to cast light on the fact that private law still abides by the commodity form. The difference lies in it being assessed in the reality of capitalist production, not in an abstract account of it. These rules are necessary precisely because the commodity form not only needs to be protected, but also must be specifically construed against the forces and tendencies of monopolization. It is because the current status of global capitalism is dominated by rent extraction, dynamics of appropriation (Vasudevan 2021), and accumulation by dispossession

(Harvey 2003) that these interventions are crucial. In short, I contend that all these interventions aim to restore and preserve the commodity form, not to overcome it.

Indeed, PLAMC departs from the abstraction of classical legal thought and is developed in order to correct some of the distortions in the production and realization of value. In this respect, a functionalist approach to the creation and correction of market distortions implies that the abstract approach of formal equality has to be abandoned. Nevertheless, even though the abovementioned rules transform traditional categories, they do not structurally depart from the commodity form.

This approach modifies the basic notion on which traditional laws and regulations were based. However, it does not challenge the homology between the commodity form and the legal form. On the contrary, it is exactly because the commodity form is under strain that PLAMC tries to restore it: in some sense, it involves further socialization of the legal form.

While classical legal thought reproduced the commodity form, starting from the perspective of a competitive market where the subjects had to be left free to act, PLAMC reproduces the commodity form taking into account the distortions of monopolization and the asymmetries that derive from this process. Therefore, as the price of commodities can be distorted by these situations, private law should attempt to emend these deficiencies: as the functioning of the market that preserves and fosters the rationale of the commodity is distorted, private law tries to restore the very basis of that homology. The constraints that the commodity form imposes on the transformative potential of private law still hold.

VI. Climate Change Litigation Breaks the Homology Between the Commodity Form and the Legal Form

Because the homology between the legal form and the commodity form prevents the law from having antisystemic potential, it is when such homology is disentangled that private law may be used in this way. I advance that this is the case with climate change litigation, where three aspects concerning the elements of a tort claim produce this disentanglement. First, plaintiffs do not claim reparation for a specific loss, but aim to force the defendant to comply with the objectives of climate mitigation and, therefore, to modify its conduct. Second, the claim is brought to protect the general interest. Third, the boundaries of legal personalities are partially bypassed in relation to the defendant as well. Some of these elements are of course present in other kinds of litigation; in climate change litigation they are, uniquely, all present at the same time, effecting a wide disentanglement. These aspects are obviously intertwined and interact in a mutually reinforcing way, but examining each of them separately helps to highlight how this dissociation operates. As the objective of this article is not to assess the whole range of climate litigation, nor to argue that this disentanglement is present only in this field, but to assess how and why this happens in these cases, it is not necessary to comprehensively compare climate litigation with litigation in other fields that may present similarities.

First, plaintiffs do not claim the reparation of a specific loss—like damages, compensation for the loss in market terms—that would simply follow the rationale of exchange value. Instead, they claim that the defendant has to reach a specific outcome, irrespective of the economic effects that this may entail. The demand is, thus, radically alien to the exchange of equivalents. The judgment does not specifically entail any attribution of resources, nor any realization of value. It is, on the contrary, a mandate concerning the action that must be undertaken by the defendant—an injunction that has no relationship with the commodity form. It is, in some respect, a command similar to that of a legislator: it intends to force a company to manage its business differently or a state to modify its political decisions (Gillaerts 2020).

Injunctive remedies are not new, of course. For instance, they are very common in the field of intellectual property, which is far from being uninvolved with the commodity form. However, what is peculiar in climate change litigation are the other aspects coupled with injunction. Intellectual property litigation deals with a specific implementation of property rights, which are the product of capitalist relations and privatization of knowledge (Kapczynski 2015). Intellectual property litigation is based on a claim brought by a specific business in order to implement its rights. The claim thus replicates the commodity form. On the contrary, in climate change litigation the injunction sought imposes a reduction of emissions to reach a specific outcome: here, the formal aspect couples with the substantive one. The injunction does not concern the allocation of resources and risks between juridical subjects, but limits on emissions that a business must comply with, regardless of the necessity of making profits, which is the necessity of smooth production and realization of value. In these cases, the content of the injunction is not in any way related to the commodity form and its preservation. Moreover, the injunction concerns the emission of GHGs, which are a byproduct of the whole capitalist cycle of production and realization of value, and not a specific product or activity, such as tobacco or asbestos. In other words, the injunction directly challenges a core element of the general process of capital accumulation.

Second, NGOs are granted standing and they sue to further the general interest (despite the flaws of the neocolonial approach highlighted in Part III). This is a major break with the classical doctrine of private law, which had invested a great deal in individualizing the claims of plaintiffs. The tension inherent to this aspect, and the contradiction with classical doctrine, is manifest in those judgments[33] where courts have refused standing to individual plaintiffs (and not to NGOs or communities), arguing that they lacked "a sufficiently concrete individual interest" different from "the common interest which the class actions seek to protect" (*Milieudefensie*, para. 4.2.7).

Although national procedural systems differ widely, the procedural conditions usually imply that the claimant can sue only if he aims to obtain satisfaction of an individual right, having a specific interest in obtaining that specific judgment. This condition has usually barred the way to *actio popularis*, where plaintiffs sue in order to realize a general interest. These conditions are not overcome even in the cases where the law specifically provides for some sort of collective action, such as the class action (Hensler 2001). Even though the action is collective, it aims to protect individual interests (Allard 2019, 358), and through this protection to achieve regulatory aims, which often replicate the commodity form; class actions as a tool to booster private enforcement and reduce transaction costs in consumer law and class actions to enforce a more optimal allocation of risks and costs in cases of mass torts are two examples in kind. Class action law also remains special law, and thus has not been subject to extensive interpretation, and moreover, it is on the decline even in the US (Klonoff 2013; Fisk and Chemerinsky 2011).

Climate change litigation, on the contrary, differs because the claimants seek an injunction forcing a company or a state to reach a specific outcome. The consequences are twofold. On the one hand, the plaintiff does not sue only to protect their rights, but on behalf of the general interest (Cournil 2017). The individual dimension thus trespasses on the collective one. It is not the satisfaction of an individual pretention, but of the interest of the community, generally speaking. Even when the argument is framed through the individual dimension, it is more of a ruse to comply with the traditional doctrine, an *escamotage*, than the real aim of the claim. The risk of individualization that

[33] See for instance Carvalho v. European Parliament and Council, no. T-330/18 (European Court of Justice, 25 Mar. 25, 2021), paras. 37–44, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210325_Case-no.-T-33018_judgment.pdf; Greenpeace e.V. v. Germany, VG 10 K 412.18 (Administrative Court of Berlin, Oct. 31, 2019), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20211031_0027117R-SP_judgment-1.pdf.

could derive from the mobilization of fundamental rights (Rochfeld 2019; Griffin 2023) is reversed. Even though the damage to the community affects the individuals, the community is crucially protected through the enforcement of the duty of care. A pillar of the legal form is therefore abandoned because there is no correspondence between the legal personality and the rights protected, which exceed the individual sphere. This distinguishes contemporary climate litigation from climate litigation at the beginning of the 2000s, which was still characterized by individual persons seeking redress for their loss (Cournil 2017, 247–48).

The fact that the claim does not concern a specific loss suffered by the plaintiff reinforces this. Since the wrongful conduct harms the community at large, the remedy cannot satisfy only an individual. The injunction is adequate to protect not only the interests of the claimant, but also those of the society, as the transformation of the damaging behavior does not redress only the specific loss of the claimant, but is adequate to eliminate the damage to the community. This entails that climate change litigation acquires a "strategic ambition" (Setzer and Higham 2022; Parance 2022). To be sure, the "general interest" advanced via the human rights perspective suffers from the same bias that has been highlighted in relation to the human rights movement. Human rights can serve different narratives (Frankenberg 2016, 167), and is "one instrument in the pursuit of environmental justice that has both advantages and disadvantages" (Gonzalez 2015, 172). For the reasons that have already been underscored, climate change litigation does not, at least for the moment, manage to overcome the neocolonial conception of the world that affects most of the human rights movement (Mutua 2001; Natarajan 2022, 200; Rajagopal 2003, 189).

Third, the bypassing of the individual character of legal personality also pertains to the defendant. In litigation against companies, the holding company is held liable for the behaviors of the whole group. This is a crucial innovation that implies at least a partial overtaking of the theory of the juridical person and is also developing, albeit in different forms, in common law systems.[34] As the development of corporate veils and the individualization of liability have been a pillar of the development of the commodity form, attributing liability to the holding company for the actions of the whole group is a major innovation that cannot be overstated. In some sense, this can be considered a consequence of the very success of transnational corporations and of monopolization. It is this phenomenon that makes it necessary to overcome the fragmentation of corporate structures and of value chains. This enables claimants to target the holding company—the core where the decisions, organization, and planning of corporate activities are ultimately undertaken—instead of hundreds of subjects whose individual activities and liabilities would be almost impossible to identify and to consider as tortious per se (not to mention the puzzling private international law issues that would arise).

Therefore, the dissociation from the commodity form operates not only in respect of private law, but also in the dynamics of the litigation. For all these combined reasons, in this specific type of litigation the homology between legal form and commodity form is broken; even though the claims are based on tort law, they have an antisystemic outcome. It is not because of the content of a specific law, or because of the content of the judgment, but because of the form that they have: they do not replicate the commodity form.

The present analysis has focused on private law; it could be questioned whether the commodity form theory of law also applies to public law and whether climate change litigation presents similarities with public regulation. Indeed, as I have argued above, public law is a fundamental aspect in the regulation of the cycle of accumulation and the specific neoliberal mode of regulation.

[34] Okpabi v. Royal Dutch Shell [2021] UKSC 3, [2021] 1 WLR 1294; Vedanta Resources PLC v. Lungowe [2019] UKSC 20, [2019] 2 WLR 1051.

Pašukanis has not devoted much interest to public law, and his reflections on the topic amount to sparse thoughts mostly concerning criminal law. Dimick has recently highlighted that the application of the commodity form theory of law to public law still deserves to be explored (Dimick 2021, 124). He hints that the legal form can also be found in public law, because in this field too there are oppositions of interests. However, Dimick argues that public law does not always present this form, because it is often difficult to detect the kind of opposition of interests typical of the legal form, as well as the presence of rights and obligations. Moreover, in the fascinating examples of regulation that do not seem to conform to the legal form that Dimick proposes, contradictory interests are still present (unless the possibility of contradictory interests is precluded as an assumption).

This blind spot shows that it is highly complicated to apply the commodity form theory of law to many strands of public law. However, it seems noteworthy to my argument that climate change litigation presents many similarities with precisely the kind of public law to which it is difficult to apply the commodity form theory of law (Simmonds 1985, 146). For instance, it has been argued that criminal law is bewildering because of its distinctive remedy and enforcement (the fact that the action is brought by an authority of the state). Climate change litigation differs from traditional tort law in both these elements, because the remedy is an injunction of a very particular kind and because the claim is brought by NGOs that represent the public interest. Moreover, it has been highlighted that "if legal obligation makes little sense outside of that context of reciprocity, then it makes little sense in the context of the instrumental use of public law by the modern state" (ibid. at 146). This aspect is present in climate change litigation, too, as it involves the use of tort law in an instrumental way to realize a public policy objective.

Even though interests are mediated through tort law's classical language, in climate change litigation there is no direct opposition of interest, no reciprocity in rights and obligations. There is, of course, an opposition of interest, but not one that is mediated through the individual and autonomous character of legal personality. As discussed above, the plaintiffs in climate change litigation do not claim a specific autonomous individual right, but rather act to protect the interests of the community. Furthermore, the autonomous character of the defendant is seriously undermined, as the holding company is liable for the whole group and the state for all the policies concerning emissions on its territory. Finally, the sanction does not involve any kind of compensation (not even under the disguised form of criminal law), but rather constitutes a command to behave differently. These elements resonate with the characteristics that have made it very difficult to apply the commodity form theory of law to public law. The outcome of this litigation resonates with the form of command typical of the public authority; I consider this to be a further argument strengthening my claim that in climate litigation there is a dissociation between the legal form and the commodity form.

Building on its antisystemic potential, future research on the role of law in social movements and political transformation could inquire into whether climate change litigation constitutes an example of a nonreformist reform: a reform that "aim[s] to undermine the prevailing political, economic, and social order, construct an essentially different one, and build democratic power toward emancipatory horizons" (Akbar 2023, 2507; see Gorz 1964). Moreover, it has to be assessed whether climate litigation can be used in a strategic approach, as a tool to achieve the structural and long-term goal (Knox 2010) of dismantling the socioeconomic system that produces climate change.

Finally, although this largely exceeds the scope of the present article, it is important to highlight that future climate change litigation could be based on laws such as the French Law on the Duty

of Vigilance of 2017, the German Supply Chain Due Diligence Act of 2023, and the Directive on corporate sustainability due diligence. These laws have not yet had any major application and are difficult to frame, in part because of the gaps and uncertainties concerning their scope and interpretation, but despite their deficiencies, scholars hint that they could have transformative potential (Bartl 2022). From a very general perspective, it can be argued that they simultaneously present some characteristics of PLAMC and some elements that can be considered to bypass the commodity form. Whether they will engender only bureaucratic practices, used for greenwashing and to discharge liability, or have an impact on the way business is carried out, is a matter that can be assessed only in the light of their future applications. However, these legal hybrids are typical of historical processes of concentration and centralization, which foster socialization of capital. These contradictory processes also mark the regulations and legal institutions that are created in these contexts: for instance, this was the case for public companies, as highlighted by Marx in volume 3 of *Capital*.

VII. Conclusion

Analyzing climate change litigation, this article has made three contributions. First, it has shown that the form of climate litigation is not consistent with the rationale of capital accumulation and, therefore, has antisystemic potential. This assessment has called for closer scrutiny of how this is possible, given the role that private law plays in our societies. To explain what usually forecloses such utilization of private law, I have made recourse to the commodity form theory of law. The second contribution has been to make this theory consistent with current European private law structures: to this end, I have built a theoretical framework, labeled PLAMC. I have argued that PLAMC has to be understood as a response to the monopolization of the economy and provides a consistent framework to understand the transformation of the current private law systems. I have contended that these systems still abide by the rationale of the commodity form. The construction of this theoretical framework has been necessary to assess whether climate change litigation is a further manifestation of this rationale or significantly departs from it. The third contribution has been to argue, against this background, that in climate change litigation the homology between the commodity form and the legal form is broken, and that this accounts for its antisystemic potential.

The *in medias res* character of the phenomenon, as well as the uncertainty affecting its real impacts on the global governance of climate change, call for caution about the theoretical significance of climate change litigation for private law. Historical processes have to come to their end before we can "consume them productively, meaning theoretically" (Marx [1879] 2010, 354). For the transitory should not be confused with structural transformations, and it is difficult to tell whether an ongoing process will prove significant and noteworthy or merely a fashionable trend that will not have real impact on the sociolegal system. However, this analysis of the stability of the legal system, as well as of the cases where private law can have antisystemic potential, may stimulate further research on the relationship between legal mobilization and social movements.

To conclude, the present analysis gives us two further indications concerning the role and the transformative potential of private law. First, private law can be used in a way that is not merely tactical but properly antisystemic only in the interstices, where the legal form does not correspond to the commodity form. Second, if we are looking for the transformative power of the law, we should look for fields where it is possible to realize this disentanglement: it is there that law and litigation may bear the most promising fruits.

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