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Dear Dr. Fornasari:

Thank you again for your patience throughout the review process for your manuscript, “The Legal Form of Climate Change Litigation.” We are delighted to accept your article for publication in the *Journal of Law and Political Economy*.

We will follow up soon with next steps regarding the publication process.

Best wishes,

The Editors

The legal form of climate change litigation

An inquiry into the transformative potential and limits of private law

Riccardo Fornasari*

Abstract: This paper aspires to analyze the impact of climate change litigation on the form of private law and, in so doing, to provide a contribution to the understanding of the transformative potential and limits of private law. I argue that, because of its distinctive features, climate change litigation has anti-systemic potential: more precisely, I advance that it is anti-systemic in its form because it contradicts the rationale of capital accumulation. This finding is surprising and needs to be inquired: indeed, it is usually impossible to use private law in an anti-systemic way, 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 commodity form and 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 anti-systemic potential. 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 upon which this theory is built: it therefore necessitates an update. To do so, I develop a theoretical framework to conceptualize and understand the transformations of European private law systems that have been unfolding for some decades, that 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 these cases the legal form does not replicate the commodity form: this rare dissociation makes possible its anti-systemic potential.

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I. Introduction

After the release of the last report of the Intergovernmental Panel on Climate Change (IPCC 2023), the urgent necessity to cut emissions to keep the planet livable cannot be denied (UN Human Development Report 2021/2022). 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 paper 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). As it 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, and, second, it 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 paper 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 anti-systemic potential: more precisely, I advance that it is anti-systemic in its form because it contradicts the rationale of capital accumulation. This litigation is not focused on a different allocation of risk and of resources, but mandate to transform the way business is carried out, on the basis of an aim that is external to the rationale of capital accumulation. This finding is surprising and needs to be inquired: indeed, it is usually impossible to use private law in an anti-systemic 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 commodity form and 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 anti-systemic potential. We need to carry out this examination 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 upon which this theory is built: it therefore necessitates an update. To do so, I develop a theoretical framework to conceptualize and understand the transformations of European private law systems that have been unfolding for some decades, that 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 these cases the legal form does not replicate the commodity form: this rare dissociation makes possible its anti-systemic potential.

Climate change litigation is a flourishing field. In the last years, the number of lawsuits has burgeoned worldwide (Setzer and Higham 2022), and it can be foreseen that is going to further increase. First, because of the still unsatisfactory actions undertaken by legislators and governments, as the disappointing outcome of COP27 shows only too well. Second, because of the growing juridification of the issues related to climate change, that shall foster further litigation in the perspective of climate justice (Tigre and Al. 2023). It has been shown that global climate change affects disproportionately those who have least contributed to the problem and have less 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 injustices (Morrow 2021). Third, because the resounding victories in landmark cases incentivize other actors to follow the path and to widen the subjects on behalf of which the action is brought. Rights of nature (Schimmöller 2020; Tănașescu 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, Higham, Jackson, and Solana 2021), dragging into the fray the credit system, whose contribution to fossil capital is quintessential (Fossil Fuel Finance Report 2023).

Two kinds of litigation will be 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 greenhouse gases (GHGs) emissions. Second, litigation against States because they do not fulfil 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 limits of emissions to mitigate climate change.

The expression «climate change litigation» is broad, and its boundaries are inevitably blurred, as those of any rapidly developing category. In the following analysis I will use the expression admittedly arbitrarily, to refer to the litigation of the kind mentioned above and further examined in Part II. The inconveniences occasioned by this restraining definition of the term are compensated by the easing of innumerable passages of the paper 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 paper, that does not aim to develop a general analysis of climate litigation, but to assess if and why some specific cases can have anti-systemic potential. Even though not numerous, the cases I analyze are, at least in Europe and within the successful ones, amongst the most important ones. They have catalyzed the attention of scholarship and, most importantly, they serve as the model for further litigation. It will be up to an eventual reader that might want to apply this analytical framework to other cases and contexts to evaluate whether it is appropriate, pertinent, or useless.

This paper deals mostly with European case law. As climate change is a global phenomenon, that has been produced in a colonial, post-colonial and imperialist setting of international relations that necessitates a dimension of environmental justice to be adequately addressed (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 due to the fact that 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 repercussions on the jurisdiction of litigation involving their activities.

Second, even for damages occurred in the South, redress is often sought in courts in the North (Bradshaw 2020), seen as jurisdictions where claims might have more chances 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 on litigation aiming to establish Global North States' responsibilities and liabilities. This would therefore expropriate the voice 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 aspect 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 socio-economic systems (their influence or imposition and transplant abroad is an issue that is well beyond the scope of this article). Therefore, it would be inappropriate to apply the same categories to other legal contexts and cultures. Even when climate litigation in the Global South and Global North shares common features, it differs because of its context and content (Setzer and Benjamin 2020, 79). Eventually, it is up to scholars more familiar with those systems to assess whether this framework may be appropriate and useful to study 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. Therefore, the analysis will not delve into interesting cases pending in the Global South¹, even though they present, *prima facie*, similarities with case law upon which the present argument is built.

To be sure, my argument does not contend that litigation is the best site to tackle climate change and that a satisfactory solution to the problem can come mainly from this field, as it requires instead socio-economic planning at the national and transnational level (Kampourakis 2023). As the 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 the sites of political power supported by strong social movements. However, climate change litigation can prove useful, first, in conferring to social movements the symbolic legitimation of the law (Averill 2007, 462; McCann 2006, 29-30). Second, 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 laying «the outcome and ambition of climate governance» (IPCC WG III 2022).

This paper 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, to find liability, 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

¹ See, for instance, *Pari islanders v. Holcim* <https://callforclimatejustice.org/en/>; *Ministerio Publico Federal v. Rezende*, 7a Vara Federal Ambiental e Agrária da SJAM, 1005885-78.2021.4.01.3200, 16 April 2021; *Lahore*; *Salamanca Mancera v. Colombia*. In general, see Maria Antonia et Al. 2023.

has anti-systemic potential despite its shortcomings in addressing social and racial inequalities. To examine what makes this outcome possible, I develop a twofold analysis: first, I assess what usually grants that private law does not develop autonomously from the socio-economic system and, then, what are the peculiarities of climate change litigation that account for their anti-systemic potential. Therefore, the paper 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. In Part V, as some of the fundamental elements of contemporary European private law do not seem to be coherent with the commodity form theory of law, I develop a theoretical framework to analyze these transformations. 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 is still coherent with the socio-economic system. In Part VI, against this theoretical framework, I argue that climate change litigation has anti-systemic potential because it presents specific features that break the homology between the legal form and the commodity form.

II. The original features of climate change litigation

Recently, several lawsuits have targeted States and companies because they do not fulfil commitments concerning the reduction of GHGs 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 that I will assess concern mitigation cases, where the courts order an injunction. I have excluded on purpose cases that are usually considered as participating in the same wave, where plaintiff claims damages, such as *Luciano Lliuya v. RWE AG*². Indeed, my aim is not to draw a comparative analysis of prominent cases of climate litigation, but to show that in litigation with specific characteristics (that only some cases present) there is a disentanglement between the commodity form and the legal form. In these cases, the claim is brought by NGOs and a wide array of actors that do not seek primarily damages, but injunctions to transform the conduct of the defendants, which 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. 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 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.

² District Court Essen on 15 December 2016, 14/0354Z/R/rv, in *Luciano Lliuya v. RWE AG*, http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2016/20161215_Case-No.-2-O-28515-Essen-Regional-Court_decision.pdf, currently under appeal.

A. Climate Litigation Against States

Concerning litigation against States, even though there are many cases currently pending or already decided in Ireland³, Germany⁴, Romania⁵, Pakistan⁶, Italy⁷, and before the Grand Chamber of the European Court of Human Rights⁸, *Urgenda*⁹, *Affaire du siècle*¹⁰, *Klimaatzaak*¹¹ are the most representative amongst successful cases. In *Urgenda* the Supreme Court found that the Dutch State, failing to adopt policies coherent with the Paris Agreement of 2015, breached its duty of care towards its citizens, and violated articles 2 and 8 of the ECHR. In *Affaire du Siècle*, the Court found that, under international and national laws, the State has a general duty to fight climate change. As France has not adopted policies adequate with the objectives that it has itself set in national legislation, the State has 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 Court of Appeal established the liability of the Federal State, the Flemish Region and the Brussels-Capital Region on the basis of national provisions on tort law and articles 2 and 8 of the ECHR, and ordered the defendants to reduce their GHG emissions by 55% compared to the 1990 level by 2030.

These three decisions follow this general line of reasoning: climate change damages fundamental rights, because climate change 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*

³ *Supreme Court of Ireland*, 31 July 2020, n. 205/19, available at: climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200731_2017-No.-793-JR_opinion.pdf.

⁴ *German Federal Constitutional Court*, 24 March 2021, 1 BvR 2656/18; 1 BvR 78/20; 1 BvR 96/20; 1 BvR 288/20, in *Resp. civ. prev.*, 2021, 1782

⁵ *Declic et al. v. The Romanian Government*, suit filed on January 31, 2023 before the Cluj Court of Appeal <http://climatecasechart.com/non-us-case/declic-et-al-v-the-romanian-government/>.

⁶ *Lahore High Court*, 25 January 2018, n. W.P. No. 25501/2015, available at: <http://climatecasechart.com/non-us-case/ashgar-leghari-v-federation-of-pakistan/>.

⁷ *A Sud et al. v. Italy*, lawsuit filed on June 5, 2021, before the Civil Tribunal of Rome, <http://climatecasechart.com/non-us-case/a-sud-et-al-v-italy/>

⁸ *Duarte Agostinho and Others v. Portugal and 32 Other States*, lawsuit filed on September 2, 2020, <http://climatecasechart.com/non-us-case/youth-for-climate-justice-v-austria-et-al/>.

⁹ *Supreme Court of The Netherlands*, 20 dec. 2019, n° 19/00135, climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf.

¹⁰ First partial decision: Trib. adm. Paris, 3 fév. 2021, nos 1904967, 1904968, 1904972 and 1904976/4-1, *AJDA* 2021, 705; final decision: Trib. Adm. Paris, 14 oct. 2021, nos 1904967, 1904968, 1904972 and 1904976/4-1, *Droit administratif* 2022(2), 37.

¹¹ *Cour d'appel de Bruxelles*, 30 novembre 2023, n° 8411, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20231130_2660_judgment-1.pdf.

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 their violation constitutes therefore a breach of the duty of care of the State or, in French terms, a *carence fautive*.

The starting point is, therefore, that climate change infringes the fundamental rights of citizens (Peel and Osofsky 2018) and, in particular, the right to health, to a healthy environment, to life, and to private life. The key treaty is the 1992 UN Conference on Environment and Development in Rio de Janeiro, followed by the 2015 Paris Agreement under the United Nations Framework Convention on Climate Change. In the EU space, the common framework is represented by Article 37 of the Nice Charter, Article 191 Treaty on the Functioning of the European Union, 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*¹²; Renucci 2020). In the absence of States' specific commitments to mitigate climate change enforceable by citizens, they are a prerequisite to affirm that States have a duty to adopt policies to combat the phenomenon. However, plaintiffs do not claim a direct violation of fundamental rights, but that fundamental rights determine what is the content of the duty of care of the State (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 hold liability because of the violation of precise targets that the State has imposed on itself, therefore a discussion of what are the appropriate limits that public action must respect is not necessary (Hautereau-Boutonnet 2021). In other cases (*Urgenda* and *Klimaatzaak*), the 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 the definition of the concept see Heede 2014). This litigation is even more

¹² ECHR, 24 January 2019, n. 54414/13 e 54264/15, *Cordella et al. v. Italy*.

ambitious: suing the holding company, it seeks to challenge the conduct of the whole group and, moreover, it seeks to make the International Agreements on climate change mitigation binding for companies.

*Milieudefensie*¹³ is a landmark case (for different interpretations of the decision see Mayer 2022; Burgers 2022; Paiement 2023). The District Court of the Hague has stated that climate change hampers human rights of Dutch citizens (I will return in Part III on the exclusion of standing on behalf of citizens from the Global South and its implication): the company has a duty of care to mitigate climate change and to limit its GHGs emissions. This duty of care derives from the application of Article 6:162 BW (*Burgerlijke Wetboek*, Dutch Civil Code). This general rule sets forth that conduct that shall not be regarded as «proper» in relation to unwritten law is tortious. After all, fossil fuel companies themselves acknowledge the necessity to limit emissions (Bach 2019), and these commitments, even though it is still disputed whether they constitute legally binding commitments (the issue has been raised, for instance, in *Notre Affaire à Tous et al. v. BNP Paribas*¹⁴), at least reinforce the fact that mitigation has to be taken seriously and may be integrated into the duty of care of high-emitting companies.

In order to substantiate the duty of care and the level of emission reduction, the District Court heavily relies 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 GHGs direct and indirect (the so-called «scope 3» emissions) from its global operations by 45% by 2030 compared to 2019. Despite the fact that compliance by Shell with these targets does not guarantee that global emissions will diminish, the Court has affirmed that the faults of other subjects cannot justify the unlawful conduct of the defendant. To cut emissions, Shell must do everything that is possible, irrespective of the impacts that such measures may have on its business.

Even though it has been unsuccessful, it is worth mentioning a very similar case before the judicial Court of Nanterre (*Notre Affaire à tous et al. v. Total*¹⁵), where NGOs and communities sought an injunction against Total to force the whole group to reduce its emissions. Under the French Law on the Duty of Vigilance, big companies¹⁶ are

¹³ *Milieudefensie v. Royal Dutch Shell*, The Hague District Court, 26 may 2021, C/09/571932 / HA ZA 19-379, http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526_8918_judgment-2.pdf (currently under appeal, but the judgement has been declared provisionally enforceable).

¹⁴ Filed on February 23, 2023, <http://climatecasechart.com/non-us-case/notre-affaire-a-tous-les-amis-de-la-terre-and-oxfam-france-v-bnp-paribas/>.

¹⁵ Lawsuit filed on January 28, 2020, <http://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/>. On July 6, 2023, the pre-trial judge dismissed the lawsuit on procedural grounds. The NGOs have stated that they will appeal the order.

¹⁶ Meaning companies that employ «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

obliged to establish a plan that should prevent the violation of human rights and environmental damage that may occur in the course of their business. Plaintiffs filed a lawsuit asking for an injunction requiring Total to make its conduct consistent with the goal of limiting global warming to 1.5°C. Through these lawsuits, the claimants sought to impose on Total a transformation of its activities, that should be aligned with the goals of the Paris Agreement of 2015, irrespective of the effects that such modification may have on the corporation's business and profits. However, the Tribunal has dismissed the claim on procedural grounds¹⁷.

In these cases, 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 bypassing of the principle of legal personality and is based on previous Dutch case law (Bertram 2021, 432)¹⁸ 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, they must establish a vigilance plan. The law provides that the holding company must establish a plan for the activities of the whole group and of the companies with which the group has established business relationships. The holding company is liable for the damages that could occur because of the violation of this duty.

Moreover, 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 mandates banks not to invest in and 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 suit against BNP Paribas (*Notre Affaire à Tous et al. v. BNP Paribas*)¹⁹ 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 to 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

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 of the French Commercial Code).

¹⁷ Tribunal Judiciaire de Paris, 6 juillet 2023, n° 22/03403, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230706_NA_order.pdf.

¹⁸ *Doob et al. v. Royal Dutch Shell*, Court of Appeal of The Hague, 29 January, ECLI:NL:GHDHA:2021:133; *Oguru and Efangana et al. v. Shell Petroleum*, Court of Appeal of The Hague, 29 Jan. 2021, ECLI:NL:GHDHA:2021:132.

¹⁹ See <http://climatecasechart.com/non-us-case/notre-affaire-a-tous-les-amis-de-la-terre-and-oxfam-france-v-bnp-paribas/>.

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 provides for its horizontal effect. The protection of fundamental rights imposes a duty of care on States (Minnerop 2019) and on companies: they must act on limiting 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 the Courts to stretch traditional tort law categories (Taylor 2018, 83 ff.; Loth 2018). As these issues have already attracted great scholarly attention, I will just sketch them briefly because they are a symptom of the cutting-edge territories this litigation goes through. Even though 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.

For instance, courts have to choose whether fault liability or strict liability applies. When targeting States, plaintiffs have to show that the inaction to mitigate climate change, likely joined with the violation of international Treaties and, maybe, of national rules, constitutes a tort. When targeting polluting firms, plaintiffs have to show that the activity is tortious even if it has been subject to administrative authorization. When targeting financial institutions, claimants need to demonstrate that financing polluting activities makes the financier liable for the outcome of that activity. Even though there is now agreement that obtaining administrative authorization for the exercise of an activity does not prevent a liability claim (Neyret 2017; Hinteregger 2017, 253; Paiement 2023), all these issues involve difficult legal tactics to affirm the binding character of climate commitments, and their horizontal enforceability, as well as 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 the so-called adequate causation - does not work (S. Porchy-Simon 2019, 156; Faure and Peeters 2011, 267; Spitzer and Burtscher 2017, 166 ff.). The causal link between the activities of companies and global warming is cumulative, because it is the product of the activities of several actors prolonged in time and spread out in space: it is only the sum of these activities that causes the harmful effects (see in this respect the decision of the District Court Essen on 15 December 2016, 14/0354Z/R/rv, in *Luciano Lliuya v. RWE AG*, currently under appeal). The conduct

of each subject is not, on its own, decisive to produce the damage, as the but-for test requires. Causation has to be dealt with innovative judicial creativity, also thanks to the analogies with alternative and cumulative causation that have been developed by case law (Wentz and Franta 2022; Fornasari 2023).

Finally, damage is almost impossible to apprehend and liquidate. On the side of the plaintiff, given the principle that the plaintiff has to be put in the same situation she was before the tort, it is extremely difficult to appreciate the monetary value of the damage caused. On the side of the defendant, 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 and does not allow to fulfil 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 endanger human life and cause huge damages to health, the most adequate remedy is a preventive one in the form of an injunction to stop the polluting activity. The issue fosters much debate about the conditions of injunctive remedies and their admissibility.

This brief overview of the criticism that climate change presents in relation to tort law gives the measure of the issues at stake. It is important to cast light on the fact that these problems stem from a broader issue, which is related to the structure of tort law. 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 makes it so difficult for ambitious climate change litigation to succeed, and this 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, it is now to the potential of this litigation that we shall turn our attention.

III. The anti-systemic 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). Even though most climate litigation (intended in general) is not radical at all (Markell and Ruhl 2012), my contention is that climate change litigation hereby assessed presents peculiar characteristics that make it fundamentally different from traditional tort law litigation and anti-systemic (a different issue from whether tort law is progressive or conservative, Bernstein 2004). Reversing the usual path of

argumentation, I will first clarify what this statement does not imply and then I will argue what it means.

First, I do not advance that these judgements may have a redistributive effect that is, broadly speaking, more favorable to the weakest subjects in a legal relationship, allocating resources in a more egalitarian way: this is not something exceptional and anti-systemic (see Part V). This possibility stems from the role of private law in our societies and it shall 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 interest of individual capitalists and the interests of the capitalist class as a whole (Marx 1985 [1867], 259 ff.; Wallerstein 2011 [1983], 17). The pursuit of individual interests at the expenses 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 the 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 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 keep a livable and profitable planet. It is not the content of a specific decision that is directly and *per se* anticapitalist (even though this point necessitates further elaboration, as I will be highlighted below).

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

Instead, I contend that it is primarily the form of these judgements that manifests their anti-systemic potential. The form of these injunctions and the consequences that they entail conflict with the rationale of the accumulation of capital. As capitalism is characterized by endless accumulation (Marx 1985 [1867], 81 ff.; Harvey 2018 [1982], 29; Wallerstein 2011 [1983], 17), the form of a decision that directly challenges this rationale has anti-systemic potential. More specifically, climate change litigation, irrespective of the logic of valorization of capital and of the market exchange, entails a command to a company to operate its business in a way that must be consistent with the climate goals. And this, regardless of the activity and the organization of the company itself, and even of the specific administrative authorizations that the

company has obtained to exercise that activity and on the basis of which has planned its investments.

The injunction does not consider the rules that constitute the framework of the processes of production and realization of value, and imposes to reach 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 can entail «financial sacrifice», «limit production», and «forego new investment». The same can be said of the order given to the State to implement specific measures: as long as they involve the undermining of the functioning of capital accumulation, they imply that the State has to take measures that limit or forbid specific paths of accumulation. If the State is free to choose the way to achieve this aim, it is however bound to reach it, notwithstanding the economic effects of such decisions. It has therefore been argued 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 paroxysmal effect of shielding corporate interests and profits from the legislative power of 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 somewhat reversed. Despite the administrative authorizations and a framework that should make the activity legal, the courts have ordered to exercise corporate activity in a completely different manner, that has to be compatible with climate targets that a fossil fuel company cannot respect, other than at the price of stranded assets and a curtailment of accumulation.

In this respect, these decisions greatly differ from those that strike a different balance between the interests of professionals and consumers, or between companies with different 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 that is external to the rationale of capital accumulation. The anti-systemic character of the form is entangled with the problem that this litigation approaches and, more generally, the relationship between capitalism and climate change. I am not referring here to the fact that climate change litigation is increasingly considered as a risk for capital accumulation and, more specifically, for financial stability (Christophers 2017; Network for Greening the Financial System, 2021; Bolton et al. 2020): indeed, this could be considered as an issue of reallocation of resources and profit opportunities to green industries (Signe and Oman, 2019). Instead, I argue that, given the growing consensus that the current functioning of capitalism is incompatible with the sharp reduction of GHG emissions (Moore 2016; Id. 2011; Bellamy Foster 2022), the contradiction between the

accumulation of capital and the injunction to reduce emissions is stark (Wallerstein 1999). The different scenarios elaborated by IPCC to mitigate 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.

This is true not only for the profitable exploitation of the fossil activities, but also for the whole production and circulation processes. Carbon Majors have long perceived the climate destructive impact of their business and have since then acted in order to foreclose effective regulation that would have constituted an important threat to their profitability (Bonneuil, Choquet, and Franta 2021). However, more broadly, this incompatibility between mitigating climate change and business as usual concerns the entire functioning of the 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 1994, with great clairvoyance, Eric Hobsbawm (1995 [1994], 570) identified the ecological crisis as one of the two major problems for the XXI 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.

To be sure, even though climate change litigation is anti-systemic, 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: indeed, it does not account for the different impact that climate change has on the Global South (a critique that has also been addressed to the IPCC climate mitigation scenarios: Hickel and Slameršak 2022). For instance, in *Milieudefensie* (par. 4.2.3-4.2.5), the refusal to take into account the 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. In the same case there is no consideration of people of the Global South, such as the communities of the Caribbean Dutch islands (Païement 2023). A similar argument can be made in relation to French climate litigation, that does not take into account the specific interests of the French *Outre-mer*.

Moreover, this litigation claims mainly mitigation efforts, while the Global South, that has been already hardly hit by climate change, necessitates 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): the plunder of natural resources that are not replenished (Amin 1973, 131) and the creation of sacrifice zones proceed along racial divides. These cases suffer from a post-colonial mentality also in the choice of the threshold of 2°C instead of 1.5°C, because this implies accepting the existential threat to people living in small islands that risk to be drowned by ocean rising (Païement 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 confirm that attraction of jurisdiction in the 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 upon Fanon's work (Fanon, 2002 [1961]; Id. 2006 [1964]), Knox has convincingly argued that crises of accumulation are overcome not only through spatial fixes (Harvey 2018 [1982], 415 ff.), 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; Id. 2016). The many examples of green colonialism prove that affording the climate issue does not involve, *per se*, fighting racial injustices. For instance, green grabbing involves the appropriation of land and resources in the Global South for ecological aims (Hamouchene and Sanwell eds. 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 innumerable 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, which 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; Id. 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 made possible the development of racial capitalism, that is, a system where the processes of profit making and race making are inextricably entangled and operate in a mutually reinforcing way (Gonzalez and Mutua 2022; Robinson 2021 [1983]): «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).

These critiques are correct; however, for the purpose of the paper - the assessment of anti-systemic potential of climate change litigation - three observations deserve to be made. 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. However, mitigation benefits everyone (even though differently), as the continued increase in temperatures would severely damage also countries in the Global South. Second, nothing forbids using these litigation models to put at the forefront 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 example²⁰. Third, and most importantly, these shortcomings can be considered as non-decisive 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 remolded to take into account also social, racial, and neocolonial injustices. However, as it contradicts the rationale of capital accumulation, despite its deficiencies this legal form presents an anti-systemic potential.

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

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

²⁰ <http://climatecasechart.com/non-us-case/comissa%cc%83o-pastoral-da-terra-and-notre-affaire-a-tous-v-bnp-paribas/>. In this case, NGO's have sued BNP Paribas claiming that its investment in and financing to businesses involved in deforestation, land-grabbing, and violations of the fundamental rights of Indigenous peoples in Brazil violates the duty of vigilance it owes on the basis of the Law on the Duty of Vigilance of 2017.

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 anti-systemic way (Baars 2019; Wood 2016), the reason that lays behind this possibility has to be inquired. This analysis deserves to take into account, dialectically, the reasons that bind private law to the rationale of the socio-economic system and the reasons that might explain its disentanglement in climate change litigation. To analyze the boundaries of the social transformations that can be possibly achieved through private law, it is fruitful to refer to the so-called commodity form theory of law, elaborated by Pašukanis. Even though the issue has not been deeply examined by Pašukanis, this theory applies also to tort law. I will make the case that this theory 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.

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). Even though the law is semi-autonomous, and despite the different contents it can have, the legal form corresponds to the rationale of the commodity. As it 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, 191-192). 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 realize the exchange of equivalent rights (Marx 2011 [1857-1858], 201 ff.). This abstraction is also central for the constitution of property and entangles it to racialization (Bhandar 2014). To accomplish 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 2018 [1924]). 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, 1985 [1867], 112 ff.). The development of the juridical subject, ownership, and contract is a prerequisite for the goods to be exchanged as commodities (Marx 1985 [1867], 115). Exchange is fundamental for the evaluation of goods (Marx 2008 [1864-1875], 1529).

The historical development of the exchange confers to the goods their character of commodities and fosters the development of money. Money is crucial: the whole system is based on the possibility to evaluate any claim on the basis of the universal representation of value, as the entanglement between the development of capitalism

and of the monetary system clearly demonstrates (Desan 2014; Aglietta 2009, Marx 1985 [1867], 121 ff.; De Brunhoff 2015 [1973]). 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 1985 [1867], 71, 121 ff.) (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) concerning the substance of the law, private law does not usually have anti-systemic potential. For instance, the constitutionalization of freedom of contract in *Lochner v. New York* (1905)²¹, even though extremely significant for contract law (Horwitz 1992, 33 ff.), 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 the transformations of the system are «inventions sous contrainte structurale» (Bourdieu 2012 [1989-1992], 169-170, 234). Drawing an analogy with Poulantzas' (2013 [1978]) analysis of the State, that is conceived as a battlefield and as a condensation of a power relationship, but that has 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 destructure the link between legal form and commodity form: private law may have redistributive outcomes, but cannot subvert the rationale of the system.

This homology is best accomplished in the civil codes of the XIX century, but can 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 XIX century, where 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 shall not be surprising when it is considered that the world-economy of the XIX century was mostly shaped by Britain, but its politics and ideology were provided mostly by France (Wallerstein 2011; Hobsbawm 1977 [1962], 73-74).

²¹ 198 U.S. 45 (1905).

The juridical subject is atomized and is conceived as untied from society, except for juridical ties. His universe of relationships concerns claims against other juridical subjects (ownership, contract and tort) (Hobsbawm 1977 [1962], 183 ff.). 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: these are the basic units of a juridical system suited for a capitalist system.

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

The particularities of the functioning of tort law 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 than for contract law because it does not govern the exchange of commodities and therefore the realization of value. However, it aims to ensure that negative externalities bear on 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 conducts that damage other goods and claims, and it guarantees a correspondence between the conducts that grant a profit and the allocation of the risks that stem from them. Tort law is therefore a fundamental instrument to preserve the smooth production and circulation of value from external wrongful conduct. As it 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 that is at the basis of the construction of the juridical subject. This individualization frames the claims also 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, entailing 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 trial structure, where standing is granted individually and for the exercise of rights that have the abovementioned form (Pašukanis 2018 [1924], 34; Loiseau 2018, 245). The basic

structure of the trial reproduces and fosters this form. Indeed, the role of parties to the trial reproduces that construed by the legal personality: the juridical person is conceived as an individual that can enforce only its 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, considering the law as a mirror of economic relationships. On the contrary, it conceives the legal system as semi-autonomous (Balbus 1977; Collins 1984, 47 ff.; Poulantzas 1967, 159, speaking of an «autonomisation spécifique»). Therefore, the content of rules is not predetermined, nor is 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, this theory is compatible with the deep insights that have argued 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 been built also through law (Wallerstein 2011, 10, 137; Polanyi 1957 [1944], 3) by governments (Vogel 2018).

This theory, that scholars have applied also to other 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 socio-economic 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 ff.), which fails to account for the stability of the legal system (McDougall 2019, 25 ff.). In this respect, I advance that this framework can be usefully combined with theories that highlight the role of lawyers, their *habitus* (Bourdieu 1986; Id. 2012 [1989-1992]; Id. 2001 [1982], 77 ff.), 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, 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 in a spectrum, cannot usually have anti-systemic 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 national, transnational and international level: 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 socio-economic environment. Therefore, it is pertinent to inquire whether the commodity form theory of law is still relevant and if 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) and Weyl (M. Weyl and R. Weyl 1968, 161 ff.) had forecasted that monopolization implied a distancing of the law from the political economy of competitive capitalism; however, that remained at the stage of simple intuition, perhaps also because the private law transformations in relation to political economy had still to come. Pašukanis (2018 [1924], 138-139) himself observed that the developments of the capitalist system towards monopolization would have had a huge impact on the legal form. However, he envisaged the issue through the perspective of centralization and planification as an alternative to contract, and did not consider that private law could have become a site contradictorily devoted to the construction and hindering of monopolization.

A further element that may account for the apparent abstraction and rigidity of the commodity form theory of law is that Pašukanis mainly focuses on the first volume of *Capital*, that entails a maximum of abstraction and takes as a presupposition a market with competition (Harvey 2013, 27 ff.). Focusing more on the insights of Volume II and especially III, 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 to update the analysis of the legal form. Pašukanis has started from the hypothesis of XIX century competitive capitalism, as Marx did in Volume I of *Capital* (Amin 2018, 184). Adapting the commodity form of the law to the realities examined in Volume III would be helpful to assess whether the legal form replicates the commodity form also 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 socio-economic

regime is modified. The development of the world market, mass production and consumption, concentration and centralization impose the adoption of new and different rules, both in the fields of private and public law. In this context, the transparent homology between legal 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 XIX century private law, such as equality between legal persons, negotiation of agreements considered as the product of free will, 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, therefore, it has no heuristic value in relation to the current stability of private law.

This could lead one to think that the anti-systemic 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 not coherent anymore. 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 into account these developments, 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 a modification of European private law systems necessary, and I will develop a theoretical framework to coherently 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 come back to climate change litigation and demonstrate that it is anti-systemic 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 construed 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 for its foundation on public law (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 ff.). 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 1979 [1890]).

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 ff.). This new regime entails a 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 the way 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 them 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, that entails standardization of regulations and practices (Casini 2022). Public law has been indispensable in the creation of specific spaces of exception, not subdued to national regulations (Campling and Colás 2021, 268 ff.; 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) and in the development of intellectual property rights (Kapczynski 2015; Sell 2003).

Focusing on private law, European private law has undergone great transformations in the last decades, which have changed the structure and rationale of private law itself and have led 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 may be identified. The answer provided is affirmative: 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; Lapavistas 2013), intellectual property and digital economy (Durand 2020; Rikap 2021; Pagano 2014) play 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 socio-economic 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. The fast-growing

monopolization (Baran and Sweezy 1966; Bellamy Foster 2014; Selwin and Leyden 2021)²², where the power of a few actors, which either collude or fiercely compete 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 fulfil its aim, precisely because the assumptions that had structured the regulation, such as the presumption of equality between different subjects and their rationality, that shall guarantee the rationality of agreements, do not work anymore. To be sure, monopolization is a phenomenon that does not only derive from pure economic developments, but is also legally construed (Vasudevan 2022, 1273 ff.; 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 2008 [1864-1875], 1606 ff.). 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 ff., 542 ff.; Banaji 2020). This is also true for the period of industrial revolution and of the incipient formation of mass production and consumption (Hobsbawm 1977 [1962]). However, the capitalist system could be overall considered as competitive, and most economic transactions were at arm's length: this context was the bedrock (economically and ideologically) for XIX century private law regulation. On the contrary, current transformations make the socio-economic system that private law shall regulate completely different from competitive capitalism (Amin 2018, 177 ff., 193 ff.).

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 may be completed by the following argument advanced by Durand (2021, 210):

²² This does not mean to say that competition is completely foreclosed, neither 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 ff.).

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 too much extended, 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 2021; 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 which concerns the legal regulation of such 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. Even though 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 2000 [1973], 103 ff.) and, therefore, also the conflicts that arise between different capitalists and capitalists and consumers (Marx 2008 [1864-1875], 1634 ff., to be read in connection with the circuits of capital, Marx 2008 [1869-1879], 1071 ff.). 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 concerns mostly 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, impacting production and innovation (Vasudevan 2021). The sectors of large-scale organized distribution or 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 one, capitalists continually try to tame competition (Wood 2003, 22; Harvey 2014, 131 ff.). 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 was affirmed by Marx (2008 [1864-1875], 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 XX and XXI centuries has made private law, and especially contract law and tort law, completely outdated in relation to the reality they were supposed to rule. This poses the problem of a regulation that could foster an appropriate and smooth functioning of the market. A quick look at the current state of these two branches of 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, and the consequences that it entails concerning the rationality and enforceability of agreements, do not work, as most contractual terms, and even prices, are not 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, the simple damage to property caused by a single tortfeasor that can be repaired through monetary compensation does not represent anymore the main problem that tort law shall afford. Therefore, also tort law, as a tool of allocating risks and costs through the mechanism of individual liability and compensation, is challenged. Compensation is often an inadequate relief in order to evaluate the dimension of the tortious activity, especially when small damages are caused to many subjects and therefore it does not further an adequate function of deterrence. The contradictions between the individualization process typical of liability and the global character of the phenomena which are apprehended 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 and participation in processes that could cause damages (Bueno and Bright 2020). Furthermore, the development of global processes entails complex and cumulative causation: this makes it difficult to establish who should bear the liability for harm that many, often located in different places and having acted in the course of decades, have contributed to cause.

Private law does not only involve a micro-regulation of specific relationships; instead, the regulation of relationships between private parties has a macroeconomic dimension (Beckers and al. 2023) aiming to build and preserve a competitive market. Not only competition law, but also contract law, especially at the European level, is built upon ordoliberal and neoliberal ideologies and the following idea of implementing market rationality (Bartl 2015), as competition regulation is part of the architecture aiming to allow the continued accumulation of capital (Buch-Hansen and Wigger 2011). The multiplication of private law rules at a European level, for which

the EU does not have direct competence (they are usually adopted on the basis of article 114 of the TFEU, that concerns the establishment and functioning of the internal market and therefore implies a functionalization of private law, Michaels 2011; Micklitz 2014) has to be interpreted also as a reaction to monopolization.

Confronted with this phase of capitalist development, private law regulation has developed a specific rationale to tackle these problems. These rules modify the traditional structures of private law. Myriad legislation passed in different fields such as consumer law, agri-food business, large-scale organized distribution, antitrust, finance, digital commerce and so on aim 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 contracts²³, modified by Directive 2011/83/UE on consumer rights²⁴, 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 kind are the Directive 2014/65/EU on markets in financial instruments²⁵; Regulation (EU) 600/2014 on markets in financial instruments²⁶; Directive 2011/7/EU on combating late payment in commercial transactions²⁷; EU Directive 2019/633 on unfair trading practices in

²³ Council Directive 93/13/CEE of April 1993 on unfair terms in consumer contracts.

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, data.europa.eu/eli/dir/2011/83/oj.

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) Text with EEA relevance, <http://data.europa.eu/eli/dir/2014/65/oj>.

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, <http://data.europa.eu/eli/reg/2014/600/oj>.

²⁷ Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, <http://data.europa.eu/eli/dir/2011/7/oj>.

business-to-business relationships in the agricultural and food supply chain²⁸; EU Directive 2019/771 on certain aspects concerning contracts for the sale of goods²⁹.

This phenomenon has also concerned tort law, as the 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 Union³⁰ and the Proposal for a Directive on liability for defective products³¹ demonstrate. 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, the Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers³² has generalized class action 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 socio-economic relationships characterized by market failures. In doing so, they go beyond the abstraction of the equal subject and of parties' autonomy. On the one side, they fragment the juridical subject: the asymmetries of information and market power make it necessary to break the equality of the juridical subjects. On the other hand, tort law develops mechanisms to sanction behaviors that damage many people, such as collective actions and injunctive remedies.

The problem arises because of a situation of imbalance in the relationship between different subjects, that hampers the normal functioning of the market relationship, that private law rules try to restore (Zimmermann 2006, 83 ff.; 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 1975 [1932-1935], II, Q. 10, s. 41, 1321).

However, the broad scope of these regulations challenge the traditional homology between the legal form and the commodity form. For instance, the abovementioned

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

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, <http://data.europa.eu/eli/dir/2019/771/oj>.

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, <http://data.europa.eu/eli/dir/2014/104/oj>.

³¹ Proposal for a Directive on liability for defective products³¹ of 28 September 2022 (COM(2022) 495)

³² (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, https://eur-lex.europa.eu/resource.html?uri=cellar:b9a6a6fe-3ff4-11ed-92ed-01aa75ed71a1.0001.02/DOC_1&format=PDF.

fragmentation of the juridical subject, that is now apprehended in relation to the specific market situation that they face, from a functionalist perspective (Fornasari 2019), undermines one of the pillars of the classical legal system. It has been convincingly argued that the introduction of special groups into the law corresponds to the market rationality (Bartl 2020, 236 ff.). As «the individual is the historic “subject” of modernity par excellence» (Wallerstein 2011, 12), it cannot be overstated how these transformations are troubling for the legal order of modernity that still determines the structure of private law.

As this rule affords 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 the suitability of such regulation can be questioned (Durand and Rikap 2023). This might also explain the apparent contradiction between a period of skyrocketing inequality, that the law contributes 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 found, in order to avoid excessive rent extraction from corporations that have 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 different 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 ff.), allocating resources in a more egalitarian way. There is no doubt that these issues are important and have a real impact on the life of the affected parties (Bernstein 2004, 15 ff.). 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 on the contrary even be said that they grant the preservation of that rationale. The law is also a product of the dominated class, but that does not mean that this law develops in itself another system, that it represents a neutral tool that can be crafted at will against the rationale of the system (M. Weyl and R. Weyl 1968, 101 ff.; Gramsci 1975 [1932-1934], III Q. 13, s. 18, 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 the way the law is interpreted, and the correlated choices of

policy and governance (Herrine 2022). In short, it 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 a proper functioning of the system. However, the transformations that have been highlighted do not disentangle the 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 ff.): using regulationist language, it could be said that PLAMC belongs to its mode of regulation and that it purports to mitigate some of the distortive effects of monopolization. However, as for the economy, also for private law it can be argued that it is the regime of accumulation that is transformed, not the rationale of the system itself (Harvey 1990).

This framework can better assess the current role and functioning of private law, and enables to cast light on the fact that private law still abides by the commodity form. The difference lies in the fact that it is assessed in the reality of capitalist production, and not in an abstract account of it. These rules are necessary exactly because the commodity form does not only have to be not protected, but also 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 created 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 these 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 derives from this process. Therefore, as the price of commodities can be distorted by these situations, private law shall attempt to emend these deficiencies: as the functioning of the market that preserve and foster 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 commodity form and legal form

As the homology between the legal form and the commodity form prevents the law from having anti-systemic 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 the tortious 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 also in relation to the defendant. Some of these elements are of course present in other kinds of litigation: in climate change litigation it is peculiar that they are all present at the same time, realizing a wide disentanglement. These aspects are obviously intertwined and interact in a mutually reinforcing way: but pointing out each of them helps to highlight how this dissociation operates. As the objective of this paper is not to assess the whole range of climate litigation, nor to argue that this disentanglement is proper only to 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, the compensation for the loss in market terms - that would simply follow the rationale of exchange value. On the contrary, they claim that the defendant has to reach a specific outcome, irrespective of the economic effects that this may entail. Therefore, the demand is radically alien to the exchange of equivalents. The judgement does not

specifically entail any attribution of resources, nor any realization of value. It is, on the contrary, a command concerning the action that must be undertaken by the defendant. It is an injunction that has no relationship with the commodity form. It is, in some respect, a command similar to the one of the legislator: it intends to force the company to manage differently its business or the 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 litigations 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 imposes to reduce 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 the limits of emissions that a business must comply with, irrespective of the necessity to make profits, that is the necessity for a 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 pursue the general interest (despite the flaws of a neocolonial approach highlighted in Part III). This is a major break with the classical doctrine of private law, that 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 judgements³³ 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*, par. 4.2.7).

³³ See for instance ECJ, *Armando Ferrão Carvalho and Others v. The European Parliament and the Council*, Case no. T-330/18, 25 March 2021, par. 37–44, http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210325_Case-no.-T-33018_judgment.pdf. *Family Farmers and Greenpeace Germany v. Germany*, 31 Oct. 2019, VG10K412.18, <http://climatecasechart.com/non-us-case/family-farmers-and-greenpeace-germany-v-german-government/>

Even though 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 to obtain that specific judgement. 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, that often replicate the commodity form: class actions as a tool to booster private enforcement and reduce transaction costs in consumer law, and to enforce a more optimal allocation of risks and costs in cases of mass torts are two examples in kind. Class action also remains special law, 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 to protect only their rights, but on behalf of the general interest (Cournil 2017). The individual dimension thus trespasses in the collective one. It is not the satisfaction of an individual pretention, but 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 could derive from the mobilization of fundamental rights (Rochfeld 2019; Griffin 2023, 36 ff.) 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 litigation at the beginning of the 2000s, which was still characterized by individual persons seeking redress for their loss (Cournil 2017, 247-248).

The fact that the claim does not concern a specific loss suffered by the plaintiff reinforces this. Since the claim 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 that 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 through 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 ff.), and «as 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 (M. Mutua 2001; Natarajan 2022, 200; Rajagopal 2003, 189 ff.).

Third, the bypassing of the individual character of legal personality pertains also 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 in part an overtaking of the theory of the juridical person and is developing, even though in different forms, also in common law systems (see *Okpabi v. Royal Dutch Shell* [2021] UKSC 3, [2021] 1 WLR 1294; *Vedanta Resources PLC and Another v. Lungowe and Others* [2019] UKSC 20). 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 for the actions of the whole group is a major innovation that cannot be overstated. In some sense, it can be considered that this is a consequence of the very success of transnational corporations and of monopolization. It is this phenomenon that makes necessary to overcome the fragmentation of corporate structures and of value chains. This enables claimants to target the holding, that is the core where the decisions, the organization and the planning of corporate activities are ultimately taken, 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 trial. For all these combined reasons, in this specific litigation the homology between legal form and commodity form is broken; even though the claims are based on tort law, they have an anti-systemic 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 therefore be questioned whether the commodity form theory of law applies also 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.

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 this kind of opposition of interests, and 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 not evicted as an assumption).

This blind spot proves 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 precisely with the kind of public law to which it is difficult to apply the commodity form theory of law (Simmonds 1985, 146). For instance, in relation to criminal law, it has been argued that it is bewildering for its distinctive remedy and enforcement (the fact that the action is brought by a State's authority). Climate change litigation differs from traditional tort law in both these elements, as 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» (Simmonds 1985, 146). This aspect is present in climate change litigation too, as tort law is used in an instrumental way to realize a public policy objective.

Even though 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 do not claim a specific autonomous individual right, but act to protect the interests of the community. Furthermore, the autonomous character of the defendant is seriously undermined, as the holding 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 constitutes a command to behave differently. These elements resonate with those characteristics that have made it difficult to apply the commodity form theory of law to public law. The outcome of this litigation resonates with the form of the command typical of the public authority: I consider this to be a further argument to strengthen

the claim that in climate litigation there is a dissociation between the legal form and the commodity form.

Building upon its anti-systemic 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 non-reformist reform: a reform that «aim to undermine the prevailing political, economic, and social order, construct an essentially different one, and build democratic power toward emancipatory horizons.» (Akbar 2023, 2507; Gorz 1964. Moreover, it has to be assessed whether climate litigation can be used in a strategic perspective, as a tool to achieve the structural and long-term goal (Knox 2010) of dismantling the socio-economic system that produces climate change.

Finally, even though this largely exceeds the scope of the present article, it is important to highlight that climate change litigation in the future 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 do not have had any major application yet and are difficult to frame, also because of the gaps and uncertainties concerning their scope and interpretation: despite their deficiencies, scholars hint that they can have transformative potential (Bartl 2022). From a very general perspective, it can be argued that they present at the same time 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 they will have an impact on the way businesses are 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, that 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 of public companies, as highlighted by Marx in Volume III of Capital.

VII. Conclusion

Analyzing climate change litigation, this paper 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 anti-systemic potential. This assessment has called for closer scrutiny as to 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, labelled 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 that 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 this accounts for its anti-systemic 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 to «consume them productively, meaning theoretically» (Marx 2010 [1879], 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 a fashionable trend that will not have real impact on the socio-legal system. However, this analysis of the stability of the legal system, as well as of the cases when private law can have anti-systemic 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 not in a merely tactical, but properly anti-systemic way 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 shall 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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